

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AIR LINE PILOTS ASSOCIATION,  
INTERNATIONAL

and

Cases 05-CA-34837  
(formerly 18-CA-18999)  
05-CA-35014  
05-CA-35244  
05-CA-35419

UNION OF ALPA PROFESSIONAL AND  
ADMINISTRATIVE EMPLOYEES, UNIT 1

REPLY BRIEF OF THE  
COUNSEL FOR THE ACTING GENERAL COUNSEL

**I. THE 2008 LAYOFFS WERE A *FAIT ACCOMPLI*.**

The Acting General Counsel argues in cross-exceptions that to any extent that the Board finds the 2008 layoffs to be relevant to ALPA's bargaining obligation in 2009 and 2010, the 2008 layoffs were a *fait accompli*. In its Answering Brief, ALPA argues that the 2008 layoffs were not a *fait accompli* because Unit 1 had notice of ALPA's difficult financial position, but didn't request bargaining. But ALPA's argument is based on both a misreading the facts and the underlying *fait accompli* principle.

First, ALPA claims that Unit 1 had months of advance notice, but failed to act. But notice of what? ALPA points only to generalized statements that indicate it expected to be in a difficult position if it lost the US Airways decertification election. ALPA never presented a specific proposal regarding layoffs to Unit 1 until after ALPA's leadership already made its "final decision."

Second, ALPA's claim that the General Counsel failed to present evidence that it had "no intention of changing its mind" is contradicted by the testimony of its own officials. Jalmer Johnson testified that once the national officers approved the layoff list, that decision was final. (Tr. 363:5-8) More to the point, Kelly Collie testified that if Unit 1 would have demanded to bargain over the layoffs, ALPA would have only agreed to meet and discuss. (Tr. 705-706) Yet, ALPA now asserts that it would have bargained if only Unit 1 would have asked? Or, is ALPA arguing that Unit 1 should have made a pointless request to bargain, even though ALPA would have refused? The facts show that no matter what Unit 1 did, ALPA was going to conduct layoffs the way it wanted to, and without bargaining with its employees' representative. A finding that the 2008 layoffs were a *fait accompli* is consistent with both the facts in the record and ALPA's own arguments that it had no obligation to bargain over layoffs.<sup>1</sup>

## **II. ELAINE GRITTNER'S LAYOFF WAS PRESENTED AS A FAIT ACCOMPLI.**

ALPA defends against this exception by claiming that it either bargained over Grittner's layoff, or engaged in a process "equivalent to bargaining." However, any dispute about whether ALPA bargained over Grittner's layoff should end by simply looking at the statements of ALPA's own supervisors.

By a letter dated November 6, 2009, ALPA announced to Unit 1 that Grittner's employment with ALPA "will end on Friday, January 29, 2010." (GCx 44) In a series of letters that followed, Unit 1 insisted that ALPA had an obligation to bargain over Grittner, but Collie

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<sup>1</sup> ALPA repeatedly points to Wayne Klocke's statement that Unit 1 had a "change of philosophy" in 2009, without context. In response to Collie's assertion that Unit 1 had not asked to bargain in the past, Klocke answered by saying, "You are on notice that if that is true, this is a change of philosophy; we are insisting on bargaining on reductions in force." (Tr. 85:12-16)

steadfastly maintained that under the terms of the imposed agreement, ALPA was only willing to “meet with Unit 1 to discuss the RIF.” (GCx 46)

Although ALPA and Unit 1 did meet about Grittner, when asked if ALPA was bargaining over Grittner, Collie unambiguously testified “No.” (Tr. 669:20-670:1) Similarly, when asked by Unit 1 if ALPA was bargaining, Jim Johnson replied, “No.” (Tr. 220:17-20) On this factual record, it is amazing that ALPA would claim that it was bargaining over Grittner, or that it engaged in a “process that was equivalent to bargaining.” The evidence demonstrates that ALPA entered negotiations with a closed mind; having already picked the day she would be “out the door.” ALPA cannot credibly point to its meetings with Unit 1 as evidence that it satisfied its duty to bargain when ALPA itself tainted the parties’ discussions at the outset.

### **III. GC EXHIBITS 56, 57, 59, & 60 ARE RELEVANT**

ALPA claims that these exhibits were properly excluded because it never advanced an argument that an essential element of the standstill agreements was the suspension of merit-pay increases. The facts, however, tell a different story.

On May 18, 2009, Unit 1 filed a grievance over ALPA’s failure to pay merit increases during the period from April 1 to May 7, 2009. Senior Attorney Jim Lobsenz, who at that time was chairman of the Unit 1 grievance committee, served as Unit 1’s primary representative in processing this grievance. (Tr. 261:11-16; 262:2-22; GCx 48)

Between late May and early June 2009, Lobsenz and Collie had approximately 20 individual meetings related to this grievance because ALPA insisted on a separate grievance meeting for each affected employee. (Tr. 270:2-15) In general, the discussions in each of these meetings were substantially the same. (Tr. 270:16-23). Lobsenz testified without contradiction

that in one of these grievance meetings (Marian Tashjian's), Collie implied that ALPA and Unit 1 had an agreement that there would be no merit pay increases during the period from April 1 to May 7. When questioned by Lobsenz, Collie held up a document purporting to reflect this agreement between ALPA and Unit 1, but she would not show it to Lobsenz. (Tr. 272:2-10) It was not until October 3, 2009, that Collie identified the April 1 standstill agreement (GCx 28) as the document she had held up in Tashjian's grievance meeting. (Tr. 273:9-274:1; GCx 52, 53) In ALPA's subsequent decisions to deny Unit 1's grievance, it continued to cite the standstill agreement as a justification for ceasing merit-pay payments. (GCx 49; 51)

This evidence shows that ALPA linked the standstill agreements to extend the contract with its suspension of merit pay. The Acting General Counsel's position is that the weight of the evidence shows that rather than for the purpose of suspending merit-pay payments, the standstill agreements were negotiated solely to prevent either party from taking economic action after March 31, 2009. To that end, these rejected exhibits provide evidence of the environment in which these standstill agreements were negotiated. They show that there was a very real possibility of a strike, including the measures ALPA was taking on March 30 and 31 to prepare for a work stoppage. Therefore, these exhibits are relevant for evaluating and interpreting the meaning of the terms reached in the standstill agreements negotiated on and after March 31. Additionally, Exhibits 56 and 57 are relevant to show that as a result of ALPA's unfair labor practices, job security remained an important issue to the Unit 1 membership in the period preceding ALPA's unilateral implementation of its final offer. Under the liberal standard for relevancy, these exhibits should have been admitted by the judge. Fed. R. Evid. 401.

**IV. ALPA’S PRACTICE OF NEGOTIATING WITH UNIT 1 OVER INDIVIDUAL JOB ABOLISHMENTS IS RELEVANT.**

In its Answering Brief, ALPA claims that while its mass layoffs were privileged by Section 11 of the contract, that same section was not implicated when it conducted layoffs of individual employees. But Section 11 doesn’t make this distinction.

As discussed more fully in the Acting General Counsel’s earlier submissions, Section 11 of the contract provides that, “[i]n the event a Staff Employee’s position is abolished and ALPA is unable to provide work of comparable pay, the Staff Employee shall receive severance pay....” The ALJ, who relied on the very similar facts of *Teamsters Local 71*, 331 NLRB 152 (2000), found that rather than demonstrating a clear and unmistakable waiver, Section 11 merely provides for the succession of layoffs and the manner in which those layoffs will be implemented should they become necessary.

When examined within the terms of Section 11, the layoffs at issue in this case and the individual layoffs are comparable because in both sets of circumstances, the affected employees received the severance benefits provided for in the contract. Moreover, Collie admitted that in both situations, employee performance was a consideration. Instead, the distinguishing feature, which ALPA tries to ignore, is that it negotiated with Unit 1 over the individual layoffs, but refused to bargain with the Union over the mass job abolishments.

**V. THE *STONE CONTAINER* EXCEPTION DOES NOT APPLY IN THIS CASE.**

The *Stone Container* case outlines an exception to the general rule that an employer must refrain from individual unilateral changes until an overall impasse is reached. *Stone Container Corp.*, 313 NLRB at 336, citing *Bottom Line Enterprises*, 302 NLRB 373 (1991). See also, *TXU Electric Co.*, 343 NLRB 1404 (2004), *Neighborhood House Association*, 347 NLRB 553 (2006),

and *St. Mary's Hosp. of Blue Springs*, 346 NLRB 776 (2006). This exception is permissible when the change concerns a "discrete event" that arises during the course of bargaining. *Stone Container*, 313 NLRB at 336. Contrary to ALPA's argument, however, there is no "discrete event" when it comes to Respondent's merit pay program. This is because each employee's merit pay is based on the employee's annual evaluation, and with approximately 160 unit employees, these evaluations occur on a rolling basis throughout the year, and not as a single "discrete event" as in the cases cited above. ALPA claims that the Acting General Counsel has failed to cite any cases in support of this argument, but in every case cited above (*Stone Container*, *Neighborhood House*, etc.) there was a single, one-time event, not a series of events spread throughout the year as there are in this case. See also, *Nabors Alaska Drilling Inc.*, 314 NLRB 610 (2004). In its Answering Brief, Respondent relies on *E.I. DuPont de Nemours & Co.*, 355 NLRB No. 177 (2010) for the proposition that the "discrete event" can occur on a rolling basis. But, in that case, the judge found the *Stone Container* exception was not applicable, and the Board affirmed the judge's decision.

ALPA's discrete-event analysis is further undercut because the parties bargained for the contractual merit pay rates in advance. In the cases cited above, the disputed actions occurred annually and were tied to some factor that was unknown in advance, such as the current market conditions (*TXU Electric*), the amount of an annual federal grant increase (*Neighborhood House Ass'n*), or health-benefit plan changes necessary to prevent disruptions to employees' coverage (*St. Mary's Hospital* and *Nabors Alaska Drilling*). Because ALPA bargained these merit-pay rates in advance of any independent or unknown factor, its argument that its merit pay program is a "discrete event" within the meaning of that term in the cited cases is unsupported.

The cases cited by the General Counsel show that the *Stone Container* exception has only been applied in situations where the parties were negotiating their first contract. ALPA claims that this was in error because of the *DuPont* case (which was not a first contract case) cited in its Answering Brief. But, as discussed above, the ALJ and the Board found that the *Stone Container* exception was *inapplicable* in *DuPont*.

The *Stone Container* exception is narrow, and limiting it to first-contract cases properly corrals this exception. In the cases where the exception was applied, the wages or benefits that those employers were seeking to modify had been the products of their own criteria, and not reached during bargaining with the unions. Presumably, the factors the employers considered in those cases were based on the business models they established before they had any bargaining obligation. By contrast, when dealing with benefits that are the product of a collective-bargaining relationship, such as the merit pay program at issue here, employers have agreed to create benefits with full knowledge that these benefits and any future changes to them must be part of the broader give-and-take bargaining to an overall impasse, absent some business exigency. Allowing ALPA to make piecemeal changes to the terms of the parties' agreement permits it to wrongly escape its obligation to refrain from making unilateral changes before an overall good-faith impasse.

The merit pay program was the result of a mature bargaining relationship between ALPA and Unit 1. These experienced parties bargained for an agreement that provides a start date for the merit pay rates, but no ending date. The language of the contract provides for specified pay increases beginning on set dates. Presumably, if ALPA or Unit 1 intended these rates to apply for only a single year, they would have specified an end date for the final period listed in the

contract. Having failed to do so, these rates should rightly continue until they are replaced by different rates through bargaining, or after the parties have reached a lawful, good-faith impasse.

Finally, the *Stone Container* exception doesn't apply because ALPA imposed its unilateral change not for the duration of the "discrete event," but for the entirety of its imposed contract. This act takes ALPA beyond the limited scope of the *Stone Container* rule. In *Stone Container*, the Board found that the employer's conduct was lawful, in part, because it was only proposing to eliminate wage increases for that specific year, but not for subsequent years. 313 NLRB at 336. Here, ALPA proposed and implemented merit pay rates of 0% for the duration of its imposed contract, (GCx61) and thus further distinguishes this case from those where the *Stone Container* exception was found applicable.

Respectfully submitted,

/s/ Patrick J. Cullen

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Dated this 12th day of September, 2011

## STATEMENT OF SERVICE

I hereby certify that copies of the Reply Brief of the Counsel for the Acting General Counsel were served by e-mail, on the 12th day of September 2011, on the following parties:

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