

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL,

Respondent,

Cases No. 5-CA-34837
5-CA-35014
5-CA-35244
5-CA-35419

and

UNION OF ALPA PROFESSIONAL AND
ADMINISTRATIVE EMPLOYEES, UNIT 1,

Charging Party.

**CHARGING PARTY'S REPLY BRIEF IN
SUPPORT OF ITS CROSS-EXCEPTIONS**

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INTRODUCTION

The cross-exceptions filed by the Union of ALPA Professional and Administrative Employees Unit 1 (“Unit 1”) ask the board to address issues of fact and law that the ALJ did not – including whether certain layoffs were announced as a *fait accompli* and whether the *Stone Container* exception was inapplicable for reasons that the ALJ did not articulate. As explained herein, ALPA’s response (Answering Brief of the Airline Pilots Association, International (“ALPA Br.”)) contains nothing that undermines the merits of Unit 1’s cross-exceptions

ARGUMENT

I. The ALJ Should have Cited Additional Reasons for Concluding that Past Practice did not Establish that Unit 1 had Waived its Right to Bargain over Layoffs.

A. Because Laying Off Employees is a Non-Routine Decision, the Right to Lay Off Employees Cannot be Established by Past Practice.

In the brief supporting its cross-exceptions, Unit 1 argued that, in rejecting ALPA’s claim that the parties’ past practice established a waiver, the ALJ should have relied on that body of law holding that a past practice cannot be based on non-routine employer decisions, such as laying off employees for economic reasons. (Charging Party’s Brief in Support of its Cross-Exceptions (“Unit 1 Br.”) at 9-11) In its response, ALPA does not dispute the proposition that economically motivated layoffs cannot create a past practice constituting a waiver. Instead, ALPA narrows the scope of its past practice argument. ALPA’s argument, in its most recent iteration, is not that the past practice establishes a waiver. ALPA contends solely that section 11 of the collective bargaining agreement constitutes the waiver and that the past practice merely “confirms this interpretation of the CBA.” (ALPA Br. at 1 n.1) Accordingly, the parties agree that the evidence of past practice does not establish a waiver.

The difficulty with ALPA’s current argument is that the prior layoffs do not shed any

light on the meaning of section 11. The record contains no evidence – and ALPA has cited none, *see* Brief in Support of Exceptions of Respondent ALPA at 20-25 – that, in laying off employees without bargaining, ALPA was acting, or even claiming to act, pursuant to section 11. Since section 11 contains no language permitting ALPA to lay off bargaining unit employees, and ALPA did not purport to rely on that section in laying off employees without bargaining, either in 2009 or other years, the past practice cannot be used to establish the meaning of section 11.¹

B. On Several Occasions, ALPA Bargained with Unit 1 over the Layoff of Individual Employees.

In the brief in support of its cross-exceptions, Unit 1 showed that ALPA had frequently bargained over the layoff of individual employees. (Unit 1 Br. at 5-6) ALPA argues in response that these “negotiated departures” are immaterial because “those agreements were not layoffs pursuant to Section 11.” (ALPA Br. at 13-14) But, it is difficult to find any meaningful distinction between the individual and large-scale layoffs. Both those laid-off individually and in groups received section 11 severance benefits. Both were chosen for layoff based on their performance and skills. And, both were characterized as the result of job abolishments. (*See* Unit 1 Br. at 5) ALPA contends that the large-scale layoffs confirm its interpretation of section 11. (ALPA Br. at 1 n.1) The only connection between those layoffs and section 11 is the fact that the laid-off employees received section 11 severance benefits. If, as the record shows, employees laid-off individually also received section 11 benefits, then those individual layoffs are just as probative as the large-scale layoffs.

¹ It is difficult to reconcile ALPA’s contention with the testimony of its witness Jim Johnson, who stated that ALPA believed that it had “absolute discretion” to lay off employees, but conceded that nothing in the collective bargaining agreement actually says that ALPA has such discretion. (Tr. 376:14-17, 444:8-11)

C. ALPA Announced the Layoffs during the Term of the 2000-2004 Collective Bargaining Agreement to Unit 1 as a *Fait Accompli*.

According to ALPA witness Jim Johnson, when ALPA laid off employees during the term of the 2000-2004 collective bargaining agreement, it announced its decision “[a] day or two before the layoff . . . and then the layoff was executed.” (Tr. 411:16-20) ALPA nevertheless argues that the record evidence does not establish that the layoffs were announced as a *fait accompli*. (ALPA Br. at 5 n.2) Its argument is based solely on a statement attributed to Unit 1 negotiator Wayne Klocke who, according to ALPA, said in 2009, when Unit 1 demanded bargaining over layoffs, that there had been a change in philosophy. *Id.* That argument is based on a mischaracterization of Klocke’s statement and a misunderstanding of the applicable law.

As Unit 1 has explained (Charging Party’s Brief in Opposition to Respondent’s Exceptions at 10-11), it was Kelly Collie, not Klocke, who asserted that Unit 1 had never before demanded bargaining over layoffs. Wayne Klocke merely responded that if that were true, then there had been a change in philosophy. (Tr. 85:12-16) Klocke, who was not a union officer and had never before served on a bargaining committee (Tr. 66:12-15), was not agreeing with Collie’s assertion. His statement therefore cannot fairly or reasonably be understood as an admission that Unit 1 had not previously requested bargaining over layoffs.

ALPA’s argument with respect to prior layoffs appears to be that whether it presented the layoffs as a *fait accompli* is immaterial since Unit 1 would not have requested bargaining even if ALPA had provided adequate notice. That argument turns the applicable law on its head. When a union receives notice from an employer that it intends to change a term or condition of employment, the union must request bargaining with “due diligence” or risk waiving its right to bargain. *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790 (1990). But, that issue does not even arise unless and until the union receives adequate notice. That notice

must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention changing its mind, then the notice is nothing more than informing the union of a *fait accompli*.

Ciba-Geigy Pharmaceuticals Div., 264 NLRB 1013, 1017 (1982), *enf'd*, 722 F.2d 1120 (3rd Cir. 1983). The failure to request bargaining where a change is announced as a *fait accompli* cannot be construed as a waiver. *Id.*; *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). Thus, the failure to request bargaining is of no consequence when, as in this case, layoffs were announced “a day or two” before they were implemented. ALPA cannot avoid the conclusion that it announced the layoffs as a *fait accompli* by pointing to the fact that Unit 1 did not demand bargaining or by arguing that, even if adequate notice had been given, Unit 1 would not have requested bargaining. That argument has no support in the law or in the record.

D. ALPA Announced the 2008 Layoffs to Unit 1 as a *Fait Accompli*.

ALPA General Manager Jalmer Johnson testified that, as of May 8, 2008, when ALPA’s officers approved his plan to lay off a specific list of employees, that decision was final. (Tr. 363:5-8) ALPA notified Unit 1 on May 12 that employees would be laid off (without identifying who would be laid off) and began implementing those layoffs four days later. (See Charging Party’s Brief in Opposition to Respondent’s Exceptions at 30-32) Although Unit 1 was notified of the layoffs only after the final decision had been made and only four days before the layoffs were implemented, ALPA contends that the layoffs were not announced as a *fait accompli*. ALPA makes two arguments: that Kelly Collie told Unit 1 in February that employees might be laid off if ALPA lost the right to represent pilots at US Airways and that there is no record evidence that ALPA did not intend to change its mind after May 12. (ALPA Br. at 2-5)

Jalmer Johnson testified that, at ALPA, layoff decisions are made by pilots, rather than staff. (Tr. 353:20-355:2) And, the process for laying off employees in 2008 did not begin until

Jalmer Johnson prepared a proposed plan in April, which he then presented to the officers. (Tr. 356:9-12) Accordingly, statements made by Kelly Collie, a non-officer, in February about what might happen if ALPA lost the decertification election at US Airways – without specifying the number, identity or location of employees who might be laid off – was merely speculation. A request to bargain at that point would have been pointless, since no one, including Kelly Collie, knew whether employees would be laid off or, if so, which employees would be laid off. Collie’s statement was thus not the type of notice that could trigger an obligation to request bargaining. *Sierra International Trucks, Inc.*, 319 NLRB 948, 950 (1995) (“The notice given to the union, however, must be sufficiently clear to trigger a duty to request bargaining.”)

The record, moreover, contains ample evidence that the decision announced on May 12 was final and irrevocable. Jalmer Johnson acknowledged that after May 8 the decision was final. ALPA began laying off employees four days after making the announcement. And, although ALPA told Unit 1 that there would be layoffs, ALPA did not reveal the names or job classifications of those who would be laid off, even when asked for that information. (*See* Charging Party’s Brief in Opposition to Respondent’s Exceptions at 30-32) The Board has held that the refusal to provide that information precludes bargaining. *Wilen Mfg.*, 321 NLRB 1094, 1097 (1996). Thus when it announced the layoffs on May 12, ALPA was plainly not prepared to bargain over that decision, because it was not prepared to provide information necessary for such bargaining. Accordingly, as of May 12, 2008, the decision to lay off bargaining unit employees was a *fait accompli*: because ALPA itself characterized its decision as final, because ALPA did not provide enough notice to permit meaningful bargaining, and because ALPA was not willing to reveal the information necessary for bargaining.

II. In Concluding that ALPA had Failed to Bargain over the Layoff of Elaine Grittner, the ALJ Should have Found that ALPA Announced her Layoff to Unit 1 as a *Fait Accompli*.

Two facts establish that ALPA announced the layoff of Elaine Grittner as a *fait accompli*: First, Kelly Collie acknowledged that, by November 6, 2009, ALPA had already picked the day on which Grittner would be “out the door.” And second, although ALPA agreed to meet with Unit 1 to discuss the layoff, ALPA explicitly refused to bargain over her layoff. (*See* Unit 1 Br. at 11-12) By deciding that Elaine Grittner would be laid off on a specific day and then refusing to bargain over that decision, ALPA presented the layoff as a *fait accompli*.

In its response, ALPA, citing *Haddon Craftsmen, Inc.*, 300 NLRB 789 (1990), *rev. denied*, 937 F.2d 597 (3rd Cir. 1991), argues that it was entitled to present Grittner’s layoff as a fully developed plan. (ALPA Br. at 7) That argument misses the point. It is one thing to present a fully developed plan. It is another to determine in advance not to deviate from it and then refuse to bargain over it.

ALPA also points to the fact that it met with Unit 1 for two days to discuss Grittner’s layoff. Its argument, however, ignores some facts and invents others. ALPA ignores the fact that it explicitly refused to bargain over the layoff, both prior to the meeting (G.C. Exs. 45, 46) and at the meeting itself (Tr. 220:15-22, “we’re not bargaining”). Without citing to the record, ALPA claims that, despite its refusal to bargain, the meetings were “equivalent to bargaining” because ALPA listened to Unit 1 and “[t]he parties exchanged proposals.” (ALPA Br. at 9 & n.4) There is, however, no evidence in the record that ALPA ever made a proposal at that meeting. Instead it listened to Unit 1’s proposals and simply said no, over and over again. (*See*

III. The ALJ Should have Cited Additional Reasons for Rejecting ALPA's Argument that it was Entitled to Discontinue its Merit Pay Program.

A. The ALJ incorrectly found that Employees did not Receive Merit Pay Increases After the Collective Bargaining Agreement Expired.

Although the ALJ found that no employee received a merit pay increase after ALPA discontinued that program on April 1, 2009, the record shows that ALPA gave merit increases to four employees after that date. That fact undermines ALPA's contention that it could not give merit increases after the agreement expired because it could not determine what rates to use. (See Unit 1 Br. at 13)

ALPA responds to that straightforward issue of fact by doing two things, each of which is improper: offering additional facts not contained in the record and rehashing its argument (relevant only to its exceptions) that the merit pay program expired with the contract.

At the hearing in this case, ALPA successfully moved to revoke that paragraph of Unit 1's subpoena requesting documents relating to ALPA's efforts to recoup merit pay increases awarded after April 1, 2009, arguing that such documents were irrelevant. (Tr. 13:19-15:16) In opposing Unit 1's cross-exceptions, ALPA now volunteers, without citation to the record, that those merit pay increases were recouped. (ALPA Br. at 15) A party cannot add facts to the record of a case merely by asserting them in its brief, particularly after it has refused to produce

² ALPA also contends that the availability of a position for Grittner in Houston shows that her layoff was not a *fait accompli*. (ALPA Br. at 8) But, the record merely shows that, before it met with Unit 1, ALPA had determined, presumably by communicating with Grittner, that she was not willing to relocate to Houston. (Tr. 627:25-628:2) The record does not show whether that communication occurred before or after the layoff was announced to Unit 1. The fact that ALPA discussed relocation directly with Grittner, rather than Unit 1, is consistent with the ALJ's conclusion that ALPA had failed to bargain with Unit 1 over her layoff and with the proposition that, by the time it announced the layoff to Unit 1, it was a *fait accompli* over which ALPA was not willing to bargain.

documents relating to those facts. Moreover, the additional fact asserted – that ALPA recouped the merit increases from employees who received them – does nothing to bolster ALPA’s claim that it could not ascertain what rates to use in paying merit increases after March 31, 2009.

Although not relevant to any of the cross-exceptions, ALPA repeats its argument that the merit pay program expired with the contract on March 31. (ALPA Br. at 16-17) Repetition does not make its arguments any more persuasive. Unit 1 has responded to those arguments (Charging Party’s Brief in Opposition to Respondent’s Exceptions at 64-70) and will not repeat its responses here.

ALPA states that it “does not argue waiver with respect to merit pay question” and that this fact is “fatal to the ALJ’s Decision.” (ALPA Br. at 16) But, the failure to show a waiver is fatal, not to the ALJ’s decision, but to ALPA’s contention. If, as the Board has held in *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd*, 73 F.3d 406 (D.C. Cir. 1996), and other cases, employers have a statutory duty to continue a previously-established merit pay program, without first bargaining to a lawful impasse, then ALPA had a statutory duty to continue its program, absent a waiver – shown either in the agreement, by past practice or by bargaining history. If Unit 1 never waived that right – and ALPA does not contend that it did – then ALPA was obligated to continue its merit pay program.

- B. The Stone Container Exception was Inapplicable for the Additional Reasons that 1) the Parties were not Negotiating a First Contract; 2) Merit Increases were Given Throughout the Year, Rather than on a Single Specific Date; and 3) the Discontinuance of those Increases was a Permanent, rather than a Temporary Change.

Under ALPA’s merit pay program, ALPA awarded merit increases throughout the year to employees on their individual anniversary dates. ALPA contends that the payment of those increases was a “discrete event” for purposes of applying the exception of *Stone Container*

Corp., 313 NLRB 336 (1993). In support of that argument ALPA cites *E.I. DuPont de Nemours and Co.*, 355 NLRB No. 177 (Aug. 27, 2010), in which the Board held that the employer's periodic changes to its benefits plans did not constitute a discrete event within the meaning of *Stone Container*. Slip op. at 11-13. ALPA argues that the Board's decision in that case supports its position because "[t]he facts of the instant case have no resemblance to those in the *DuPont* case." (ALPA Br. at 20) That argument is simply illogical. That the facts of *DuPont* did not fall within the scope of the *Stone Container* exception does not show that the facts of this case do. What ALPA does not cite, because it cannot, is any case in which the Board had found the *Stone Container* exception applicable to facts like those in this case, in which the changes at issue were made, not on a single occasion, but throughout the year.³

ALPA also argues – again citing *DuPont* – that the *Stone Container* exception is not confined to situations in which the employer and union are negotiating a first contract. But, no case has found *Stone Container* applicable other than in a first contract setting. (Unit 1 Br. at 14-15) That the Board found *Stone Container* inapplicable in *DuPont*, for reasons other than the fact that the parties were not negotiating a first contract, does not logically mean, as ALPA suggests, that *DuPont* eliminated that requirement *sub silentio*.

ALPA states that there is no rationale for limiting the *Stone Container* exception to first contract situations. (ALPA Br. at 20-21) Although the Board has not explained the rationale for each requirement, it has emphasized that the exception is intentionally narrow. *TXU Electric Co.*, 343 NLRB 1404, 1407 (2004) ("no broad application"). The Board may have been

³ ALPA also argues that the relevant question is whether the employer "had no choice but to take some action." (ALPA Br. at 20 n.10) But that cannot be the question. Every paycheck, every fringe benefit payment and every paid holiday constitutes an occasion on which the employer has no choice but to take some action. That obligation does not permit the employer to make unilateral changes under *Stone Container*.

unwilling to permit an employer unilaterally to change terms that were the product of bargaining. The relevant point is that the Board has stated that the exception applies only in first contract settings, and this case did not arise in a first contract setting.

Finally, ALPA argues that the merit pay program was not permanently eliminated because ALPA was trying to negotiate an agreement with Unit 1 on merit pay. (ALPA Br. at 22) In *Daily News*, concurring Members Stephens and Cohen, whose opinion the Board adopted in *TXU Electric*, 343 NLRB at 1407, stated that “if the employer’s proposal is for a permanent change in the practice, i.e., a change that would operate in the current year and in future years, the employer cannot make the permanent change . . . until an impasse has been reached.” 315 NLRB at 1244. This formulation assumes that the employer is making proposals and that the parties are bargaining. The fact that the parties are bargaining does not therefore preclude the employer’s unilateral change from being deemed permanent. ALPA discontinued its merit pay program on April 1, 2009 and never re-established it. It was thus a permanent change and, for that additional reason, did not fall within the scope of the *Stone Container* exception.

CONCLUSION

For the reasons stated in this brief and in Unit 1’s initial brief in support of its cross-exceptions, the ALJ’s findings and conclusions should be modified in the manner requested by Unit 1.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Charging Party's Reply Brief in Support of its Cross-Exceptions have been served on September 12, 2011 by email on:

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