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Raytheon Network Centric Systems[1] *and* United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL–CIO. Case 25–CA–092145

December 15, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE, MCFERRAN, KAPLAN, AND EMANUEL

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that unionized employers must refrain from making a unilateral change in employment terms, unless the union first receives notice and the opportunity to bargain over the change.

In the instant case, the Respondent is alleged to have violated Section 8(a)(5) of the National Labor Relations Act (NLRA or Act) in 2013, following expiration of its collective-bargaining agreement (CBA), when it unilaterally modified employee medical benefits and related costs consistent with what it had done in the past.[2] Relying primarily on the Board's decision in *E.I. du Pont de Nemours, Louisville Works*, 355 NLRB 1084 (2010) (*DuPont I*), enf. denied and remanded 682 F.3d 65 (D.C. Cir. 2012), the judge found that the Respondent violated Section 8(a)(5) of the Act. The judge rejected the Respondent's defense that its 2013 adjustments were a lawful continuation of the status quo, even though the Respondent had made similar modifications to healthcare costs and benefits at the same time every year from 2001 through 2012.

Subsequent to the judge's decision, the Board decided *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont*).[3] In *DuPont*, which issued without any prior invitation for the filing of amicus briefs, the Board majority dramatically altered what constitutes a "change" requiring notice to the union and the opportunity for bargaining prior to implementation. The majority in *DuPont* held that, even if an employer continues to do precisely what it had done many times previously—for years or even decades—taking the same actions constitutes a "change," which must be preceded by notice to the union and the opportunity for bargaining, if a CBA permitted the employer's past actions and the CBA is no longer in effect. The *DuPont* majority also stated, as part of its holding, that bargaining would always be required, in the absence of a CBA, in every case where the employer's actions involved some type of "discretion."

Then-Member Miscimarra criticized the Board majority's decision in *DuPont* as follows:

> When evaluating whether new actions constitute a "change," my colleagues do not just compare the new actions to the past actions. Instead, they look at whether other things have changed—specifically, whether a collective-bargaining agreement . . . previously existed, whether the prior CBAs contained language conferring a management right to take the actions in question, and whether a new CBA exists containing the same contract language. If not, the employer's new actions constitute a "change" even though they are identical to what the employer did before.
>
> In effect, my colleagues . . . [hold that] whenever a CBA expires, past practices are erased and everything subsequently done by the employer constitutes a "change" that requires notice and the opportunity for bargaining before it can be implemented.[4]

We conclude that the Board majority's decision in *DuPont* is fundamentally flawed, and for the reasons expressed more fully below, we overrule it today. *DuPont* is inconsistent with Section 8(a)(5), it distorts the long-understood, commonsense understanding of what constitutes a "change," and it contradicts well-established Board and court precedent. In addition, we believe *DuPont* cannot be reconciled with the Board's responsibility to foster stable bargaining relationships. We further conclude that it is appropriate to apply our decision retroactively, including in the instant case.

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[1] During the hearing, the judge granted the General Counsel's unopposed motion to amend the complaint to change the name of the Respondent from Raytheon Company to Raytheon Network Centric Systems. We have amended the case caption accordingly.

[2] On November 19, 2013, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed a reply brief. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[3] The Board's 2016 *DuPont* decision resolved two cases—*DuPont I* and *E.I. du Pont de Nemours & Co.*, 355 NLRB 1096 (2010) (*DuPont II*), enf. denied and remanded 682 F.3d 65 (D.C. Cir. 2012)—that had been remanded to the Board from the Court of Appeals for the District of Columbia Circuit. See *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012) (*DuPont v. NLRB*). Although the 2016 *DuPont* decision might be referred to as *DuPont III* (since it was decided after *DuPont I* and *DuPont II* had been remanded to the Board from the court of appeals), for ease of reference we refer to it simply as *DuPont*.

[4] 364 NLRB No. 113, slip op. at 15–16 (Member Miscimarra, dissenting).

Accordingly, we find that the Respondent's modifications in unit employee healthcare benefits in 2013 were a continuation of its past practice of making similar changes at the same time every year from 2001 through 2012. Therefore, the Respondent did not make any "change" when it made the challenged modifications, and accordingly it lawfully implemented these modifications without giving the Union prior notice and opportunity to bargain. Because the 2013 modifications were lawful, we also find that the Respondent's 2012 announcement of those modifications was lawful. For these reasons, we reverse the judge's unfair labor practice findings and dismiss the complaint.[5]

Background

Since 1997, the Respondent has operated a facility in Fort Wayne, Indiana, where it designs, manufactures, tests, integrates, and installs electronic systems, radars, missile systems, and related equipment for the Federal government and other customers.[6] The Union represents a unit of approximately 35 production and maintenance employees employed at the Fort Wayne facility. The Respondent and the Union (and its predecessor union) have been parties to CBAs for more than 20 years.[7] The parties' most recent CBA ran from May 3, 2009 until April 29, 2012. The Union does not represent any of the Respondent's employees other than those in the Fort Wayne production-and-maintenance bargaining unit.

In 1998, after it had merged with Hughes Aircraft, the Respondent decided to create a uniform, nationwide system of benefits for its employees. On January 1, 1999, the Respondent implemented a comprehensive nationwide "cafeteria-style" benefits plan called the Raytheon Unified Benefits Program (Raytheon Plan). The Raytheon Plan includes healthcare coverage with various options, dental coverage, vision coverage and other benefits, such as an investment plan. Raytheon Medical is a self-insured healthcare option within the Raytheon Plan.

Beginning January 1, 1999, the Respondent made coverage under the Raytheon Plan available to salaried and hourly nonunion employees at the Fort Wayne facility. During annual enrollment periods each fall, employees choose the level of coverage they want. As discussed below, the terms of the Raytheon Plan allow the Respondent to alter costs and benefits for covered employees.

After the Respondent implemented the Raytheon Plan in 1999, its employees in the Fort Wayne bargaining unit continued for a time to receive healthcare coverage under separate plans provided for in the then-current CBA. During negotiations for a successor CBA, however, the Respondent and the Union agreed to make coverage under the Raytheon Plan (including the various medical options under the Raytheon Plan) available to the unit employees effective January 1, 2001. The parties also agreed that the unit employees' contributions for Raytheon Medical would not exceed the rates paid by salaried employees at the facility. The Respondent would pay the majority of the premiums for Raytheon Medical, and employees would be responsible for the balance.

Beginning in January 2001, pursuant to the parties' 2000–2005 CBA, the unit employees received coverage under the Raytheon Plan. Coverage under the Raytheon Plan was also provided under the parties' 2005–2009 CBA and 2009–2012 CBA. Accordingly, every year from 2001 to 2012, and pursuant to the then-current CBA and Raytheon Plan documents referenced therein, the unit employees at the Fort Wayne facility were covered by the Raytheon Plan on the same basis as the Respondent's nonunit employees.

Raytheon Plan documents provide that "the Company reserves the absolute right to amend the plan and any or all Benefit Programs incorporated [therein] from time to time, including, but not limited to, the right to reduce or eliminate benefits," and the parties' CBAs referred to and incorporated this right. Thus, the 2000–2005 CBA, 2005–2009 CBA, and 2009–2012 CBA all included provisions stating that the Respondent "reserves the right to amend or terminate said Group Benefit Plans," and that "[a]ll benefits . . . are subject in every respect to the terms of the applicable Plan documents under which payment is claimed." Thus, under the terms of the Raytheon Plan and the successive CBAs, the Respondent had the right to alter costs incurred by and/or benefits received by bargaining-unit members under the Raytheon Plan.

During the fall of each year from 2000 to 2011, the Respondent mailed a document entitled "Your Raytheon Benefits" to participating employees.[8] The document

[5] Because we find that the Respondent's benefit changes did not alter the status quo and therefore did not require notice and an opportunity to bargain before implementation, we need not reach the question of whether the Union waived its right to bargain.

[6] The parties stipulated to the relevant facts in this case, which are set forth in greater detail in the judge's decision.

[7] As described in the judge's decision, Hughes Aircraft operated the Fort Wayne facility prior to 1997. PACE Local 6-0254 represented production and maintenance employees at the facility for more than 20 years. In 2005, PACE merged with the Steelworkers Union, and sometime between 2005 and 2009 PACE Local 6-0254 became USW Local 7-0254. Meanwhile, the Respondent had merged with Hughes Aircraft, recognized the Union, and assumed the CBA in effect at the time of the merger.

[8] In some years, the document was called "Raytheon Benefits" or "For Raytheon Employees—Benefits."

described the available medical and benefit options. The document also described any upcoming modifications to employees' benefits, premiums, deductibles, and copayments that would be effective at the beginning of the next year. The Respondent then made such changes in January of every year from 2001 to 2012. The changes have included, without exception, increases in premiums for health insurance. There have also been various other changes, including changes to available benefits, medical options, deductibles, and copayments.

The Union did not object to any of the changes between 2001 and 2012 or seek to bargain over any of them. There is no dispute that the modifications were authorized by the several CBAs and Raytheon Plan documents referenced therein. At no time since 2001 has there been any hiatus period between CBAs that overlapped with an open enrollment period.

The 2009–2012 CBA was set to expire on April 29, 2012. In February 2012, the Union informed the Respondent that it wanted to open negotiations and schedule bargaining sessions for a successor contract. On April 24, 2012, the Respondent and the Union began negotiations. Over the course of the next 5 months, the parties met 10 times in an effort to reach an agreement. The Union submitted proposals to change contract provisions granting the Respondent the right to make annual changes to unit employees' health insurance. One such proposal was to strike the "pass through" language in the expiring contract[9] and to provide that the Raytheon Plan benefits (and other benefits) offered to the unit employees would remain the same for the duration of the contract. The Union also stated that it was no longer willing to waive its right to bargain over a mandatory subject of bargaining, such as health benefits. The Respondent rejected the Union's proposals to modify the contract language and asked the Union to provide alternative proposals. The Union proposed that the "pass through" language be revised to state that changes be made "by mutual agreement." The Respondent provided a counterproposal, which the Union rejected. The Union subsequently stated that its medical insurance proposal had not changed.

According to the Union, continuing to agree to the "pass through" language was one of the two biggest issues for the membership. Bargaining continued on the "pass through" language (and two other issues) on April 28, with no resolution. The contract expired the next day, and unit employees continued to work under the status quo terms and conditions of employment. The parties subsequently met for further negotiations, but they did not make headway on the "pass through" language issue and did not reach agreement on a new contract. However, they did not reach impasse.

During a negotiating session on September 26, 2012, the Union solicited the Respondent's position on whether the unit employees would be asked to participate in the upcoming enrollment period for the Raytheon Plan. The Respondent informed the Union that open enrollment was about to commence and that it would proceed as planned for all Raytheon employees based on the Respondent's belief that this was required by the terms of the expired contract. The Union asked the Respondent to exclude the unit employees from the upcoming open enrollment period. The Respondent rejected this request. Subsequently, the Respondent announced changes to the 2013 benefit package in the "Your Raytheon Benefits" document sent to all domestic employees, including the unit employees at the Fort Wayne facility, in the fall of 2012. The parties have not held a negotiating session since September 2012.

On January 1, 2013, the Respondent, over the objection of the Union, implemented several changes to the Raytheon Plan, thereby modifying the Raytheon Plan for all employees, including the unit employees at the Fort Wayne facility. The various modifications included, among other things, the expansion of the Plan's "wellness reward" and the conversion of a medical insurance plan into a health savings account.

The Union filed an unfair labor practice charge, and the General Counsel issued a complaint alleging that the Respondent's announcement and implementation of the 2013 changes to the Raytheon Plan violated Section 8(a)(5) of the Act. Applying *DuPont I*, the judge found that the Respondent's 2013 modifications to the Raytheon Plan constituted a change, not the continuation of preexisting practice. Accordingly, the judge found that the Respondent violated Section 8(a)(5) by announcing and implementing those modifications. Our dissenting colleagues, applying *DuPont*, would likewise find that the Respondent's actions violated Section 8(a)(5) because (i) Raytheon's past practice of making annual modifications in costs and/or benefits under the Raytheon Plan was developed under management-rights clauses in three consecutive CBAs, and (ii) the Board majority in *DuPont* held that, whenever an employer's past practice is developed while relevant CBA provisions (e.g., a management-rights clause) permit the employer to act unilaterally, the past practice is treated as if it never existed when the CBA expires. Thus, according to our col-

[9] The "pass through" language in the expiring contract provided that the same disability/leave of absence benefits, paid time off, and Raytheon Plan offered to all of the approximately 65,000 domestic Raytheon employees would be offered to the Fort Wayne bargaining-unit employees on a year-to-year basis.

leagues, the Respondent's continuation of what it previously did—making annual modifications to medical benefits and relevant costs under the Raytheon Plan—after the parties' CBA expired constituted a unilateral "change" in violation of Section 8(a)(5), since the Union was not given advance notice and the opportunity for bargaining. Second, our dissenting colleagues argue that Raytheon exercised discretion when it made annual modifications in costs and/or benefits under the Raytheon Plan, and under *DuPont* the exercise of any discretion precludes a "past practice" defense to a *Katz*-type 8(a)(5) allegation. For the reasons that follow, however, we overrule *DuPont*, reverse the judge's decision and dismiss the complaint.

Discussion

A. The Supreme Court's Katz Decision and Other Cases Addressing What Constitutes a "Change"

Prior to the Supreme Court's decision in *Katz*, it was well established that Section 8(a)(5) requires parties to bargain in good faith, upon request, regarding mandatory subjects of bargaining, which the Act defines as "wages, hours, and other terms and conditions of employment."[10] Separate from this duty to bargain upon request,[11] the Supreme Court in *Katz* held that Section 8(a)(5) requires employers to refrain from making a *change* in mandatory bargaining subjects unless the change is preceded by notice to the union and the opportunity for bargaining regarding the planned change.[12]

Among other things, the employer in *Katz*, while engaged in initial contract negotiations with the union, unilaterally implemented three types of changes from the status quo: (i) across-the-board "wage increases,"[13] (ii) modifications in the existing "sick-leave plan,"[14] and (iii) "merit increases" (given to 20 employees out of approximately 50 in the bargaining unit, and ranging from $2 to $10).[15] In *Katz*, the Supreme Court discussed each of these changes and found that each type of unilateral change violated Section 8(a)(5).[16] When discussing the third type of change—which the Court referred to as "merit increases"[17] or "merit raises"[18]—the Court stated:

> The respondents' third unilateral action related to *merit increases*, which are also a subject of mandatory bargaining. *Labor Board v. Allison & Co.*, 165 F.2d 766. The matter of merit increases had been raised at three of the conferences during 1956 but no final understanding had been reached. In January 1957, the company, without notice to the union, granted *merit increases* to 20 employees out of the approximately 50 in the unit, the increases ranging between $2 and $10. This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of 8(a)(5), *unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews—in ef-*

[10] Sec. 8(a)(5). A subject is considered a "mandatory" subject of bargaining when it is among the subjects described in Sec. 8(d) of the Act, which defines the duty to bargain collectively as encompassing "wages, hours, and other terms and conditions of employment." See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (regarding mandatory subjects, the employer and union upon request have an "obligation . . . to bargain with each other in good faith," although "neither party is legally obligated to yield"); *NLRB v. Katz*, 369 U.S. at 743 ("A refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.").

[11] There are some exceptions to the requirement to bargain upon request over a mandatory subject, including, for example, where the parties have entered into a collective-bargaining agreement that suspends the obligation to bargain for the agreement's term, or that constitutes a waiver of the obligation to bargain or covers the subject matter at issue. *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). Cf. *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992) (describing "contract coverage" standard applied by some courts when evaluating whether unilateral action is permitted); *NLRB v. Postal Service*, 8 F.3d 832, 836–837 (D.C. Cir. 1993) (same); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936–937 (7th Cir. 1992) (same).

Significantly, the duty to bargain upon request regarding a mandatory subject of bargaining is *not* eliminated by an employer's past practice. Even if an employer has taken actions involving wages or other employment terms in precisely the same way, the existence of such a past practice does *not* permit the employer to refuse to bargain over the subject if requested to do so by the union. See, e.g., *Shell Oil Co.*, 149 NLRB 283, 287 (1964). In other words, even though *Katz* permits the employer to take unilateral actions to the extent they are consistent with past practice and therefore not a "change," the employer must engage in bargaining regarding those actions whenever the union requests such bargaining, unless an exception to the duty to bargain applies—e.g., unless the union has waived bargaining over the subject contractually or bargaining over the subject has already occurred. See *Provena*, supra; *Department of Navy v. FLRA*, supra.

[12] Although *Katz* involved the obligation to refrain from making changes to the status quo during negotiations for a first contract, the *Katz* principle was subsequently reaffirmed by the Supreme Court in the context of negotiations for a new CBA following expiration of the prior CBA. See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

[13] *Katz*, 369 U.S. at 745. The Supreme Court described the wage increases as "a new system of automatic wage increases whereby there would be an increase of $5 every 3 months up to $74.99 per week; an increase of $5 every 6 months between $75 and $90 per week; and a merit review every 6 months for employees earning over $90 per week." Id.

[14] Id. at 744.

[15] Id. at 745–746.

[16] Id. at 744 (discussion of "sick leave" changes); id. at 744–745 (discussion of the employer's "unilateral action in increasing wages," also referred to as "wage increases"); id. at 745–746 (discussion of "merit increases").

[17] Id. at 741, 745–746.

[18] Id. at 746.

fect, were a mere continuation of the status quo—differentiates them from the wage increases and the changes in the sick-leave plan. *We do not think it does. Whatever might be the case as to so-called "merit raises" which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice*, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.[19]

The Supreme Court's *Katz* decision establishes that a unilateral change in a mandatory bargaining subject (i.e., wages, hours, and other terms and conditions of employment) violates Section 8(a)(5). In cases interpreting *Katz*, the Board has stated that "the vice . . . is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge."[20]

In reliance on *Katz*, the Board has likewise held:

> [W]here an employer's action does *not* change existing conditions—that is, *where it does not alter the status quo*—the employer does *not* violate Section 8(a)(5) and (1). . . . *An established past practice can become part of the status quo*. See *Katz*, 369 U.S. at 746. Accordingly, the Board has found *no violation* of Section 8(a)(5) and (1) *where the employer simply followed a well-established past practice*.[21]

The principle that an employer may *lawfully* take unilateral action that "does not alter the status quo,"[22] which permits changes that have become part of the status quo, is often referred to as the "dynamic status quo." This principle was described by Professors Gorman and Finkin in their well-known labor law treatise as follows:

> [T]he case law (including the *Katz* decision itself) makes clear that conditions of employment are to be viewed dynamically and that *the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of change*. An employer modification consistent with such a pattern *is not a "change" in working conditions at all*.[23]

Our dissenting colleagues themselves, when interpreting *Katz*, have invoked the "dynamic status quo" concept, referring to it as "the familiar 'dynamic status quo' doctrine," and citing with approval the 2004 edition of the labor law treatise by Professors Gorman and Finkin. See *Finley Hospital*, 362 NLRB No. 102, slip op. at 5 (2015), enf. denied 827 F.3d 720 (8th Cir. 2016); fn. 23, supra. Similarly, our dissenting colleagues acknowledged in the *DuPont* majority opinion that "[t]he Board's past practice doctrine also flows from *Katz*." *DuPont*, supra, slip op. at 7.

Judge Harry Edwards of the D.C. Circuit described the vital role that "change" plays when interpreting the Supreme Court's *Katz* decision, stating:

> [I]t makes absolutely no difference under *Katz* whether the change at issue adds to or subtracts from employees' wages, or whether it institutes a new employment policy or withdraws one that already exists. Thus, "in some circumstances it will be an unfair labor practice to grant unilaterally a wage increase, and . . . in other circumstances it will be an unfair labor practice to deny unilaterally a wage increase. The Act is violated by a unilateral change in the existing wage structure whether that change be an increase or the denial of a scheduled increase." . . . *It cannot be doubted that, under the prevailing case law from the Supreme Court, the circuit courts, and the Board, the relevant inquiry here is*

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[19] Id. at 745–747 (footnotes and citations omitted; emphasis added). As the above quotation shows, the Supreme Court in *Katz* indicated that the unilateral "merit increases" violated Sec. 8(a)(5) "unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews—in effect, were a mere continuation of the status quo—differentiates them from the wage increases and the changes in the sick-leave plan" (which were the two other unilateral changes the Court found to be unlawful). The Court then answered its own question by stating: "We do not think it does" (meaning that the merit increases were unlawful, as were the other two unilateral changes involving "wage increases" and "the changes in the sick-leave plan"). Id.

[20] *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (emphasis in original) (quoting *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). See also *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002) (same).

[21] *Post-Tribune Co.*, 337 NLRB at 1280 (emphasis added) (citing *House of the Good Samaritan*, 268 NLRB 236, 237 (1983)); see also *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), affd. 772 F.2d 421 (8th Cir. 1985); *A-V Corp.*, 209 NLRB 451, 452 (1974).

[22] Id.

[23] Robert A. Gorman, Matthew W. Finkin, *Labor Law Analysis and Advocacy*, at 720 (Juris 2013) (hereinafter "Gorman & Finkin") (emphasis added). This is the most recent edition of the well-known authoritative treatise by Professors Gorman and Finkin, published in 2004, which described the "dynamic status quo" in relation to *Katz* using the same language quoted above. See Robert A. Gorman, Matthew W. Finkin, *Basic Text on Labor Law*, Sec. 20.14 (2d ed. 2004). See also *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, 1577 (1965) (referring to whether unilateral subcontracting decisions "var[ied] significantly in kind or degree from what had been customary under past established practice"), and fn. 89, infra.

whether any established employment term on a mandatory subject of bargaining has been unilaterally changed.[24]

When interpreting *Katz*, the Board and the courts have often evaluated whether particular actions constitute a "change." As to this issue, numerous cases have focused on whether there has been "a substantial departure from past practice,"[25] with no scrutiny into whether CBAs existed when the employer's prior actions created the past practice, and regardless of whether any CBAs contained language expressly permitting the actions in question.

For example, the Board decided *Shell Oil* in 1964—2 years after the Supreme Court issued its decision in

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[24] *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996) (initial ellipsis in original; emphasis added) (quoting *NLRB v. Allied Prods. Corp*., 548 F.2d 644, 652–653 (6th Cir. 1977), and citing *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970)), cert. denied 519 U.S. 1090 (1997).

If our dissenting colleagues dispute the correctness of our description of the Supreme Court's *Katz* decision, their contentions are plainly without merit. Our discussion of *Katz*, as set forth in this opinion, consists exclusively of verbatim quotations from the *Katz* opinion itself (see, e.g., fn. 19, supra and accompanying text) or descriptions of the *Katz* opinion that are unquestionably accurate (see, e.g., fns. 13–16, supra and accompanying text, indicating that the Supreme Court ruled that three different types of unilateral changes—involving wage increases, changes to the sick-leave plan, and merit raises—were unlawful). Nor is there any doubt that the Board and the courts have uniformly interpreted *Katz* to require advance notice and the opportunity for bargaining only when the employer's actions constitute a "change." As the Board held in *Daily News*, "the vice . . . is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *Daily News of Los Angeles*, 315 NLRB at 1237; see also *Post-Tribune Co.*, 337 NLRB at 1280 (same). And as shown above, the D.C. Circuit has held likewise. See *Daily News*, 73 F.3d at 411 (quoted in text). Finally, the "dynamic status quo" doctrine—requiring advance notice and the opportunity for bargaining over an employer's actions only when the actions differ from a pattern of prior changes that have become an employer's past practice—is equally well established in "case law" and "the *Katz* decision itself." See Gorman & Finkin, supra fn. 23. As noted in the text, our dissenting colleagues themselves have interpreted *Katz* as embracing the "dynamic status quo" concept, referring to it as "the familiar 'dynamic status quo' doctrine," and citing with approval the 2004 edition of the labor law treatise by Professors Gorman and Finkin. See *Finley Hospital*, 362 NLRB No. 102, slip op. at 5; see also fn. 23, supra.

Chairman Miscimarra responds as follows to the criticism belatedly raised by Members Pearce and McFerran—nearly one and one-half years after they participated in the *DuPont* case—who now assert that Chairman Miscimarra's dissenting opinion in *DuPont* contained a "misquotation" or "incomplete quotation" that constituted a "misreading" of the Supreme Court's *Katz* decision. Preliminarily, to the extent that the dissent complains that the Supreme Court's *Katz* decision was misquoted in the *DuPont* dissent, this has no bearing on the instant case because, as noted previously, this opinion quotes in full the language in *Katz* addressing the employer's unlawful merit wage increases and past practice. Moreover, Members Pearce and McFerran were part of the *DuPont* majority, and their own *DuPont* opinion never claimed that the *DuPont* dissent misquoted the Supreme Court's *Katz* decision. *DuPont*, slip op. at 10–12 (*DuPont* majority's "Response to Dissent"). Nonetheless, Members Pearce and McFerran now augment their prior *DuPont* opinion by asserting that the *DuPont* dissent "entirely altered the meaning" of the Supreme Court's discussion in *Katz*. This claim is specious, and as explained in the text, Members Pearce and McFerran misconstrue the *Katz* opinion in the instant case. See also fn. 76, infra.

The *DuPont* dissent—like dissenting Members Pearce and McFerran here—clearly indicated that the *Katz* Supreme Court *rejected* the employer's past practice defense. Immediately preceding the *DuPont* dissent's quotation of *Katz*, the dissent stated that the Supreme Court in *Katz* held the employer's merit wage increases "constituted an *unlawful* refusal to bargain in *violation* of Section 8(a)(5)." *DuPont*, slip op. at 19 (Member Miscimarra, dissenting) (emphasis added). Immediately after this language, the *DuPont* dissent quoted the Supreme Court's reference to a possible past practice defense (i.e., that the employer's merit increases, "in effect, were a mere continuation of the status quo"), and the *DuPont* dissent quoted the Supreme Court's explanation *why* the past practice defense *was rejected*—i.e., "the raises . . . were in no sense automatic, but were informed by a large measure of discretion," and there was "simply . . . no way in such case for a union to know whether or not there has been a substantial departure from past practice." Id. (quoting *Katz*, 369 U.S. at 746–747). And immediately following the *Katz* quotation, the *DuPont* dissent reiterated the holding of *Katz*—again focusing on the *violation* found by the Supreme Court—as follows: "The rule in *Katz* is that employers *cannot* deviate from the status quo by making unilateral changes in wages and other mandatory bargaining subjects." Id. (emphasis in original). Next, the *DuPont* dissent referred to the "dynamic status quo" principle, as described by Professors Gorman and Finkin, supra fn. 23, whose treatise states that case law, including *Katz*, "makes clear that the status quo against which the employer's 'change' is considered must take account of any regular and consistent past pattern of change." Id., quoted in *DuPont*, slip op. at 19 (Member Miscimarra, dissenting). Members Pearce and McFerran themselves have invoked the same "dynamic status quo" principle, as noted in the text, citing with approval the 2004 edition of the labor law treatise by Professors Gorman and Finkin. See *Finley Hospital*, supra, 362 NLRB No. 102, slip op. at 5. Finally, Members Pearce and McFerran attach significance, erroneously, to the *DuPont* dissent's quotation of *Katz* without including one phrase ("the fact that") and one sentence ("We do not think so"). In *Katz*, the latter sentence appears after the Supreme Court commented on whether the employer's past practice "differentiate[d]" the disputed merit raises from the "wage increases" and "changes in the sick-leave plan," both of which the Supreme Court had already found unlawful. Yet, as noted above, the *DuPont* dissent quoted the Court's explanations *rejecting* the employer's past practice defense, and the *DuPont* dissent indicated that the disputed merit raises in *Katz* were *unlawful*, which is precisely what the Supreme Court conveyed in the sentence, "We do not think so." Moreover, the Supreme Court in *Katz* clearly did *not* hold that past practice was immaterial when determining whether an employer's actions constituted an unlawful unilateral change from the status quo. Indeed, the *DuPont* majority's own opinion stated that employers in some circumstances *may* lawfully "act unilaterally *pursuant to an established practice*" and that the "Board's past practice doctrine also *flows from Katz*." *DuPont*, supra, slip op. at 7 (emphasis added). Thus, the *DuPont* dissent—like Members Pearce and McFerran here—portrayed *Katz* as rejecting the employer's past practice argument, and creating the principle that actions consistent with an established practice are not a "change" within the meaning of *Katz*. Again, as noted previously, these observations have no bearing on the Board's opinion in the instant case, which quotes in full the *entire* Supreme Court discussion in *Katz* regarding the employer's unlawful merit raises and past practice.

[25] *Katz*, supra, 369 U.S. at 746.

Katz—and the Board squarely rejected the position taken by the majority in *DuPont*. The Board in *Shell Oil* held that the determination of whether an employer's actions constitute a "change" does *not* depend on whether past actions were permitted by language in a CBA that has since expired.

In *Shell Oil*, the parties' CBA contained a subcontracting clause—article XIV—that authorized the employer to subcontract bargaining-unit work without giving the union notice and an opportunity to bargain. Consistent with management's right recognized in article XIV, the employer "for some time" had subcontracted construction and maintenance work.[26] The CBA expired in March 1962, and a lengthy hiatus period ensued during which no CBA was in effect.[27] During the hiatus, the employer subcontracted three construction and/or maintenance jobs without giving the union notice and opportunity to bargain.[28]

In these circumstances, the Board in *Shell Oil* found that the employer did not violate Section 8(a)(5) of the Act when it unilaterally subcontracted work during the hiatus between contracts because the challenged subcontracting was consistent with what the employer had done previously. The General Counsel argued that the subcontracting during the hiatus must be regarded as a "change" because the prior subcontracting occurred during the term of the CBA (which contained article XIV, the subcontracting clause that recognized management's right to engage in subcontracting unilaterally), and the General Counsel contended that "termination of the preceding agreement in March 1962 revived any bargaining rights the Union may have surrendered under article XIV."[29] The Board rejected this argument for reasons that have equal application in the instant case:

> In our opinion, the rights and duties of parties to collective bargaining, during a hiatus between contracts, may be derived from sources other than a formal extension agreement. Thus, it is well settled that notwithstanding the termination of a labor contract, the parties, pending its renewal or renegotiation, have the right and obligation to maintain existing conditions of employment. Unilateral changes therein violate the statutory duty to bargain in good faith. We are persuaded and find that *Respondent's frequently invoked practice of contracting out occasional maintenance work on a unilateral basis*, while predicated upon observance and implementation of article XIV, *had also become an established employment practice and, as such, a term and condition of employment*.[30]

The Board concluded:

> [I]t does not appear that the subcontracting during this hiatus period *materially varied in kind or degree from what had been customary in the past*. In these circumstances, we cannot say that the Respondent's action in subcontracting, according to its established practice, certain unit work without prior notice to or bargaining with the Union during the period when no bargaining agreement was in effect was in derogation of a statutory duty to bargain on terms and conditions of employment.[31]

Significantly, the Supreme Court in *Fibreboard Paper Products Corp. v. NLRB* upheld the Board's position that certain subcontracting decisions were a mandatory subject of bargaining.[32] Yet, in the Board's very first post-*Fibreboard* case evaluating subcontracting—*Westinghouse Electric Corp. (Mansfield Plant)*[33]—the Board reiterated that determining what constitutes a "change," even during the hiatus between contracts, involves comparing the challenged actions taken by the employer with what the employer had done in the past. Thus, in *Westinghouse*, the Board, applying *Katz* and *Fibreboard*, squarely rejected the position the Board majority subsequently adopted in *DuPont*.

In *Westinghouse*, the Board held that the employer lawfully implemented "thousands of contracts"[34] during a hiatus period between CBAs, explaining as follows:

> [I]t is wrong to assume that, *in the absence of an existing contractual waiver*, it is a per se unfair labor practice in all situations for an employer to let out unit work

[26] 149 NLRB 283, 284 (1964).
[27] Id. at 285.
[28] Id. at 285–286.
[29] Id. at 287.

[30] Id. at 287 (emphasis added).
[31] Id. at 288. The Board in *Shell Oil* also held that, even though the employer could continue its practice of unilateral subcontracting during the hiatus between contracts, the union retained its right to request bargaining over subcontracting, and the employer, though permitted to proceed with subcontracting unilaterally, was still required to bargain on request by the union. Thus, separate from the employer's right to engage in lawful subcontracting under *Katz*, any existing past practice did not eliminate the employer's duty to bargain upon request because the union had the right "to propose a change in or elimination of the Company's practice and to request bargaining thereon." Id. But the Board stated that "the Union's demand to bargain for a modification or elimination of the Respondent's established practice did not suspend the Respondent's right to maintain its established practice, any more than a demand by the Union to modify the existing wage structure would suspend Respondent's obligation to maintain such wage structure during negotiations." Id. at 287–288.
[32] 379 U.S. 203, 211 (1964).
[33] Supra, 150 NLRB at 1574.
[34] Id. at 1576.

without consulting the unit bargaining representative. As the Supreme Court [in *Katz*] has indicated in a broader context, even where a subject of mandatory bargaining is involved, there may be "circumstances which the Board could or should accept as excusing or justifying unilateral action."

It is also pertinent to the issue before us to observe that an employer's duty to give a union prior notice and an opportunity to bargain normally arises *where the employer proposes to take action which will effect some change in existing employment terms or conditions within the range of mandatory bargaining*. In the *Fibreboard* line of cases, where the Board has found unilateral contracting out of unit work to be violative of Section 8(a)(5) and (1), it has invariably appeared that *the contracting out involved a departure from previously established operating practices*, effected *a change in conditions of employment*, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit.

Here, however, there was no departure from the norm in the letting out of the thousands of contracts to which the complaint is addressed. The making of such contracts was but a recurrent event in a familiar pattern comporting with the Respondent's usual method of conducting its manufacturing operations at the Mansfield Plant. It does not appear that the subcontracting engaged in during the period in question materially varied in kind or degree from that which had been customary in the past.[35]

Even when dealing with something as central to the Act as wages, the Board has likewise found that when an employer has a past practice of providing certain wage increases, an employer does not violate Section 8(a)(5) when it provides new wage increases in keeping with that practice without affording the union notice and opportunity to bargain. See, e.g., *Daily News of Los Angeles*, supra, 315 NLRB at 1236. Indeed, although the *DuPont* majority determined that any "discretion" associated with an employer's action means the action constitutes a "change" that cannot be unilaterally implemented, regardless of whether the employer has taken precisely the same actions in the past, the Board in other cases has expansively defined "past practice" and found that the Act *required* employers to act unilaterally—specifically, to provide wage increases and to do so without bargaining—even though the past wage increases involved substantial employer discretion. See *Arc Bridges, Inc.*, 355 NLRB 1222 (2010), enf. denied 662 F.3d 1235 (D.C. Cir. 2011); *Mission Foods*, 350 NLRB 336, 337 (2007); *Central Maine Morning Sentinel*, 295 NLRB 376 (1989).[36]

Neither has the Board required bargaining prior to an employer's minor variations from actions taken in the past. "When changes in existing plant rules . . . constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice," it is lawful to continue applying the same rules without bargaining because the changes are not sufficiently "material, substantial, and significant" to require notice and the opportunity to bargain. *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991); see *Trading Port, Inc.*, 224 NLRB 980, 983–984 (1976) (employer implemented no change that required bargaining when the employer applied its preexisting productivity standards, including penalties for failing to satisfy those standards, but "devised a more efficient means of detecting individual levels of productivity, of policing individual efficiency, and advanced a more stringent view towards below average producers than in the preceding 18 months or so").

[35] Id. (emphasis added). In *Westinghouse*, the Board again stated that an employer's right to engage in unilateral subcontracting consistent with past practice did not affect or diminish the employer's obligation, upon request, to bargain with the union regarding subcontracting. Id. at 1576–1577 ("We do not mean to suggest that, because subcontracting in accordance with an established practice may stand on a different footing from that of subcontracting in other contexts, an employer is any less under an obligation to bargain with the union on request at an appropriate time with respect to such restrictions or other changes in current subcontracting practices as the union may wish to negotiate."). Significantly, the Board held that this duty to bargain upon request was an additional reason not to require bargaining before an employer took action that was consistent with past practice. Thus, the Board in *Westinghouse* explained: "The fact that the Union does have an opportunity to bargain generally on request about Respondent's recurrent subcontracting practices, *provides in our view a contributing, though not a controlling, reason for not imposing upon the Respondent the duty to bargain separately, at the decision-making level, about each of the thousands of individual subcontracts covering work that could be performed by its own employees*." Id. at 1577 (emphasis added). As noted in the text, the union's right to request bargaining regarding mandatory subjects is not affected, let alone eliminated, merely because an employer may have the right to take unilateral action consistent with its past practice, and any contractual waiver of the union's right to request bargaining would remain predicated on the existence of a contract. Id.

[36] The Board must exercise considerable care when interpreting *Katz*—where the Supreme Court described a past practice *defense* to an allegation that an employer's unilateral changes violated Sec. 8(a)(5)—to mean that Sec. 8(a)(5) imposes an obligation on employers to *make* unilateral changes, particularly since the Act explicitly states that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." Sec. 8(d); see also *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970). We express no opinion on this reverse version of the *Katz* exception.

In more recent decisions—as the United States Court of Appeals for the D.C. Circuit recognized when remanding *DuPont I* and *II*—the Board and the courts have likewise held that, following a CBA's expiration, employers may lawfully take unilateral actions consistent with past practice, even though the practice may have developed in whole or in part while prior CBAs were in effect. In *Courier-Journal*, 342 NLRB 1093 (2004) (*Courier-Journal I*), the Board held that the legality of employer actions consistent with past practice following contract expiration did not depend on "'whether a contractual waiver of the right to bargain survives the expiration of the contract' but rather upon whether the change 'is grounded in past practice, and the continuance thereof.'"[37] And in *Capitol Ford*, 343 NLRB 1058 (2004), the Board stated that "'the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice,'" and "although the employer 'cannot rely upon the management rights clause of that contract to justify unilateral action,' the 'past practice is not dependent on the continued existence of the [expired] collective-bargaining agreement.'"[38] To the same effect, as the D.C. Circuit observed in its decision remanding *DuPont I* and *II*, the Court of Appeals for the Sixth Circuit "captured the point precisely" when it stated: "'[I]t is the *actual past practice of unilateral activity under the management-rights clause of the CBA*, and *not* the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract."[39] Further, in *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006) (*Beverly II*), although a consistent past practice had not been established, the Board stated that "'without regard to whether the management-rights clause survived,'" the employer would have been "'privileged'" to make "'the unilateral changes at issue if [its] conduct was consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract.'"[40]

Contrary to this extensive and consistent application of *Katz*, where the Board has found that an employer has made no "change" when it continues to do what it has done in the past—regardless of whether a CBA was in effect at the time of the past acts—the Board issued decisions in *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001) (*Beverly I*), and *Register-Guard*, 339 NLRB 353 (2003), that support the reasoning adopted by the majority in *DuPont*. However, as the above discussion demonstrates, *Beverly I* and *Register-Guard* were short-lived departures from preexisting case law, and the Board returned to its prior longstanding treatment of this issue, consistent with *Katz*, in the *Courier-Journal* cases (decided in 2004), *Capitol Ford* (also decided in 2004), and *Beverly II* (decided in 2006).[41]

[37] *DuPont v. NLRB*, 682 F.3d at 69 (quoting *Courier-Journal I*, 342 NLRB at 1095). See also *Courier-Journal*, 342 NLRB 1148 (2004) (*Courier-Journal II*).

[38] Id. (quoting *Capitol Ford*, 343 NLRB at 1058 fn. 3) (alteration in *DuPont v. NLRB*).

[39] Id. (quoting *Beverly Health and Rehabilitation Services, Inc. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002)) (alteration in *DuPont v. NLRB*; emphasis added).

[40] Id. at 69–70 (quoting *Beverly II*, 346 NLRB at 1319 fn. 5) (alteration in *DuPont v. NLRB*).

[41] It is not correct, as the *DuPont* majority appeared to argue, that *Shell Oil*, 149 NLRB at 283, and *Winn-Dixie Stores*, 224 NLRB 1418 (1976) (subsequent history omitted), were subsequently overruled with respect to the holdings of those cases that are relevant here. The *DuPont* majority stated that *Shell Oil* and *Winn-Dixie* were "deemed" by the Board in *Beverly I* to have been "overruled in relevant part[,]" sub silentio, by subsequent precedent. 364 NLRB No. 113, slip op. at 5 fn. 17. However, the only aspects of *Shell Oil* and *Winn-Dixie* that were referenced in *Beverly I* as being purportedly overruled involved a different proposition—that a management-rights clause does not survive contract expiration—which is not at issue here and which we would not dispute if it were. See *Beverly I*, 335 NLRB at 636 ("[T]he management-rights clause in those agreements . . . did not survive the contracts' expiration.") (footnote omitted). The Board in *Beverly I* stated that "[t]o the extent" that *Shell Oil* and *Winn-Dixie* "could be read to imply the contrary," they had been overruled *sub silentio* in more recent cases. Again, this pertained *only* to whether a management-rights clause survives contract expiration, which is not disputed in the instant case. Moreover, the Board's suggestion in *Beverly I*—that *Shell Oil* or *Winn-Dixie* could be read to imply that management-rights clauses survive contract expiration—was unfounded. Neither *Shell Oil* nor *Winn-Dixie* implies any such thing: in neither decision did the Board hold or so much as suggest that a management-rights clause survives the expiration of the CBA that contained it. Rather, the Board's decisions in *Shell Oil* and *Winn-Dixie* reflect the fact that an employer's actions *based on past practice* do not constitute a "change" over which bargaining is required. It is true that in *Beverly I*, two members of a three-member panel—Members Liebman and Walsh—took the same position as was taken by the majority in *DuPont*, i.e., that a past practice developed under the auspices of a management-rights clause terminates at the expiration of the CBA that contained that clause. 335 NLRB at 636 & fn. 7. However, the third member of the panel, Chairman Hurtgen, rejected that view, stating that "even if the management-rights clause expired with the contract, the work practices that were extant during the contract constituted a part of the terms and conditions of employment. Thus, if the employer, after contract expiration, continues to act consistently with those practices, it has not 'changed' the status quo and it has not violated Section 8(a)(5)." Id. at 646. Because the Board adheres to the practice that two members cannot overrule Board precedent, it is clear that the panel majority consisting of Members Liebman and Walsh in *Beverly I* did not overrule *Shell Oil* or *Winn-Dixie*. Thus, prior to *DuPont*, the Board had never overruled *Shell Oil* or *Winn-Dixie* (by implication or otherwise) regarding the holding of those cases that the existence of a past practice is unaffected by the existence or non-existence of a management-rights clause, and this holding was subsequently reaffirmed in the *Courier-Journal* cases, *Capitol Ford*, and *Beverly II*.

Moreover, in its decision remanding *DuPont I* and *II*, the D.C. Circuit pointed out the irrelevancy of the post-expiration nonsurvival of management-rights clauses to the issue of past practice. As the court

B. DuPont Is Incompatible with the Supreme Court's Decision in NLRB v. Katz and Important Purposes of the Act

In *DuPont*, the Board majority held that, when evaluating whether actions constitute a "change," parties may not simply compare those actions to past actions. Instead, the majority held that parties must look at whether other things have changed—specifically, whether a CBA previously existed, whether the prior CBA contained language conferring a management right to take the actions in question, and whether a new CBA exists containing the same contract language. If not, according to the *DuPont* majority, the employer's new actions constitute a "change" even though they *continue* what the employer previously did and can be seen *not* to involve any "substantial departure" from past practice.[42] The majority in *DuPont* also held that, if the employer's past and present actions involved any "discretion," this *always* means a "change" occurred (requiring advance notice and the opportunity for bargaining), even where the employer obviously was continuing its past practice and was not altering the status quo. In so holding, the *DuPont* majority overruled *Beverly II*, *Capitol Ford*, and the *Courier-Journal* cases, plus earlier cases consistent with those decisions, including *Shell Oil Co.*, 149 NLRB at 283, and *Winn-Dixie Stores, Inc.*, 224 NLRB at 1418.

As explained below, we find that the Board majority's decision in *DuPont* is incompatible with established law as reflected in *NLRB v. Katz* as well as fundamental purposes of the Act. We overrule *DuPont*, and we restore the correct analysis to this area, specifically, principles reflected in the *Shell Oil* line of cases and embodied more recently in the *Courier-Journal* cases, *Capitol Ford*, and *Beverly II*.

Our view of this case is straightforward, and it consists of two parts: (1) in 1962, the Supreme Court held in *Katz*, supra, that an employer must give the union notice and the opportunity for bargaining before making a "change" in employment matters;[43] and (2) actions constitute a "change" only if they materially differ from what has occurred in the past.

The *DuPont* majority disagreed with the second of these two points. When evaluating whether new actions constitute a "change," the *DuPont* majority did not just compare the new actions to the past actions. Instead, the *DuPont* majority held that parties must look at whether *other things* had changed—specifically, whether a CBA previously existed, whether the prior CBA or CBAs contained language conferring on management the right to take the actions in question, and whether a new CBA exists containing the same contract language. If not, the employer's new actions constitute a "change" even though they are identical to what the employer did before.

The following example, borrowed from then-Member Miscimarra's dissent in *DuPont*, illustrates the fundamental error in the *DuPont* majority's decision:

> Take, for example, an employer that has always painted factory walls blue every summer and green every winter. When doing this painting, the employer exercised discretion: it varied the precise shade of blue and green, and it also varied the precise time when the painting would be done. Summer approaches. If the employer again paints the factory walls blue, will that constitute a "change"? In my view, because this is what the employer has always done, it is not a "change" for the employer to do the same thing again.[44]

The Board majority in *DuPont* saw things differently. Again, we quote then-Member Miscimarra's dissent:

> Here is how my colleagues would analyze it. Summer approaches, and with it, the time to paint the factory walls blue. Will this constitute a "change"? To answer that question, the parties must look at whether CBAs existed previously during all or some of the past factory-wall-painting. If CBAs existed previously, parties must then determine whether those CBAs contained language conferring on management the right to paint the walls as described above, and whether a new CBA containing the same language exists now. If no CBA exists now, or if the CBA does not contain the same language conferring a management right to paint the walls, then everything the employer did in the past is treated like it never happened. Therefore, even though the employer does what it always did (paints the walls blue every summer), my colleagues will find this constitutes a unilateral "change," which means the employer will have violated our statute, and to avoid vio-

stated, "whether a management-rights clause survives the expiration of the contract is beside the point Du Pont is making." *DuPont v. NLRB*, 682 F.3d at 69. The court then stated that the Sixth Circuit "captured the point precisely" when it observed that "'it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract.'" Id. (quoting *Beverly Health and Rehabilitation Services, Inc. v. NLRB*, 297 F.3d at 481).

[42] *Katz*, supra, 369 U.S. at 746.

[43] See text accompanying fns. 12–24, supra. Obviously, the Board is bound by the Act, which requires bargaining in Sec. 8(a)(5) and 8(b)(3). And the Board is bound by Supreme Court decisions, including *NLRB v. Katz*.

[44] 364 NLRB No. 113, slip op. at 16 (Member Miscimarra, dissenting).

> lating the Act, the employer must first give the union notice and the opportunity for bargaining. In a separate part of their holding, my colleagues also decide that, whenever the employer exercises any "discretion" (in my illustration, for example, the employer always determined the shade of blue or green as well as the exact time when the painting would occur), taking precisely the same action would *always* constitute a "change" because the employer exercised "discretion."[45]

Of course, employers do not just paint walls. They take all kinds of actions, including many that affect wages, hours, benefits, and other employment terms. Again, the Board and the courts—interpreting *Katz*—have repeatedly held that employers can lawfully take such actions without bargaining if doing so does not constitute a "change."[46] According to the *DuPont* majority, however, if a past practice developed under contractual management-rights language, the expiration of a CBA means that *every* employer action taken thereafter constitutes a "change," even though the employer merely continues doing what it has done before.

We believe that this outcome is wrong because it contradicts the Supreme Court's decision in *Katz* and defies common sense. Moreover, we believe the *DuPont* majority's approach will produce significant labor relations instability at a time when employers and unions already face serious challenges attempting to negotiate successor collective-bargaining agreements. In highlighting the additional flaws in the majority's approach in *DuPont*, the following three considerations are important.

First, unions and employers face enormous challenges in contract negotiations: prioritizing issues, reconciling divergent positions, preparing and responding to information requests, and managing the bargaining process. The majority in *DuPont* needlessly added to these challenges by creating a new Board-imposed duty for parties to negotiate before the employer takes actions that represent a *continuation* of what the employer has done before.

Second, when no CBA exists, the bargaining obligation imposed by the *DuPont* majority is not merely to negotiate to impasse or agreement regarding the particular action that the employer wishes to take (e.g., painting the walls blue, to use the earlier example). Rather, under extant case law, if no CBA exists, the employer must bargain to a complete agreement or overall impasse regarding *all* mandatory bargaining subjects under negotiation before the employer can take action regarding *any* subject.[47] Thus, the majority's decision in *DuPont*, in tandem with other cases, prevents employers from doing precisely what they have done in the past until *everything* is resolved in contract negotiations. This is contrary to *Katz* and to the Board's obligation to foster stable labor relations,[48] and it was clearly not intended by Congress.

Third, applying the *Katz* doctrine in a straightforward manner, as described above, does not permit employers to evade their duty to bargain under Section 8(d) and 8(a)(5) of the Act. Even though employers, under *Katz*, have the right to take unilateral actions where it can be seen that those actions are not a substantial departure from past practice, employers still have an obligation to bargain *upon request* with respect to all mandatory bargaining subjects—including actions the employer has the right to take unilaterally—whenever the union *requests* such bargaining. The Act imposes two types of bargaining obligations upon employers: (1) the *Katz* duty to refrain from making a unilateral "change" in any employment term constituting a mandatory bargaining subject, which entails an evaluation of past practice to determine whether a "change" would occur if the employer took the contemplated action;[49] and (2) the duty to engage in bargaining regarding any and all mandatory bargaining subjects *upon the union's request* to bargain.[50] Existing law makes it clear that this duty to bargain upon request *is not affected by an employer's past practice*.[51]

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[45] Id. (footnote omitted). In his *DuPont* dissent, then-Member Miscimarra used the painting of factory walls as an example to illustrate the definition he attached to the word "change," on the one hand, in comparison to the definition utilized by the majority in *DuPont*, on the other hand. However, Member Miscimarra did not reach or pass on whether the color of factory walls is a sufficiently substantial term or condition of employment to require bargaining under Sec. 8(a)(5) of the Act before the walls can be painted a different color, even assuming that doing so constitutes a "change" for purposes of *Katz*, nor do we reach or pass on that question.

[46] See fns. 20–24, supra and accompanying text.

[47] See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) ("[A]n employer's obligation . . . encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole."), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994); *RBE Electronics of S.D.*, 320 NLRB 80 (1995) (same). We do not here pass on whether *Bottom Line Enterprises* and *RBE Electronics* were correctly decided.

[48] One of the Board's primary responsibilities under the Act is to foster labor relations stability. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (A "basic policy of the Act [is] to achieve stability of labor relations.").

[49] See fns. 20–24, supra and accompanying text.

[50] See fn. 9, supra and accompanying text.

[51] For more detail regarding the difference between the duty to bargain upon request and the *Katz* duty to refrain from unilaterally changing a term or condition of employment—and the fact that an employer's past practice leaves the former duty undiminished—see fns. 10, 30, & 34, supra.

In the "painting-the-walls-blue" illustration, for example, we would find that the employer does not have to bargain before it paints the walls blue this summer (because doing so would not be a "change"); but the employer is still required to bargain over this subject—*regardless* of any past practice—if the union requests such bargaining.[52]

Another troubling aspect of the majority's analysis in *DuPont* is their misleading description of the development of Board case law in this area. The *DuPont* majority constructed a narrative that took as its starting point a time when the Board (in their view) properly applied the law, as follows: (a) if employer actions occurred during a CBA's term, these actions were lawful only because the union had waived its bargaining rights contractually, typically pursuant to a management-rights clause; and (b) if the employer took the same (or similar) actions after that CBA had expired, the Board supposedly applied a "traditional and longstanding past practice doctrine"[53] under which the employer's new actions constituted a "change" even if they were identical to what the employer had done in the past. Under the *DuPont* majority's narrative, this utopian period when the Board properly applied the law was reflected primarily in two cases: *Beverly I*[54] and *Register-Guard*,[55] decided in 2001 and 2003, respectively.

As the *DuPont* majority tells the story, the key villains that came along and wrecked everything were the *Courier-Journal* cases decided in 2004.[56] According to the *DuPont* majority, the *Courier-Journal* cases were "unexplained departures from well-established . . . legal principles" and "veered sharply from the well-established precedent defining a past practice status quo."[57] And the majority further maintained that the *Courier-Journal* cases "cannot be reconciled with the traditional and longstanding past practice doctrine"[58] established in *Beverly I* and *Register-Guard*. Therefore, in *DuPont*, the majority purported to "return to the rule followed in our earlier cases,"[59] thereby restoring the law to its proper state and where it had always been, setting aside the nefarious *Courier-Journal* cases and their accursed progeny, *Capitol Ford* and *Beverly II*.

This narrative has two problems. First, the story is not true. It does not account for an earlier, *decades-long* period during which the Board—consistent with the *Courier-Journal* cases—similarly held that employer actions were not a "change" that required bargaining under *Katz* if they were consistent with past practice, regardless of whether or when a CBA was in effect.[60] In other words, the majority's decision in *DuPont* is not, in fact, supported by any "traditional and longstanding past practice doctrine." Rather, the Board's "traditional and longstanding" past practice doctrine *contradicts* the majority's approach in *DuPont*. The Board applied *Beverly I* and *Register-Guard* (the two cases relied upon by the *DuPont* majority)[61] during a relatively brief 3-year period, which was preceded *and* followed by numerous Board cases that squarely rejected the reasoning embraced by the *DuPont* majority.

There is a more fundamental problem with the narrative constructed by the majority in *DuPont*. The present case—just like the *DuPont* cases—is, at bottom, a simple one: the Board is bound by the Act, and we must adhere to Supreme Court decisions, including the Supreme Court's decision in *Katz*. There, the Supreme Court held that an employer must provide the union prior notice and the opportunity for bargaining before it implements a "change." Most people understand what "change" means, and this commonsense understanding is what the Supreme Court embraced in *Katz*: when an employer acts consistently with what it did before, this is not a "change." It does not matter whether or what type of CBA may exist, or may have existed, when evaluating whether a particular action constitutes a "change." The majority's view to the contrary in *DuPont* improperly confused the subject of contractual waivers of the right to bargain—which depend, of course, on the existence of a contract—with the analysis of what constitutes a "change" for purposes of *Katz*. Equally incorrect, in our view, was their finding that every employer action constitutes a "change" requiring prior notice and opportunity to bargain, even if the action is materially identical to what the employer has always done, if the employer exercises any discretion in taking the action. As explained more fully below, this aspect of *DuPont* is contrary to

[52] Although the duty to engage in bargaining upon request is undiminished by the existence of a past practice, there are some potential exceptions that can affect this duty. See fn. 11, supra.

[53] *DuPont*, 364 NLRB No. 113, slip op. at 6.

[54] Supra, 335 NLRB at 635.

[55] Supra, 339 NLRB at 353.

[56] *Courier-Journal I*, supra, 342 NLRB at 1093; *Courier-Journal II*, supra, 342 NLRB at 1148. The majority passed equally harsh judgment on similar Board decisions in *Capitol Ford*, supra, 343 NLRB at 1058, and *Beverly II*, supra, 346 NLRB at 1319.

[57] 364 NLRB No. 113, slip op. at 8.

[58] Id., slip op. at 6.

[59] Id., slip op. at 3.

[60] See, e.g., *Shell Oil Co.*, supra, 149 NLRB at 283; *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB at 1574; *Winn-Dixie Stores, Inc.*, supra, 224 NLRB at 1418. See also the text accompanying notes 26–40, supra.

[61] Although *Beverly I* and *Register-Guard* provide support for the reasoning adopted by the *DuPont* majority, each case was distinguishable from the *DuPont* cases. In *Beverly I*, the employer did not rely on a past practice defense, and the employer in *Register-Guard* did not establish that the changes undertaken were consistent with its past actions.

Katz as well as numerous other longstanding and recent Board and court decisions.

C. *The Board Majority in DuPont Incorrectly Expanded the Scope of Employer Actions That Might Be a "Change" Requiring Advance Notice and the Opportunity for Bargaining.*

For several reasons, we disagree with the *DuPont* majority's redefinition of the term "change," and we believe that decision erroneously expanded the *Katz* duty to refrain from making unilateral changes to encompass situations where an employer has not effected a "change" but rather has maintained the status quo by continuing its preexisting practice. In particular, when evaluating whether an employer's actions constitute a "change," we believe that it is unreasonable to require parties and the Board to examine whether a CBA or CBAs containing contractual bargaining waivers may have existed at various times in the past. We also reject the *DuPont* majority's conclusion that every action constitutes a "change" within the meaning of *Katz*, regardless of what an employer has done in the past, if the employer's actions involve any "discretion."

First, as noted above, numerous Board and court cases, interpreting *Katz*, support a view that, when determining whether an employer's action constitutes a "change" and thus triggers the obligation to provide the union notice and the opportunity for bargaining, the only relevant factual question is whether the employer's action is similar in kind and degree to what the employer did in the past. See Parts A and B, above.

Second, in *Katz*, the employer was engaged in bargaining for an initial contract, and the Supreme Court evaluated the employer's unilateral changes in comparison to other wage increases that occurred in the past, without regard to the existence or non-existence of any prior contractual waiver (since no prior contract existed).

Third, although the *DuPont* majority portrayed these issues as being within the province of the Board—which, if true, would have left the Board free to change existing law if it articulated a reasoned justification for doing so[62]—the Board cannot deviate from decisions of the Supreme Court, including decisions interpreting the Act. As to the proper interpretation of what constitutes a "change," the *DuPont* Board failed to provide a "reasoned justification"[63] for abandoning the Board's longstanding interpretation of *Katz*[64] that the Board applied consistently over several decades—save only for the 3-year period when it deviated from this interpretation in *Beverly I* and *Register-Guard*—as reflected in the *Courier-Journal* cases, *Shell Oil*, and *Westinghouse*, among others. As the Board has stated, (i) whether a "change" has occurred for purposes of the *Katz* doctrine does *not* depend on "whether a contractual waiver of the right to bargain survives the expiration of the contract," but rather upon whether the challenged action "is grounded in past practice, and the continuance thereof";[65] (ii) "the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice";[66] and (iii) even when the employer's unilateral actions involved "thousands of contracts" with outside employers during a hiatus between CBAs, there was no "change" that required the employer to give the union advance notice and opportunity to bargain when the employer's actions did not materially vary "in kind or degree from that which had been customary in the past."[67]

Fourth, as noted above, the *DuPont* majority's understanding of what constitutes a "change" is counterintuitive. Nearly everyone would evaluate whether a "change" has occurred by comparing the challenged action to the employer's past actions. In contrast, to determine whether a "change" has occurred under the standard adopted in *DuPont* requires an examination of matters *other than* the challenged action in comparison to past actions. Specifically, if an employer is doing now precisely what it has always done before, the majority in *DuPont* would find that the employer nonetheless has made a "change" if past actions were taken when a CBA containing a management-rights clause was in effect, and the CBA was no longer in effect when the subsequent

[62] As the D.C. Circuit correctly observed when remanding *DuPont I* and *II* to the Board, when the Board deviates from its own precedent—which it clearly did when it decided *DuPont I* and *II*—the Board is required to provide a "reasoned justification for departing from its precedent." *DuPont v. NLRB*, 682 F.2d at 70 (citation omitted).

[63] Id. at 70.

[64] When it rejected the Board's analysis in *DuPont I* and *II*, the D.C. Circuit stated that the analysis was not consistent with the Board's own decisions. The D.C. Circuit did not state its views regarding the merits, but it is significant that the court described *Katz* as holding that an employer "unilaterally may implement changes 'in line with [its] longstanding practice' because such changes amount to 'a mere continuation of the status quo,'" and the court quoted *Courier-Journal* for the proposition that "'a unilateral change made pursuant to a longstanding practice is essentially a continuation of the *status quo*—not a violation of Section 8(a)(5).'" 682 F.3d at 67 (quoting *Katz*, 369 U.S. at 746, and *Courier-Journal I*, 342 NLRB at 1094). Both of these propositions, which the D.C. Circuit quoted with approval, are contrary to the Board majority's holding in *DuPont*.

[65] *Courier-Journal I*, 342 NLRB at 1094.

[66] *Capitol Ford*, 343 NLRB at 1058 fn. 3.

[67] *Westinghouse*, 150 NLRB at 1576; see also *Shell Oil*, 149 NLRB at 288 (no duty under *Katz* during hiatus period between contracts to provide advance notice and the opportunity for bargaining regarding subcontracting that had not "materially varied in kind or degree from what had been customary in the past").

challenged action was taken. It is incongruous, however, to determine whether a "change" has occurred during periods when no CBA exists by undertaking a detailed examination of past CBAs, all of which have expired. Not only does this improperly confuse the concept of "contractual waiver" with the *Katz* focus on what constitutes a "change," it is a near certainty that the Board's analysis of these purely contractual issues would not be afforded deference by the courts. See *Litton Financial Printing Division v. NLRB*, 501 U.S. at 203 ("We would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract, as distinct from its devising a remedy for the unfair labor practice that follows from a breach of contract.").

Fifth, by requiring scrutiny of prior CBAs—possibly extending back in time over decades—to determine whether employers have effected a "change," the majority in *DuPont* established a standard with which most employers will find it impossible to comply. Contrary to the *DuPont* majority's portrayal of their new standard, it clearly requires meticulous scrutiny into myriad details, including the following:

(a) precisely when did prior actions occur, when did they commence, and when did they cease;

(b) whether and to what extent prior actions coincided with times when prior CBAs existed, or before any CBAs existed, and/or during hiatus periods between CBAs;[68]

(c) where prior actions were permitted pursuant to side agreements, grievance settlements, or arbitration awards that were not memorialized in any CBA, whether these constituted a "waiver" or were merely based on a preexisting management right that existed separate from any agreement;

(d) what substantive contract terms existed in any prior CBAs pertaining to the "past practice"; what came first, the CBAs or the employer's practice; and did the CBA constitute a "waiver" permitting unilateral actions the employer could otherwise not take, or did the CBA merely recognize a preexisting management right that existed separate from the CBA;

(e) how did relevant CBA provisions, side agreements, grievance settlements, or arbitration awards evolve over the years; when did the changes occur; and how did these provisions, agreements, settlements or awards coincide with the employer's past actions; and

(f) did negotiating history establish that parties agreed the employer lacked the right to take particular actions absent express language in the CBA, or did the employer insist on CBA provisions that conformed to a right that had already been exercised and as to which the union acquiesced.

The Supreme Court did not deem any of these considerations relevant when it decided *Katz* and *Litton*. Indeed, it is clear the Supreme Court would have rejected arguments that such scrutiny was necessary to determine whether employer actions constituted a "change" from what had occurred before. To borrow the Supreme Court's language in *Katz*, under the *DuPont* majority's approach, "[t]here simply is no way . . . for a union" or anyone else "to know whether or not there has been a substantial departure from past practice."[69]

[68] The *DuPont* majority did not rely on the (false) dichotomy between unilateral changes made during the term of a contract and unilateral changes made during hiatus periods between contracts, which the Board previously relied on in attempting, unsuccessfully, to distinguish the *DuPont* cases from the *Courier-Journal* cases. See *DuPont I*, 355 NLRB at 1084–1085; *DuPont II*, 355 NLRB at 1096. This notwithstanding, the standard adopted in *DuPont* would still require the Board to analyze, in at least some circumstances, interpretations of language in (expired) contracts in connection with actions taken during hiatus periods.

[69] *Katz*, 369 U.S. at 746–747 (emphasis added). Indeed, another incongruity resulting from the *DuPont* majority's redefinition of "change" under *Katz* was their creation of multiple standards that parties would need to apply when evaluating whether a "change" occurred. One *Katz* standard would apply during bargaining for an initial contract, when no union has previously represented the unit employees and no CBA has previously existed. In this situation, parties would determine whether a "change" occurred merely by comparing the challenged employer actions with the employer's past actions. A second *Katz* standard would apply during contract negotiations, where the same employer and union *were* party to prior CBAs. Here, whether a "change" occurred would depend, in part, on a detailed scrutiny of prior CBA provisions in relation to the employer's past actions, as described in the text. A third *Katz* standard would apply whenever the employer is engaged in first contract negotiations with *one* union, where employees were previously represented by a *different* union that had been party to prior CBAs with *the same employer*. In this situation, the *DuPont* majority would find that the employer's prior actions, if taken pursuant to one or more CBAs with the different union, would be irrelevant when determining whether the challenged action or actions constituted a change. However, this conclusion would follow from the prior CBAs, under the reasoning of the *DuPont* majority, only if the employer's prior actions were impermissible in the absence of a contractual bargaining waiver, which would again require detailed examination of the prior CBAs and the specific CBA provisions that ostensibly privileged the employer's past actions. Other situations could very well involve different combinations of the above circumstances. In any event, because the *DuPont* majority's reasoning would require this type of examination—an examination parties would nearly always find impossible to conduct within a reasonable period to permit bargaining, if required—*DuPont* effectively eliminated the "dynamic status quo" principle that, as described by Professors Gorman and Finkin, flows from "case law," including "the *Katz* decision itself," under which "conditions of employment are to be viewed dynamically and . . . the status quo against which the employer's 'change' is considered must take account of any regular and consistent past pattern of change." See text accompanying fn. 23, supra.

Sixth, the *DuPont* majority attempted to minimize the unworkable nature of their decision, as illustrated above, but in doing so, they made matters worse. The cornerstone of their analysis was that, whenever management actions are taken pursuant to rights *conferred by clear and unmistakable CBA language*, those actions are not part of the "status quo" that may lawfully be continued unilaterally following the CBA's expiration, because contractual bargaining waivers expire with the CBA. However, this also means that employers have the right to continue without bargaining, as part of the status quo, past practices that are *unrelated* to contractual rights conferred under past CBAs. The *DuPont* majority had to recognize that these types of past practices continue as part of the status quo because (i) this is precisely what the Board and courts have indicated in cases interpreting *Katz*, and (ii) even under the *DuPont* majority's analysis, the expiration of a CBA only eradicates those past practices where the employer's unilateral actions were based on rights conferred by clear and unmistakable CBA language.[70] In fact, the *DuPont* majority conceded that, under their theory, all "*extracontractual* terms and conditions of employment that have become established by past practice" remain part of the status quo that may be continued unilaterally after a CBA's expiration. To borrow the *DuPont* majority's words, these extracontractual past practices "*must* be maintained after a contract's expiration."[71] Therefore, as explained in the preceding paragraph, the majority's analysis requires parties to reconstruct what past practices developed under rights conferred by past clear and unmistakable CBA language (which the majority would find may *not* be continued as part of the status quo), as opposed to those "extracontractual" past practices that employers *may* continue—indeed, *must* continue—as part of the status quo without bargaining.

Here is where matters got even worse in *DuPont*. The majority, responding to then-Member Miscimarra's dissent, stated that their new approach would *not* require drilling down into past CBAs because, in their view, any CBA's expiration extinguishes *all* past practices, *including those that developed extracontractually*. The *DuPont* majority's explanation speaks for itself:

> [W]e impose no great new burden on employers or on the bargaining process generally. First, identifying the status quo is not difficult and does not involve the strained "drilling-down" scenario set forth in the dissent. *The status quo is whatever employees' concrete terms and conditions of employment are—on the ground, so to speak—when the contract expires*. That is the *baseline from which the parties bargain*. . . . Second, *employers who wish to be able to continue making discretionary unilateral changes post-expiration can bargain for contract language in the successor agreement that clearly and unmistakably gives them that right*.[72]

But the majority in *DuPont* could not have it both ways. Their own decision differentiated between "extracontractual" practices that employers may continue (must continue) without bargaining following the CBA's expiration, and practices developed under clear and unmistakable contract language that may *not* be continued (according to the *DuPont* majority) as part of the status quo. This distinction requires the type of meticulous drilling-down that we described previously. Alternatively, if one accepts the explanation of the *DuPont* majority in the above-quoted passage, there is no need for drilling down, but this is only because they extinguished *all* past practices from the status quo when any CBA expires—including those that developed extracontractually—and the "baseline" from which parties must bargain consists of "whatever employees' concrete terms and conditions of employment are . . . when the contract expires."[73] To be sure, their "baseline" approach had one virtue: it is indeed simple. Employers can never take actions unilaterally based on any past practice after a CBA expires. However, this approach is irreconcilable with *Katz*,

[70] The entire premise of the *DuPont* majority's reasoning was that contractual waivers terminate with the expiration of the CBA. Therefore, on their view, the types of past practice that are extinguished upon the CBA's expiration are actions that were based on rights conferred by CBA language. This means that when a CBA expires, the extinguished past practices must be limited to those based on actions taken under the auspices of "clear and unmistakable" CBA language, which is the standard that the Board (with only mixed acceptance in the courts) uniformly applies when evaluating contractual waivers. See fn. 11, supra. As noted in the text, the *DuPont* majority also conceded that "extracontractual" past practices remain part of the status quo and may be continued (indeed, *must* be continued) without bargaining following a CBA's expiration. See text accompanying fn. 72, infra.

[71] 364 NLRB No. 113, slip op. at 4 (emphasis added).

[72] 364 NLRB No. 113, slip op. at 12.

[73] Ostensibly, the *DuPont* majority did not find that employers violate the Act by taking actions, following a CBA's expiration, based on "a practice of automatic change based on fixed timing and criteria [where] that practice was established pursuant to a management-rights clause" (364 NLRB No. 113, slip op. at 12 fn. 31). Although this caveat appeared in their opinion, their analysis permits no other conclusion. They found that a CBA's expiration, which discontinues all contractual waivers, extinguishes past practices that are based on contractual rights. This rationale necessarily encompassed *all* "contractual" past practices, even if employers elected to exercise their contractual discretion by taking action "based on fixed timing and criteria." For the reasons explained in the text, we believe that treating past practices in these circumstances as if they did not exist is directly contrary to *Katz* and extensive Board case law.

and it is irreconcilable with numerous cases interpreting *Katz*.[74]

Seventh, we disagree with the *DuPont* majority that an employer's actions always constitute a "change" under *Katz* whenever the employer's actions involve "discretion." Although the Supreme Court in *Katz* mentioned that the employer's merit increases at issue in that case involved "a large measure of discretion," this was a factual observation made by the Court when contrasting the disputed merit increases (which ranged between $2 and $10 and were awarded only to 20 employees out of approximately 50 employees in the bargaining unit) against "*so-called* 'merit raises'" that, according to the Court, were "in fact simply *automatic* increases."[75] The Supreme Court certainly did not articulate a blanket rule that every action taken by an employer involving any "discretion" required advance notice and the opportunity for bargaining, even if the employer was continuing to do precisely what it had always done. Rather, regarding the merit increases at issue in *Katz*, the Supreme Court examined whether they constituted a "change," and the Court referred (among other things) to whether the merit increases were a "substantial departure from past practice."[76] Moreover, the Board has interpreted *Katz* to hold that an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion. For example, in *Westinghouse*, the employer engaged in unilateral subcontracting by implementing "thousands of contracts," and the Board found that no "change" occurred within the meaning of *Katz* because the subcontracting had not "materially varied in kind or degree from what had been customary in the past."[77] Additionally, the majority's holding in *DuPont* that the exercise of "discretion" precludes unilateral action is squarely contrary to the Board's treatment of Section 8(a)(5) cases addressing whether past changes (e.g., wage increases) are part of the status quo that *must be continued* without bargaining. In these cases, as noted above, the Board has held it does not constitute a "change" for an employer to grant unilateral wage increases—indeed, the Board has found that the employer is *required* to give those increases without bargaining—even though past wage increases involved substantial employer discretion.[78]

Finally, the change in the law adopted in *DuPont* concerned one of the most central aspects of the Act—the duty to bargain—and the inability of employers to act in line with past practice until the parties bargain to agreement on a complete contract or overall impasse may substantially undermine employers' ability to operate their businesses. Parties need to know the scope of their respective rights and obligations, and *DuPont* created confusion by constructing standards that will prevent employers from having any "certainty beforehand" regarding when they may safely continue to act as they have in the past.[79] Applicable here are the Supreme Court's observations in *First National Maintenance*, where the Court (evaluating partial closing decisions) found that no duty to bargain existed:

> An employer would have *difficulty determining beforehand* whether it was faced with a situation *requiring* bargaining or one that [was] . . . sufficiently compelling to *obviate* the duty to bargain. . . . *A union, too, would have difficulty determining the limits of its prerogatives*, whether and when it could use its economic powers to try to alter an employer's decision, or whether, in doing so, it would trigger sanctions from the Board.[80]

In sum, and for the reasons stated above, we overrule *DuPont* as well as *Beverly I* and *Register-Guard*, and we reinstate *Shell Oil*, *Westinghouse*, *Winn-Dixie Stores*, *Beverly II*, *Capitol Ford*, and the *Courier-Journal* cases. Henceforth, regardless of the circumstances under which a past practice developed—i.e., whether or not the past practice developed under a collective-bargaining agreement containing a management-rights clause authorizing unilateral employer action—an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past. We emphasize, however, that our holding has no effect on the duty of employers, under Section 8(d) and 8(a)(5) of the Act, to bargain upon re-

[74] See *Arc Bridges, Inc.*, 355 NLRB at 1222; *Mission Foods*, 350 NLRB at 337; *Central Maine Morning Sentinel*, 295 NLRB at 376.

[75] *Katz*, 369 U.S. at 746–747 (emphasis added) (quoted in the text accompanying fn. 19, supra).

[76] Id. Our dissenting colleagues erroneously construe *Katz* when they say that the Court's opinion "clearly says . . . that an employer's unilateral change violates the duty to bargain under the National Labor Relations Act even where the change is consistent with a past practice of changes made if the changes involve significant employer discretion." As explained above in the text, our colleagues' reading of *Katz* fails to acknowledge that the Supreme Court's reference to "discretion" was made when the Court was comparing the "January raises" (merit increases selectively given to 20 employees out of 50, ranging between $2 and $10) to "so-called 'merit raises'" that the Court described as "simply *automatic increases* to which the employer [had] already committed himself." *Katz*, 369 U.S. at 746 (emphasis added).

[77] *Westinghouse*, 150 NLRB at 1576; see also *Shell Oil*, 149 NLRB at 288.

[78] See *Arc Bridges, Inc.*, 355 NLRB at 1222; *Mission Foods*, 350 NLRB at 337; *Central Maine Morning Sentinel*, 295 NLRB at 376.

[79] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

[80] Id. at 684–686 (emphasis added; citations omitted).

quest over any and all mandatory subjects of bargaining, unless an exception to that duty applies.[81]

E. Application of the Correct Standard to the Instant Case

"The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). Under Supreme Court precedent, "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

We perceive no ill effects that would be occasioned by applying the standard we announce herein to this case and to all pending cases. No party that has acted in reliance on *DuPont* will be found to have violated the Act as a result of applying the standard we announce today retroactively. In reliance on *DuPont*, parties may have engaged in bargaining that our decision today renders unnecessary, but such bargaining is merely rendered supererogatory by our decision, not unlawful. True, parties will have been put to unnecessary time and expense, but those were consequences of the decision we overrule, not of applying our decision retroactively. On the other hand, failing to apply the new standard retroactively would "produc[e] a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, supra. As we have explained at length, *DuPont* was contrary to the Supreme Court's decision in *Katz*, it was contrary to the overwhelming weight of Board precedent save for a brief 3-year period, and it was ill-advised on policy grounds. Accordingly, we find that application of our new standard in this and all pending cases will not work a "manifest injustice." *SNE Enterprises*, supra. We proceed to do so now.

As described above, the parties stipulated that, over the course of several CBAs, and pursuant to contractual reservation-of-rights language, the Respondent modified its employees' healthcare costs and/or benefits in January of every year from 2001 to 2012. The changes applied equally to bargaining-unit employees employed at the Fort Wayne facility and the Respondent's unrepresented employees.

Thus, during the fall of each year from 2000 to 2011, the Respondent mailed a benefits document, entitled "Your Raytheon Benefits," to participating employees. The document described the available medical and benefit options. The document also described any upcoming modifications to employees' benefit programs, premiums, deductibles, and copayments that would be effective at the beginning of the next year. The Respondent implemented the announced changes in January of every year from 2001 to 2012. The changes have included, without exception, increases in premiums. Other changes included changes in available benefits, medical options, deductibles, and copayments. According to the judge, the changes were random and lacked definable criteria. We disagree. All of the changes were typical of the changes one regularly sees from year to year in cafeteria-style benefit plans. Changes made from year to year did not materially vary in kind or degree from one year to the next.[82] We find that they constituted a past practice and a term and condition of employment privileging the Respondent to make further changes in costs and/or benefits under the Raytheon Plan, provided those further changes did not materially vary in kind or degree from what had been customary in the past.[83]

The Union did not object to any of the changes between 2000 and 2012 or seek to bargain over them. There is no dispute that the modifications were authorized by the several CBAs and Raytheon Plan documents referenced therein. However, the fact that the past practice developed under contractual language authorizing unilateral action does not gainsay the existence of the past practice.[84]

The most recent CBA was set to expire on April 29, 2012. On April 24, 2012, the Respondent and the Union began negotiations for a successor agreement. Over the course of the next five months, the parties met 10 times in an attempt to reach a complete agreement. The Union submitted proposals to change provisions granting the Respondent the right to make annual changes to unit employees' health insurance. One such proposal was to strike the "pass through" language in the expiring contract[85] and to provide that the Raytheon Plan benefits (and other benefits) offered to the unit employees would remain the same for the duration of the contract. The Union also stated that it was no longer willing to waive its right to bargain over a mandatory subject of bargaining, such as health benefits. The Respondent rejected the Union's proposals to modify the contract language and

[81] See supra fn. 10.

[82] See *Westinghouse*, supra, 150 NLRB at 1576; *Shell Oil*, 149 NLRB at 288.

[83] Id.

[84] *Capitol Ford*, 343 NLRB at 1058 fn. 3.

[85] The "pass through" language in the expiring contract provided that the same disability/leave of absence benefits, paid time off, and Raytheon Plan offered to all of the approximately 65,000 domestic Raytheon employees would be offered to the Fort Wayne bargaining-unit employees on a year-to-year basis.

asked the Union to provide alternative proposals. The Union provided alternative language regarding some of these matters, but it did not modify its health insurance proposal.

According to the Union, continuing to agree to the "pass through" language was one of the two biggest issues for the membership. Bargaining continued on the "pass through" language (and another issue) on April 28, with no resolution. The contract expired the next day, and unit employees continued to work under the status quo terms and conditions of employment. The parties subsequently met for further negotiations, but they did not make headway on the "pass through" language issue and did not reach agreement on a new contract. However, they did not reach impasse.

During a negotiating session on September 26, 2012, the Union solicited the Respondent's position on whether the unit employees would be asked to participate in the upcoming enrollment period for the Raytheon Plan. The Respondent informed the Union that open enrollment was about to commence and that it would proceed as planned for all Raytheon employees based on the Respondent's belief that this was required by the terms of the expired contract. The Union asked the Respondent to exclude the unit employees from the upcoming open enrollment period. The Respondent rejected this request. Subsequently, the Respondent announced changes to the 2013 benefit package in the "Your Raytheon Benefits" document sent to all domestic employees, including the unit employees at the Fort Wayne facility, in the fall of 2012. The parties have not held a negotiating session since September 2012.

On January 1, 2013, the Respondent, over the objection of the Union, implemented several changes to the Raytheon Plan, thereby modifying the Raytheon Plan for all employees, including the unit employees. The various modifications included, among other things, the expansion of the Plan's "wellness reward" and the conversion of a medical insurance plan into a health savings account. Acting on an unfair labor practice charge filed by the Union, the General Counsel issued a complaint alleging that the Respondent's announcement and implementation of the changes violated Section 8(a)(5) and (1).

On these facts, and consistent with *Katz* and longstanding Board precedent embodied in the *Shell Oil* line of cases, the *Courier-Journal* cases, *Capitol Ford*, and *Beverly II*—which we have reinstated today—we find that the Respondent's 2013 changes were lawfully implemented consistent with its "long-standing practice."[86] The Respondent's unilateral changes to unit employees' benefits in January 2013, after the parties' CBA had expired, maintained the status quo created by the Respondent's past practice of making annual modifications to unit employees' costs and/or benefits under the Raytheon Plan in January of every year from 2001 to 2012. The changes made in 2013 did not materially vary in kind or degree from the changes made in prior years, the changes were made at the same time—January—as in past years, and the changes applied to unit and nonunit employees alike. And because the 2013 changes themselves were lawfully implemented, the Respondent's announcement of those changes in the fall of 2012 was also lawful.

Two other considerations deserve further comment here.

First, the *DuPont* majority disregarded the fact that parties have a particular need for certainty and predictability, which the Supreme Court emphasized in *First National Maintenance*,[87] when dealing with medical benefits like those at issue here. We do not at all suggest that because of the importance of medical benefits, changes involving such benefits warrant a departure from or exception to the bargaining obligations imposed by the Act. If anything, the importance of these benefits—no less than wages—warrants vigilance by the Board to ensure that parties satisfy their bargaining obligations. However, we believe the Board should recognize that the *Katz* holding—permitting unilateral employer actions that do not constitute a "change" because they do not materially vary in kind or degree from actions taken previously—is sufficiently flexible to accommodate actions that involve significant complexity and thus require advance planning, provided, of course, that the employer acts consistently with its past practice. These considerations are especially relevant in the instant case, given the existence of fixed annual enrollment periods, the participation by represented employees in benefit plans that applied throughout the company, and the lack of certainty when bargaining for a successor contract might resume, let alone conclude.

Second, concerns about the Union being excluded from bargaining over actions that are consistent with past practice are misplaced. Such concerns have been addressed by Congress in Section 8(d) and 8(a)(5) of the Act, by the Supreme Court in *Katz* and other cases, and by the Board in many decisions, including *Shell Oil* and *Westinghouse*. Under existing law, even when an employer's past practice permits the employer to take the same or similar actions unilaterally under *Katz*, the employer is required under Section 8(a)(5) to bargain with

[86] *Katz*, 369 U.S. at 746.

[87] See text accompanying fn. 80, supra.

the union *upon request* over the mandatory subject of bargaining at issue in the actions being taken unilaterally—and indeed, over those very actions (although the employer may still act unilaterally). This duty to bargain upon request over mandatory subjects, which includes matters that may be unilaterally implemented by an employer under *Katz*, is unaffected by any past practice, and an employer's refusal to engage in such requested bargaining clearly constitutes a violation of Section 8(a)(5).[88]

F. Response to the Dissent

There is no merit in our dissenting colleagues' view that we have announced a new standard. Rather, we are merely reinstating the law that existed for many years prior to the *DuPont* decisions. In this regard, our dissenting colleagues are clearly incorrect when they assert that today's decision and case law that preceded the Board's *DuPont* rulings are contrary to the treatment of past practice in the Supreme Court's *Katz* decision.[89] As explained above, our decision today is consistent with *Katz*, along with decades of Board and court cases that have consistently applied *Katz* in the same manner we apply it today. Indeed, if the Supreme Court's *Katz* decision had been misapplied in earlier Board cases—such as *Shell Oil*, *Westinghouse Electric (Mansfield Plant)*, *Winn-Dixie Stores*, *Beverly II*, *Capitol Ford*, and *Courier-Journal*—the D.C. Circuit would not have given the Board the option of adhering to the treatment of past practice reflected in these cases. Thus, in the instant case, the Board merely considers the same options that the D.C. Circuit presented when remanding the *DuPont* cases to the Board, and approves and reinstates the treatment of past practice in the above-cited cases. There is nothing unprecedented or improper about this type of policy change. "It is a fact of life in NLRB lore" that the Board's interpretation of the Act will "invariably fluctuate with the changing compositions of the Board." *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001). Congress created the Board with five members whose terms are staggered so that a different member's term expires every year, and the Board in recent years has exhibited no reluctance to modify well-established principles involving many of the most fundamental aspects of the Act.

Our decision today reflects a reasoned re-evaluation and rejection of the prior Board majority's decision in *DuPont*. We believe that decision improperly departed from fundamental principles governing past practice and the duty to bargain. Accordingly, based on the considerations described at length above, we overrule *DuPont* and reinstate the legal principles that governed this area before *DuPont* was decided.

Conclusion

"When changing existing law, the Board should first endeavor to *do no harm*: we should be vigilant to avoid doing violence to undisputed, decades-old principles that are clear, widely understood, and easy to apply."[90] In *DuPont*, the majority ignored this advice by taking a well-known term that that most people understand—the word *change*—and instead of simply comparing what the employer did *now* to what it did in the *past*, set forth a standard under which the Board would have been required to embark on a detailed examination of past contracts going back years, perhaps decades, to determine

[88] The allegations here, however, were litigated solely under a *Katz* "unilateral change" theory.

[89] As noted previously, if our dissenting colleagues dispute the correctness of our description of the Supreme Court's *Katz* decision, their contentions are plainly without merit. See the discussion in fn. 24, supra. Furthermore, numerous Board and court cases indicate—and we restate today—that the existence of "discretion" does not mean that particular actions constitute a change requiring advance notice and the opportunity for bargaining. Rather than turning on the existence or non-existence of discretion, the Board and the courts have repeatedly held that actions constitute a change, and require notice and the opportunity for bargaining, only when the actions are a "departure from the norm," *Westinghouse Electric (Mansfield Plant)*, 150 NLRB at 1576, or "materially var[y] in kind or degree from what had been customary in the past," *Shell Oil*, 149 NLRB at 288. See also *Westinghouse Electric (Mansfield Plant)*, 150 NLRB at 1576–1577 (stating the test as whether the actions "materially varied in kind or degree from that which had been customary in the past" or "var[ied] significantly in kind or degree from what had been customary under past established practice"); Gorman & Finkin, supra fn. 23 and accompanying text (under *Katz*, an "employer modification" that is consistent with "any regular and consistent past pattern of change" is "not a 'change' in working conditions at all"). Indeed, the dissent concedes, as it must, that actions involving "some discretion" have been held *not* to require notice and the opportunity for bargaining where, for example, wage increases were consistent with an established practice. See infra, slip op. at 30, quoting *Central Maine Morning Sentinel*, 295 NLRB at 379. In the instant case, the Respondent's past practice was fixed as to timing (changes occurred annually in January from 2001 to 2012) and as to regularity (changes were made in each of those years) with premium increases occurring every year. Further, the changes were of the same kind and degree each year, consistently addressing premium increases and benefits availability. See *DuPont v. NLRB*, 682 F.3d at 68 (past practice defense established where "changes were similar in scope to those it had made in previous years"). Finally, the Respondent's discretion was significantly constrained by the requirement that the benefits plan offered to the 35 unit employees would be the same plan offered on the same basis to all of Raytheon's 65,000 domestic employees. See id. at 68–69 (noting that the employer's discretion was limited by the requirement of like treatment of union and nonunion employees). Therefore, the structure and design of Respondent's benefits program—which applied to an extremely large number of participants—constituted a significant limitation on the Respondent's discretion when evaluating changes affecting the 35-employee bargaining unit at issue here.

[90] *Purple Communications, Inc.*, 361 NLRB 1050, 1067 (2014) (then-Member Miscimarra, dissenting) (emphasis added).

what contracts were in effect at what times, what employer actions occurred when, whether past actions were taken pursuant to a management-rights clause or other contractual waiver language, and possibly whether the past actions predated the earliest contract.

In our view, this makes no sense, and the Board's decision in *DuPont* was unsupported by the Act as interpreted in the Supreme Court's *Katz* decision. As stated at the outset, in contrast to the majority's analysis in *DuPont*, we believe cases of the sort before us today involve a simple question with a straightforward answer. Under *Katz*, an employer must provide notice and the opportunity for bargaining before making a "change" in employment matters. It is equally clear, as demonstrated by innumerable Board and court decisions interpreting *Katz*, that bargaining is *not* required when no "change" has occurred. Where, as here, the employer takes actions that are not materially different from what it has done in the past, no "change" has occurred and the employer's unilateral actions do not violate Section 8(a)(5) of the Act.

Again, even when new actions taken by the employer are consistent with past practice and therefore lawfully taken, the union's right to request bargaining regarding *all* mandatory subjects—including actions the employer may lawfully take unilaterally—remains intact and unaffected, and we in no way question the well-established principle that the employer remains bound by its duty to bargain upon request concerning any and all mandatory subjects, without regard to any past practice that may exist privileging unilateral action.[91]

For these reasons, we overrule *DuPont* and return to the rule embodied in the *Shell Oil* line of cases, the *Courier-Journal* cases, *Capitol Ford*, and *Beverly II*. And as described above, under this framework the Respondent did not violate the Act by announcing or making the changes in costs and/or benefits under the Raytheon Plan described above without providing the Union advance notice and the opportunity for bargaining.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 15, 2017

Philip A. Miscimarra, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, concurring.

I join in the decision today to overrule the Board's holding in *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont*). I am writing separately, however, to express my support for an alternative rationale, not raised by the Respondent, that would also support a finding that the Respondent's modifications to the Raytheon Plan on January 1, 2013 did not alter the status quo and that, therefore, the Respondent did not violate Section 8(a)(5).[1]

During the negotiations for the 2000 collective-bargaining agreement (CBA), the parties agreed that unit employees would be covered by the Raytheon Plan. The Union agreed to the Raytheon Plan in its entirety, with the understanding that the Respondent had the right to alter costs incurred by and/or benefits received by bargaining-unit members under the plan pursuant to the reservation of rights provision in the plan documents and language governing the plan in the 2000–2005 CBA. The language in the 2000–2005 CBA provided, among other things, that "[e]mployee contributions for the Medical/Vision Plan [under the Raytheon Plan] will not exceed the rates paid by salaried employees at our Ft. Wayne facilities." Further, in the 2005–2009 and 2009–2012 CBAs, the language in the respective CBAs provided that the Raytheon Plan "will be available for [unit] employees, offered on the same basis as is offered to salaried employees at the Fort Wayne, Indiana location from year-to-year." Every year during the term of the contract, the Respondent provided unit employees with coverage under the Raytheon Plan at the same level as for all other employees under the plan, including changes made to the plan on an annual basis.

Following the expiration of the parties' CBA on April 29, 2012, the Respondent was required to maintain the terms and conditions of employment of the expired CBA until the parties negotiated a new agreement or bargained

[91] See fns. 10, 30, 34 & 53, supra and accompanying text. Again, the employer's conventional duty to engage in bargaining upon request is subject to certain other potential exceptions, but is unaffected by past practice. See fn. 10, supra.

[1] Because this argument was not raised by the parties, and is in fact inconsistent with the parties' litigation concessions in this matter, I recognize that the thoughts expressed in this concurrence are dicta.

in good faith to impasse.[2] In my view, pursuant to this duty to maintain the status quo, the Respondent was required to continue to provide unit employees with coverage under the Raytheon Plan, in its entirety.[3] The Respondent was not free to provide the unit employees with only certain aspects of the Raytheon Plan, nor was the Respondent free to provide unit employees with different benefits than that provided to non-unit employees under the Raytheon Plan on an annual basis. In fact, it seems clear that, had the Respondent kept in place for unit employees the specific benefits in place at contract expiration, but then revised the Raytheon Plan benefits for all other employees, such action would constitute a violation of the Act. For these reasons, in my view, it is not reasonable to consider the Respondent's responsibility to maintain the status quo as a responsibility to maintain certain, specific benefits that were in place at the time of the contract expiration. Rather, the Respondent's status quo duty was to continue providing the unit employees with the coverage provided to all employees under the Raytheon Plan, including annual changes made pursuant to the terms of the Raytheon Plan itself.[4]

It is also my view that the "reservation of rights" clause in the Raytheon Plan should not be considered a management-rights provision, at least for the purposes of the application of Board law pertaining to management-rights clauses. The Board jurisprudence applying to management-rights clauses recognizes that these clauses are understood to be a waiver by the union for the term of the contract for a wide range of otherwise bargainable issues that are not expressly covered in the parties' contract. The "reservation of rights" clause included in the Raytheon Plan, however, is significantly different. To begin, it is a discrete, specific, and integral component of the benefit plan.[5] As discussed above, I do not think it is appropriate to view an employer's duty to continue providing benefits under an established plan as a duty to continue to apply only certain provisions of that plan.

Furthermore, unlike a management-rights clause which covers subjects not otherwise addressed in the contract, the reservation of rights clause in the Raytheon Plan and the language in the CBA concerning the plan are part of the benefits plan to which the parties agreed contractually.[6] The Respondent never agreed to provide benefits under the Raytheon Plan without the unilateral right to make changes to such plan; it agreed to provide those benefits with conditions, and those conditions are as much a part of the parties' agreement concerning benefits as are the benefits themselves. It is the Raytheon Plan in its entirety, and the language in the CBA governing the plan that is the term and condition of employment and, under this plan, the Respondent reserved the right to modify unit employees' costs and/or benefits. Once the parties' CBA expired on April 29, 2012, the status quo required the Respondent to maintain this term and condition of employment until the parties negotiated a new contract.

As mentioned at the outset, the parties did not argue that the Raytheon Plan language at issue did not constitute a management-rights clause, and therefore I do not apply this analysis in deciding the instant case. I would, however, consider this argument in a future appropriate case.

Dated, Washington, D.C. December 15, 2017

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Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

MEMBERS PEARCE and MCFERRAN, dissenting.

Reversing our recent *DuPont* precedent,[1] a newly-constituted Board majority today gives employers new power to make unilateral changes in employees' terms and conditions of employment after a collective-bargaining agreement expires. Here, as in other new

[2] See *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co*., 484 U.S. 539, 544 fn. 6 (1988) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)).

[3] Thus, the Respondent was required to provide the 35 bargaining unit employees at the Fort Wayne facility with the same coverage that was being offered to the Respondent's approximately 65,000 domestic employees.

[4] Furthermore, the "same basis" included within the CBA itself underscores this view; the parties' understanding was that the Respondent would provide the unit employees with benefits under the Raytheon Plan, including any changes to the general plan that were applicable to non-unit employees.

The parties could have agreed in the 2009–2012 CBA to additional restrictions on the Respondent's authority to make annual changes to unit employees' health insurance under the Raytheon Plan. If the parties had negotiated such an agreement, those provisions would have created a different status quo post-expiration. But that is not what the parties did here. As discussed above, the Union agreed to the entire Raytheon Plan during the 2000 negotiations and did not seek any changes to health insurance until the 2009–2012 CBA expired.

[5] Accordingly, *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001), enfd. 317 F.3d 316 (D.C. Cir 2003), and similar cases cited by the dissent are distinguishable because they all involve traditional management-rights clauses.

[6] To the extent that *Mary Thompson Hospital*, 296 NLRB 1245, 1249 (1989), and other Board precedent have treated a reservation of rights clause contained within a corporatewide benefit plan as a negotiated management-rights clause waiving a union's right to bargain over changes to the plan only for the contract term, I disagree. I would be open to reviewing those cases in a future appropriate case.

[1] *E.I. DuPont de Nemours*, 364 NLRB No. 113 (2016).

decisions, the majority fails to provide notice and an opportunity for briefing, violating an agency norm.[2] And it changes course even though *DuPont* is currently under review by the U.S. Court of Appeals for the District of Columbia Circuit, which had – in a prior remand – plainly indicated that the Board was free to choose the rule adopted and explained in *DuPont*.[3]

With little justification other than a change in the Board's composition,[4] the majority essentially cuts and pastes Chairman Miscimarra's dissent in *DuPont* into a new majority opinion. In holding that an employer may continue to make sweeping discretionary changes in employment terms even after a contractual provision authorizing such changes has expired and while the parties are seeking to reach a new collective-bargaining agreement, the majority's decision fundamentally misinterprets the Supreme Court's decision in *NLRB v. Katz*. Indeed, *Katz* clearly says the exact opposite: that an employer's unilateral change violates the duty to bargain under the National Labor Relations Act, even where the change is consistent with a past practice of changes made, if the changes involve significant employer discretion.

The Board is not free to adopt a position so manifestly inconsistent with Supreme Court precedent.[5] Moreover, the majority's new rule is not only foreclosed by Supreme Court authority, it is also impermissible as a policy choice. As the Supreme Court and other Federal courts have explained, permitting an employer to make unilateral changes while negotiations for a new contract are under way frustrates the process of collective bargaining. The Act demonstrably was intended to "encourag[e] the practice and procedure of collective bargaining," not to undermine it.[6] Undermining collective bargaining to the advantage of employers is precisely what the majority achieves today. But, for reasons we will show, that result cannot stand.

I. FACTS

The relevant facts are straightforward. In 1998, the Respondent instituted a nationwide benefits plan, the Raytheon Unified Benefits Program (Plan), which included health insurance ("Raytheon Medical"). The Plan documents for these benefits contained the following reservation of rights language:

> [T]he Company reserves the absolute right to amend the Plan and any or all Benefit Programs incorporated herein from time to time, including, but not limited to, the right to reduce or eliminate benefits . . . .
>
> ***
>
> [T]he Company reserves the absolute and unconditional right to terminate the Plan and any and all Benefit Programs, in whole or in part, with respect to some or all of the Employees.

The Respondent implemented the Plan at all of its facilities nationwide in 1999, except for the Union-represented Fort Wayne bargaining unit.

During negotiations for a 2000–2005 collective-bargaining agreement, the Respondent and Union agreed to include Fort Wayne unit employees in the Raytheon Plan. The agreement provided that unit employees are covered by the Plan under its terms which were described in an appendix to the contract—thereby incorporating the Plan's reservation of rights provision into the collective-bargaining agreement. Subsequently, the parties negotiated 2005–2009 and 2009–2012 collective-bargaining agreements which similarly included Fort Wayne unit employees in the Raytheon Plan. These agreements further provided that the plans and benefits selected by the Respondent "will be available for all employees, offered on the same basis as is offered to salaried employees at the Ft. Wayne, Indiana, location from year-to-year." The parties refer to this "on-the-same-basis" language as a "pass-through" provision.

[2] As stated by Member McFerran in her *Boeing* dissent, and adopted by Member Pearce, "[s]ince at least the 1950's, the Board has solicited briefing in some major cases," and "[i]n the last decade, this has become the Board's routine practice in significant cases." 365 NLRB No. 154, slip op. at 31 (2017) (footnote collecting cases omitted). But, over our objection, the new Board repeatedly has broken with this practice, for no sound reason. See *UPMC*, 365 NLRB No. 153 (2017); *The Boeing Co.*, supra.; *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (2017); *PCC Structurals, Inc*., 365 NLRB No. 160 (2017).

Although the majority emphasizes that *DuPont* was decided without inviting amicus briefing, it fails to note that the General Counsel had expressly asked the Board to revisit precedent, a fact certainly not lost on persons interested in the development of Federal labor law. Further, the United States Court of Appeals for the District of Columbia Circuit had remanded the case to the Board with the express instructions to decide between two conflicting branches of precedent. See *E.I. Du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). Following the remand, in turn, the Board solicited statements of positions from the parties. Thus, the reversal of precedent in *DuPont* cannot fairly be characterized as a surprise to the parties and the public—in contrast to today's decision.

[3] *E.I. Du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012).

[4] Of course, the Board has rejected the argument that a change in its composition is a good reason to reconsider an earlier decision. See *Brown & Root Power & Mfg., Inc.*, 2014 WL 4302554 (Aug. 29, 2014); *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074, 1074 (2003) (full Board), citing *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1237, 1239 (1954).

[5] See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536–537 (1992). Nor is the Board entitled to judicial deference when it interprets Supreme Court precedent. See, e.g., *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

[6] National Labor Relations Act, Sec. 1, 29 U.S.C. §151.

Under the collective-bargaining agreements in effect from 2000–2012, which incorporated the reservation of rights provision of the Plan, the Respondent retained "significant discretion" (as stipulated) to modify and/or terminate the Plan, and the Respondent regularly exercised that discretion. Each year that the contracts were in effect, the Respondent unilaterally decided what plans and benefits to offer its employees and the costs of the benefits to be borne by the employees. Some changes were intermittent, while others, such as the portion and amount of health care premiums paid by employees, changed annually.[7] While these collective-bargaining agreements were in effect, the Respondent did not offer to bargain with the Union over its changes to the Plan, and the Union did not object to any of the changes. During this period there was no hiatus between the successive collective-bargaining agreements that overlapped with open enrollment periods.

In February 2012, two months before the April 29 contract expiration, the Union notified the Respondent that it wished to schedule negotiations for a successor agreement. At the outset of negotiations, the Union informed the Respondent on April 25 that it was no longer willing to waive its right to bargain over a mandatory subject of bargaining such as health benefits and that it wished to eliminate or revise the pass-through language in any future agreement. At subsequent bargaining sessions, the Union proposed several solutions to address health benefits but no headway was made, including exploring whether unit employees could be insured through the Union's health plan. During bargaining on July 26, the Respondent presented the Union with a last, best and final offer, with no modification to the pass-through provision of the expired collective-bargaining agreement. The Respondent informed the Union that open enrollment for the 2013 Plan benefits period was about to commence and that it would proceed with announced changes applicable to all company employees. The Union requested that the Respondent exclude unit employees from the open enrollment but the Respondent refused. Without informing the Union about the specifics of its Plan changes, or providing the Union with an opportunity to bargain about them, the Respondent sent a newsletter to all company employees, including unit employees, detailing the benefit options available for selection during the October enrollment period.

On January 1, 2013, the Respondent implemented its changes to the Plan, over the objection of the Union. It is undisputed that the parties were not at a bargaining impasse when the changes were implemented.

II. DISCUSSION

A. Procedural Background

As noted above, the Board's 2016 *DuPont* decision was prompted by a remand from the D.C. Circuit.[8] In the two remanded cases,[9] the Board had found that DuPont had violated Section 8(a)(5) and (1) of the Act by unilaterally making discretionary, post-contract expiration changes to employees' health benefits, notwithstanding that DuPont, pursuant to a management-rights clause incorporated into the expired agreements, had a practice of making such changes only during the periods that those agreements were in effect. In the court's view, the Board's findings departed—without explanation—from certain precedent holding that, after an agreement expires, an employer may continue to act unilaterally pursuant to an established past practice, even if the practice had its genesis in a contractual management-rights clause or other contractual waiver of the union's right to bargain.[10] The court nevertheless acknowledged that the Board's findings were consistent with earlier cases in which the Board had held that unilateral action in those circumstances *was* unlawful.[11]

Faced with those conflicting lines of precedent, the court remanded both cases to the Board to explain its position on this issue. More specifically, the court directed the Board *either* to conform its precedent to the cases that appeared to permit DuPont's unilateral post-expiration changes *or* to explain why it was returning to the earlier cases under which DuPont's unilateral action would be unlawful. The court thus gave the Board a choice, and in its 2016 decision the Board chose the second option.[12]

[7] The employees did not pay a fixed percentage or dollar amount of the premiums year to year. Among the many changes that the Respondent made as a result of its annual reviews included the introduction of preferred providers, the addition or deletion of types of coverage, alterations in the scope of covered dependents, modifications in deductibles and co-pays, changes to the administrator for drug or other coverage, and revisions to eligibility for coverage. The Respondent unilaterally implemented some of its changes nationwide; others were imposed regionally, or on an even more limited basis.

[8] *E.I. Du Pont de Nemours & Co. v. NLRB,* 682 F.3d 65.

[9] *E.I. Du Pont de Nemours, Louisville Works,* 355 NLRB 1084 (2010), and *E.I. Du Pont de Nemours and Co.*, 355 NLRB 1096 (2010).

[10] *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006); *Capitol Ford*, 343 NLRB 1058 (2004); and *Courier-Journal*, 342 NLRB 1093 (2004).

[11] *Register Guard*, 339 NLRB 353 (2003); and *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003).

[12] The Board thus reaffirmed the rule expressed in *Register Guard*, above, 339 NLRB 353, and *Beverly Health & Rehabilitation Services*, above, 335 NLRB 635, that a contractual management-rights clause—along with any discretionary past practices it might have authorized—does not survive the expiration of the contract absent evidence that the parties intended it to do so. At the same time, the Board overruled *Beverly Health & Rehabilitation Services*, above, 346 NLRB 1319,

On remand, and after soliciting position statements from the parties, the *DuPont* Board carefully explained its decision to return to the earlier cases identified by the court and reaffirmed its findings that DuPont's discretionary, post-expiration unilateral changes to employees' health benefits violated the Act. The Board firmly grounded its decision in the status quo principles established in *Katz* and *Litton*,[13] and the Act's overarching policy to promote collective bargaining. As the Board explained, in the post-contract expiration context, the "status quo" envisioned by *Katz* and *Litton* consists, with few exceptions, of the terms and conditions of employment existing on the date the contract expired.[14] And, as the Board emphasized, maintaining that "status quo" is vital to protecting the "continuing statutory bargaining duty that unilateral actions would circumvent. Any other approach would undermine collective bargaining by making it harder for the parties to reach agreement, while simultaneously undermining the union as the representative of the unit employees."[15]

Having reviewed the rationale of *DuPont*, and the majority's arguments for overruling it, we have no doubt that the *DuPont* Board chose wisely between the options offered by the District of Columbia Circuit. Accordingly, for the reasons discussed below, we would reaffirm that choice today and find that the Respondent violated its statutory duty to bargain when it unilaterally altered unit employees' medical benefits following the expiration of the parties' agreement.

B. The Duty to Bargain

As the Board stated in *DuPont*, a fundamental policy of the Act is to protect and promote the practice of collective bargaining.[16] In furtherance of this statutory policy, Sections 8(a)(5) and 8(d) of the Act require employers to bargain collectively and in good faith with respect to wages, hours, and other conditions of employment.[17] An employer's duty to bargain in good faith, however, includes more than a willingness to engage in negotiations with an open mind and with a purpose of reaching a collective-bargaining agreement with the union that represents its employees. The duty also includes the obligation to refrain from unilaterally changing established terms and conditions of employment without prior notice to and bargaining to an impasse with the union. *Katz;*[18] *Bottom Line Enterprises*.[19] This prohibition against unilateral changes extends both to negotiations for an initial contract and for successor agreements. *Litton*.[20]

The Supreme Court has explained that unilateral changes made during contract negotiations injure the very process of collective bargaining and "must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*.[21] "[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton*.[22] Indeed, "an employer's unilateral change in conditions of employment under negotiation . . . is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *Katz*.[23]

As the Board recognized in *DuPont*,[24] permitting an employer to make unilateral changes during bargaining would have a deleterious effect on the bargaining process by requiring the union to bargain to regain benefits lost through the employer's unilateral action.[25] Placing a union in this weakened position fundamentally undermines the process of collective bargaining "and interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *Honeywell Int'l, Inc. v. NLRB*.[26] In *McClatchy Newspapers*,[27] the Board explained that the employer's "ability to exercise its economic force" by unilaterally imposing changes, and thereby excluding the union from negotiating them, "disparage[s] the [union] by showing, despite its resistance to th[e] proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment." It poses the very real danger that the unilateral action will destabilize relations by undermining a union's institutional credibility. *Aaron Bros. Co. v. NLRB*.[28] As described by the influential labor law scholar Archibald Cox:

> [w]hen [unilateral action is] taken during negotiations or upon subjects on which the union wishes to bargain

Capitol Ford, above, 343 NLRB 1058, and *Courier-Journal*, above, 342 NLRB 1093, to the extent that those cases were to the contrary.

The Board also specifically overruled *Courier-Journal*'s finding that discretion is limited when changes to benefits must be the same for unionized and for unrepresented employees—finding that to be "no limitation at all." *E.I. Du Pont*, supra, slip op. at 9.

[13] *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991).

[14] *E. I. Du Pont*, supra, slip op. at 5.

[15] Id.

[16] 364 NLRB No. 113, slip op. at 4.

[17] Id.

[18] 369 U.S. at 743.

[19] 302 NLRB 373, 374 (1991).

[20] 501 U.S. at 198.

[21] 369 U.S. at 747.

[22] 501 U.S. at 198.

[23] 369 U.S. at 743.

[24] 364 NLRB No. 113.

[25] Id., slip op. at 12.

[26] 253 F.3d 125, 131 (D.C. Cir. 2001) (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)).

[27] 321 NLRB 1386, 1391 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998).

[28] 661 F.2d 750, 753 (9th Cir. 1981).

> it weakens the union by showing the employees that it is useless to try to negotiate.

Archibald Cox, *The Duty To Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1423 (1958).

In addition to refraining from unilaterally *changing* terms and conditions of employment during negotiations, an employer has the corollary duty *to maintain* terms and conditions of employment during bargaining. *Litton*.[29] Where, as in this case, the parties were engaged in bargaining for a successor contract, the status quo consists of the terms and conditions that existed at the time the contract expired. Although these terms and conditions "are no longer agreed-upon terms; they are terms imposed by law."[30] This is so because "an expired contract has by its own terms released all its parties from their respective contractual obligations."[31] The "rights and duties under the expired agreement 'retain legal significance because they define the *status quo'* for purposes of the prohibition on unilateral changes."[32] It is this status quo that constitutes the baseline from which negotiations for a new agreement will occur, and from which the union will base its bargaining proposals.

There are two limited exceptions to the foregoing principles which, if established by an employer, will preclude finding a Section 8(a)(5) violation. Under the first exception, an employer in certain narrow circumstances may implement unilateral changes to terms and conditions of employment if it has an established past practice of doing so. *Katz*;[33] *Post-Tribune Co*.[34] As described below, the past practice exception is narrowly construed (*Adair Standish Corp. v. NLRB*),[35] and an employer claiming this exception bears a heavy burden of proof. *NLRB v. Allis-Chalmers Corp*.;[36] *Eugene Iovine*.[37] The second exception is waiver. Under this exception, if the evidence establishes that a union has waived its statutory right to bargain about a mandatory subject of bargaining, an employer may lawfully implement changes to it. *Provena St. Joseph Medical Center*.[38]

The majority contends that the Respondent lawfully implemented unilateral changes to its healthcare Plan benefits in 2013, following the expiration of the 2009–2012 contract, pursuant to an established past practice. As we explain, the changes the Respondent imposed, based on the Union's agreement to grant the Respondent broad discretion to make changes to employee health benefits during the term of the contract, do not constitute an established past practice under *Katz* because they were informed by a large measure of discretion. In addition, the waiver defense is not available to the Respondent because, as we explained in *DuPont*, an employer's contractual right to make unilateral changes, pursuant to an agreed upon management-rights provision, does not survive contract expiration.

C. Past Practice

1. Katz establishes the analytical framework for the past practice exception

On one point we agree with the majority: "the Board is bound by the Act, and we must adhere to Supreme Court decisions, including . . . *Katz*," which defines the contours of the past-practice doctrine. It is on what *Katz* holds that we part ways. In *Katz*, the Supreme Court held that the employer violated Section 8(a)(5) in three respects during bargaining for an initial contract: (1) unilaterally announcing a change in its sick leave policy, (2) unilaterally instituting a new system of automatic wage increases, and (3) unilaterally granting merit wage increases. After finding that the unilateral changes with respect to the first two subjects "plainly frustrated the statutory objective of establishing working conditions through bargaining" and "conclusively manifested bad faith in the negotiations,"[39] the *Katz* Court considered whether the employer's unilaterally instituted merit increases should be treated as lawful because they were consistent with a "long-standing practice" of granting such increases. The Court firmly *rejected* this past practice defense.

> This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of §8(a)(5), unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews – in effect, were a mere continuation of the status quo – differentiates them from the wage increases and the changes in the sick leave plan. We do not think it does. Whatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question *were in no sense automatic, but were informed by a large measure of discretion*. There simply is no way in such case for a union to know whether or not there has been a substantial

[29] 501 U.S. at 206.
[30] Id.
[31] Id.
[32] Id. (emphasis in original).
[33] 369 U.S. at 746.
[34] 337 NLRB 1279 (2002).
[35] 912 F.2d 854, 864 (6th Cir. 1990).
[36] 601 F.2d 870, 875–876 (5th Cir. 1979).
[37] 328 NLRB 294, 294–295 fn. 2 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001).
[38] 350 NLRB 808, 811 (2007).
[39] 369 U.S. at 744, 745.

departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.[40]

Due to the discretionary, non-automatic nature of the merit raises, the Court held that "the fact that the raises were in line with the company's long-standing practice" did *not* "differentiate[] them" from the unilateral changes to the sick leave plan and institution of an automatic wage increase that were also found unlawful.[41] This is because changes made to a mandatory subject of bargaining that are informed by a large measure of discretion are subject to the duty to bargain. As the *Katz* Court explained, there "simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice," and this "of necessity obstruct[s] bargaining," when the parties are attempting to reach a negotiated agreement.[42]

As the Board discussed in *DuPont*, the Board and courts have consistently adhered to these principles in *Katz* by holding that "employers may act unilaterally pursuant to an established practice *only* if the changes do not involve the exercise of significant managerial discretion."[43] The importance of that precedent and the majority's failure to acknowledge it here, compels us to reiterate it. We start with the decisions in *State Farm Mutual Auto Insurance Co.*[44] and *Oneita Knitting Mills, Inc*.[45] In both cases, applying *Katz*, the Board found that although the employers had a past practice of granting merit increases, they violated Section 8(a)(5) by continuing their practice of unilaterally granting the increases during contract negotiations, because the increases were informed by a significant degree of discretion. In *Oneita Knitting*, the Board explained that the employer could not "exercise his discretion" in continuing to grant the merit raises during contract bargaining with the union. Rather, "[w]hat is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted."[46]

In the years following these decisions, *Katz*'s emphasis on the degree of employer discretion exercised in prior unilateral changes has been the foundation underlying the Board's narrow definition of what constitutes a past practice. What the Board has required is "reasonable certainty" as to the purported practice's "timing and criteria." *Eugene Iovine, Inc*.[47] In *Eugene Iovine*, for example, the Board found that the employer failed to establish a past practice of recurring reductions of employees' work hours because the alleged practice lacked a "'reasonable certainty' as to timing and criteria" and the employer's discretion to reduce hours "appear[ed] to be unlimited."[48] Accord: *Adair Standish Corp*.[49]

The Board has applied these same principles to other mandatory subjects of bargaining, like the healthcare benefits at issue here. Thus, in *Dynatron/Bondo Corp.,*[50] the Board found that the employer unlawfully increased employee contributions to health insurance premiums without bargaining where the amounts employees paid in prior years did not follow a fixed percentage and the employer retained "total discretion" over what employees were required to contribute. Similarly, in *Garrett Flexible Products, Inc*.,[51] the Board found that the employer unlawfully increased health insurance premiums paid by unit employees where the employer had exercised substantial discretion in allocating the increases between itself and employees. Accord: *Mid-Continent Concrete*[52] and *Maple Grove Health Care Center*.[53] By contrast, where the purported practice was fixed as to timing and criteria, thereby limiting the employer's discretion, continued unilateral changes in accord with that practice have been found lawful. In *Post Tribune Co*., for example, the Board found that the employer "had a consistent, established past practice of allocating health insurance premiums on an 80/20-percent and 60/40-percent basis"; accordingly, it did not violate Section 8(a)(5) by unilaterally allocating premium increases at the same fixed ratio during bargaining.[54] The Board reached the same conclusion in *Luther Manor Nursing Home*,[55] where, in accordance with its past practice of fixed automatic changes, the employer paid one third of an insurance premium and required employees to pay the remaining

[40] Id. at 746–747 (emphasis added).
[41] Id.
[42] Id.
[43] 364 NLRB No. 113, slip op. at 7 (emphasis in original).
[44] 195 NLRB 871, 889–890 (1972).
[45] 205 NLRB 500, 500 fn. 1, 502–503 (1973).
[46] Id. at fn. 1.
[47] 328 NLRB at 294, 297.
[48] Id. at 294.
[49] 292 NLRB 890, 890 fn. 1 (1989) (because of its exercise of discretion, employer failed to establish past practice with respect to its recurring implementation of economic layoffs), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).
[50] 323 NLRB 1263, 1265 (1997), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1999).
[51] 276 NLRB 704 (1985).
[52] 336 NLRB 258, 259, 268 (2001), enfd. 308 F.3d 859 (8th Cir. 2002).
[53] 330 NLRB 775, 780 (2000).
[54] 337 NLRB at 1280.
[55] 270 NLRB 949, 959 (1984), affd. 772 F.2d 421 (8th Cir. 1985).

two thirds. Accord: *House of the Good Samaritan*[56] and *A-V Corp*.[57]

The courts have also held, in agreement with the Board's application of *Katz*, that an employer practice of unilateral changes to a mandatory subject of bargaining, marked by significant managerial discretion, does not establish a past practice that permits further unilateral changes. In *City Cab Co. of Orlando v. NLRB*,[58] the Eleventh Circuit affirmed the Board's finding that the employer violated Section 8(a)(5) by unilaterally changing, over a 2-year period, its drivers' taxicab rental rates. The court rejected the employer's defense that the changes "were merely the continuation of established practices which operated merely to maintain the status quo," finding that the employer "had not committed itself to any fixed practice" and had "exercised an impermissible degree of discretion" when it both increased and decreased the rental charges to its drivers.[59] To the extent that the employer "had any practice at all," the court found that "it was simply one of constant change."[60] Similarly, the Fifth Circuit in *NLRB v. Allis-Chalmers Corp*. rejected the employer's argument that its unilateral wage increases and benefit improvements, found unlawful by the Board, were privileged based on a past practice of periodic surveys of wages and benefits.[61] The court held that the employer failed to meet its "heavy burden" of showing that its unilateral actions were "purely automatic and pursuant to definite guidelines," noting that the wage increases and benefit improvements were not automatic but involved "considerable discretion."[62] The Ninth Circuit decision in *Aaron Brothers Co. v. NLRB*[63] is particularly instructive. The Board had found that the employer violated Section 8(a)(5) by implementing a wage increase during bargaining, but the court remanded the case to address whether the increase was lawfully instituted "pursuant to a longstanding company policy." The court stated that in determining that question, the Supreme Court in *Katz*:

> has counseled lower courts to examine the degree to which an employer has discretion to award a benefit or determine its size. The greater the discretion, the Court has reasoned, the greater the danger unilateral action will destabilize relations by undermining a union's institutional credibility.[64]

Thus, the court directed the Board to give consideration to "whether the benefit change was fixed by an established formula containing variables beyond the employer's immediate influence."[65] Because "[n]othing in th[e] record suggest[ed] that [the employer] relie[d] upon pre-established guidelines or formulae in deciding whether to grant a wage increase or in determining its size," and because the record indicated instead that the wage decision was the product of an "ad hoc decisionmaking process," the court remanded the issue to the Board "to determine whether the increase resulted from nondiscretionary standards and guidelines."[66]

2. The Respondent's discretionary unilateral changes do not constitute a past practice under *Katz*

Applying these principles here, we start with the stipulated fact that the Respondent's changes to its healthcare Plan benefits since 2001 were based on "significant discretion." That fact, alone, defeats the Respondent's past practice defense. But even absent this admission, the factual recitation, above, firmly supports the judge's finding that no past practice was established. In accord with the reservation of rights clause in each contract that granted the Respondent the absolute right to amend Plan benefits, the judge found that the Respondent gave its health benefits professionals "free rein to come up with whatever benefits they think is best" for employees. What they came up with and what was unilaterally implemented by the Respondent during the terms of successive contracts from 2001–2012 included increases to employee copayments for emergency room treatment, outpatient surgeries, and specialist visits, as well as increases to deductibles and other out-of-pocket expenses. The Respondent also added plan options, eliminated others, changed eligibility requirements, and merged some plans. Additionally, increases to medical premiums were made every year, without any fixed percentage ratio, starting in 2002 with the Respondent paying 85 percent of the premiums to employees' 15 percent, culminating

[56] 268 NLRB 236 (1983).
[57] 209 NLRB 451, 452 (1974).
[58] 787 F.2d 1475, 1479–1480 (11th Cir. 1986).
[59] Id. at 1478–1480.
[60] Id. at 1480.
[61] 601 F.2d 870.
[62] Id. at 875.
[63] 661 F.2d 750.

[64] Id. at 753 (internal citations omitted).
[65] Id.
[66] Id. at 754.

Other circuit courts are in accord. See *Adair Standish Corp. v. NLRB*, 912 F.2d at 864 (6th Cir.) (citing *Katz,* no past practice where changes were "'unpredictably episodic' as well as 'ad hoc and highly discretionary'"); *NLRB v. John Zink Co*. 551 F.2d 799, 801–802 (10th Cir. 1977) (unilateral changes to job classifications and merit increases during bargaining unlawful under *Katz* because they involved managerial discretion); *E.I. DuPont De Nemours and Co. v. NLRB*, 682 F. 3d at 67 (citing *Katz*, "the Act does not permit a unilateral change 'informed by a large measure of discretion'"); *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981) (same).

in a 75 percent to 25 percent employer-to-employee ratio by the end of the 2009–2012 contract.[67]

The judge properly concluded that based on the broad discretion afforded the Respondent under the Plan, including the discretion to eliminate benefits entirely, and the Respondent's myriad, far-ranging changes, the Respondent failed to show that its changes to the healthcare Plan benefits were based on any cognizable fixed criteria that established a past practice. As to the premiums, he found that the percentages "changed on an ad hoc basis" such that employees and the Union were unable to predict those changes, "and since there was no formula or criteria for the changes they could not be explained by the Union to the bargaining unit." Similarly, the judge found that the changes to specialist co-pays, emergency room co-pays, and prescription costs were "completely random." He found that the contractual limitation in the pass-through clause requiring that employees be offered healthcare benefits "on the same basis as" offered to unrepresented employees imposed no discretionary limitation on the Respondent to act unilaterally, noting that "[t]ying bargaining unit employees' benefits to those of non-bargaining unit employees who are unrepresented . . ., in effect removes them from represented status and undermines the Union."[68] Accordingly, consistent with our precedent, he found that the Respondent violated Section 8(a)(5) by unilaterally implementing the 2013 changes to the Plan healthcare benefits over the objection of the Union.

3. The najority's newly-fashioned standard is predicated on a misreading of *Katz* and is incompatible with the past practice doctrine

The wealth of precedent establishes that discretionary unilateral changes to a mandatory subject of bargaining that are not fixed as to timing and criteria do not establish a past practice that permits continued implementation of such changes postcontract expiration. Nevertheless, the majority states that we (and by extension, the Board and courts) have been wrong for years in interpreting *Katz* this way. The majority, which does not dispute that the Respondent here exercised broad discretion over the years when it implemented changes to health benefits, asserts that this discretion is irrelevant in determining whether an employer has implemented an unlawful unilateral change under *Katz*. Instead, it states "the only relevant factual question is whether the employer's action is similar in kind and degree to what the employer did in the past." Slip op. at (13). This statement indicates a basic misunderstanding of the issue in *Katz*.

By posing the issue this way, the majority, in effect, reads *Katz* as finding that the unilateral merit increases therein were unlawful because they were not "similar in kind and degree to what the employer did in the past," but would have been lawful had the increases been similar in kind and degree to the past increases. This is simply incorrect, as the plain language of the Supreme Court's decision establishes. As discussed above, the Supreme Court noted that the merit increases were "in line with the company's long-standing practice" or, as the majority phrases it, "similar in kind and degree," but nevertheless found them unlawful because of their discretionary nature.[69]

[67] The fact that premium changes were consistently made every year does not establish a past practice. *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 412 fn.3 (D.C. Cir. 1996) (fixed timing alone does not establish a past practice).

[68] As noted in *DuPont*, because employers are free to change and even entirely eliminate benefits to employees who are not represented by a union, there are no fixed criteria limiting the employer's discretion.

[69] This is not the first time the meaning of *Katz* has been clouded by a misreading of its plain terms. Then-Member Miscimarra's dissent in *DuPont*, upon which the majority here relies in large part, was predicated upon an incomplete quotation of the Supreme Court's language in *Katz*. The relevant passage, quoted in full, states that:

> This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of §8(a)(5), *unless the fact that* the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews – in effect, were a mere continuation of the status quo – differentiates them from the wage increases and the changes in the sick-leave plan. *We do not think it does.* Whatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, *the raises here in question were in no sense automatic, but were informed by a large measure of discretion*. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.

369 U.S. at 746–747 (emphasis added). In then-Member Miscimarra's dissent in *DuPont*, and also in *Advanced Life Systems, Inc.*, 364 NLRB No. 117, slip op. at 9 (2016), the dissent omitted three key words: "the fact that," which entirely altered the meaning of the above-quoted text. Compare 364 NLRB No. 113, slip op. at 19. The dissent then relied on the incomplete quote to argue that *Katz* supports a conclusion that was, in fact, contrary to the decision. N. Elizabeth Reynolds, *Katz Grabs Back: A Response to the Dissent in E.I. du Pont de Nemours, 364 NLRB No. 113 (2016),* ABA Section of Labor and Employment Law, Committee on the Development of the Law Under the NLRA, https://www.americanbar.org/groups/labor law/committees/dllcom/dll archive/2017.html. Although today's majority has corrected this misquotation of *Katz* in its opinion, it continues to misconstrue the Court's decision as authorizing the Respondent's action in this case. To the contrary, *Katz* holds that a long-standing practice of unilateral changes *does not* constitute a past practice where the changes "were in no sense automatic, but were informed by a large measure of discretion." That is precisely the situation presented by the Respondent's Raytheon Plan changes from 2001–2012.

Member Pearce additionally notes that although the majority has remedied this misquotation of *Katz* in its decision, its legal argument

Of course, *Katz* makes no mention of comparing the "kind and degree" of an employer's action to what it did in the past. In fact, as we explain in more detail below, the only appropriate comparison is to the terms and conditions of employment that were in effect for employees on the day the contract expired. But even taking the majority on its own terms for the moment, its reliance on the District of Columbia Circuit's decision in *Daily News of Los Angeles v. NLRB* is misplaced. The *Daily News* court explained, "The cases make it crystal clear that the vice involved . . . is that the employer has changed the existing conditions of employment." 73 F.3d at 411. It further explained that where the employer has a merit increase program that is fixed as to timing and criteria, "*Katz* demands that the Company continue to apply the same criteria and use the same formula for awarding increases during the bargaining period as it had previously." Id. at 412. This is the fundamental point that the majority misses: here, the Respondent's practice with respect to health benefits had no fixed criteria or formula; rather, it was informed by a large measure of discretion.

Clearly, the majority's interpretation of *Katz*—which would permit an employer to make whatever changes it desires, including the elimination of all health benefits, simply because it has a past pattern of making changes to benefits—cannot be right. As the Supreme Court explained in *Katz*, when changes made to employee terms and conditions are informed by a large measure of discretion, "[t]here is simply no way … for a union to know whether or not there has been a substantial departure from past practice."[70] As further explained by the District of Columbia Circuit in *McClatchy*, "[s]ince the union could not know what criteria, if any, [the employer] was using to award salary increases, it could not bargain against those standards; instead, it faced a discretionary cloud."[71] Here, too, the Union faced a "discretionary cloud," not knowing which health benefits would be reduced or eliminated, or whether and to what extent employees would be burdened with increased costs for their healthcare. Plainly, the statutory goal of encouraging good faith collective bargaining is not advanced by the majority's interpretation of *Katz*; indeed, the majority's view that *Katz* permits an employer to make myriad, ad hoc changes so long as the employer's changes follow a history of such changes, flies in the face of the Court's finding that a past practice of making changes involving significant discretion "of necessity obstruct[s] bargaining." *Katz*.[72]

Thus, the majority is simply wrong when claiming that the sole relevant question in *Katz* is whether an employer's alleged unlawful unilateral changes are "similar in kind and degree to what the employer did in the past." It misses the whole point of *Katz's* prohibition against unilateral changes to employment terms informed by a large measure of discretion, by erroneously relying on a practice whose only consistency was the exercise of untrammeled discretion to make numerous and varying changes to health care providers, coverage, eligibility, premiums, deductibles, options, etc. In the words of the Eleventh Circuit in *City Cab*, rejecting a view similar to the majority's, if the Respondent "had any practice at all, it was simply one of constant change."[73]

The majority is not saved by its reliance on cases like *Daily News of Los Angeles*, *Post-Tribune*,[74] *Luther Manor Nursing Home*,[75] and *A-V Corp*.[76] for the broad proposition it advances that when employers have a history of making unilateral changes, that history establishes the status quo that they lawfully can continue. As discussed previously, those cases make clear that the Board and courts will assess whether the prior practice has involved significant discretion when determining whether the employer can act unilaterally. And in all of those cases the employers had a consistent, established practice of sharing premium costs with employees based on a set ratio each year. As *Katz* explains, to be lawful, the changes must be *both* in line with the company's long-standing practice *and* not informed by a large measure of discretion.[77]

In yet another effort to evade the principal holding in *Katz*—that managerial discretion is determinative in deciding whether a past practice of unilateral changes may lawfully continue during contract negotiations—the majority characterizes this central tenet as a mere "factual observation" not relevant to the Court's legal analysis. The extensive Board and court authority that we and the judge have cited demonstrates the falsity of this claim. Far from being a mere "factual observation," the degree of discretion exercised by an employer is the crucial question under *Katz* in determining whether a past practice has been successfully established.

falls even more sharply now that its analysis is not predicated on those omissions from the *Katz* decision.

[70] 369 U.S. at 746.

[71] 131 F. 3d 1026, 1032.

[72] 369 U.S. at 746–747.

[73] 787 F.2d at 1480.

[74] 337 NLRB at 1280.

[75] 270 NLRB at 959.

[76] 209 NLRB at 451.

[77] 369 U.S. at 746.

Further, contrary to the majority, the wage increase cases they cite do not establish that *Katz* privileges employers to act unilaterally despite "substantial employer discretion." The *Arc Bridges, Inc.*[78] case presented the question whether a newly organized employer was required to continue a past practice of giving annual wage increases while negotiating an initial agreement with the union, not whether the employer was free to unilaterally give such increases following the expiration of an agreement. But, in any event, that case actually contradicts the majority's interpretation of *Katz* as licensing unilateral, discretionary action. Thus, in *Arc Bridges*, the Board initially found that the employer was bound by a past practice of giving annual wage increases, and so its unilateral discontinuance of such increases for bargaining-unit employees (and in particular while continuing them for non-unit employees) was unlawful. The District of Columbia Circuit reversed the Board's finding, however, precisely because the court found that the employer's past decisions regarding annual wage increases were far too discretionary to constitute a cognizable past practice. Specifically, the court found no practice of fixed, non-discretionary annual wage increases, noting that there were "no objective criteria" and it was "highly discretionary" whether increases would be awarded, and, if awarded, the amount of those increases. Plainly, then, *Arc Bridges* shows that the presence of "substantial employer discretion" renders any supposed past practice inoperative, whether viewed from the perspective of a union seeking to hold an employer to the practice or from the perspective of an employer seeking to unilaterally continue the practice.

Nor does *Central Maine Morning Sentinel*[79] support the majority. In *Central Maine*, the Board expressly considered the degree of employer discretion and determined that, based on the absence of substantial discretion, the employer's annual across-the-board wage increases constituted a practice that the employer was lawfully required to continue. Notwithstanding that the employer retained "some discretion" as to the amounts of the increases, the wage increases were nevertheless an established practice because it was based on a non-discretionary "formula derived from uniform factors." In yet another misreading of precedent, the majority states in its fn. 89 that Central Maine's retention of discretion as to the amount of the merit increase excused its obligation to bargain about the entire merit increase practice. The Board stated precisely the opposite,[80] as did the court in similar circumstances in *Daily News of Los Angeles*.[81] As the court explained, under *Katz* "[i]f an established merit increase program is fixed as to timing and criteria and discretionary only in amount, then the employer is obligated to keep the program in place and continue to apply the same criteria."[82] As to the discretionary element regarding the amount, Board and court precedent require the employer to bargain with the union and prohibits the employer from continuing to unilaterally exercise its discretion.[83]

The purported "*Shell Oil* line of cases," relied on by the majority, similarly provides no support for their position. Those cases are all subcontracting cases where the employers' discretionary rights to subcontract were substantially restricted. In *Shell Oil,* which was explicitly overruled in *DuPont* (having been previously overruled *sub silentio*) and is reinstated by the majority today, the Board found that the employer's subcontracting of construction and maintenance work during bargaining for a successor contract was a lawful continuation of a past practice because it did not "materially var[y] in kind or degree from what had been customary in the past."[84] Aside from the fact that *Katz* was not cited in *Shell Oil* and its "var[y] in kind or degree" language is nowhere found in *Katz*, the employer's right to subcontract in that case was not discretionary but had been limited by objective criteria: the "conditions of the protective wage requirement" in article 14 of past contracts and whether the employer possessed or lacked the equipment, material, expertise, or staff to perform the work.[85] Similarly, in *Westinghouse Electric Corp.*,[86] we noted in fn. 30 of our majority decision in *Du Pont* that the employer's past practice of subcontracting did not appear to lack fixed criteria. In finding that the subcontracting in *Westinghouse* was a lawful continuation of a long-time practice, the Board further noted that, as in past years, there was no evidence that the "subcontracting . . . had any significant impact on unit employees' job interests" due to the

[78] 355 NLRB 1222 (2010), enf. denied 662 F.3d 1235 (D.C. Cir 2011).

[79] 295 NLRB 376 (1989).

[80] 295 NLRB at 376.

[81] 73 F.3d at 416.

[82] Id.

[83] See *NLRB v. Blevins Popcorn*, supra, 659 F.2d at 1189, citing cases, including *Oneita Knitting*, supra, 205 NLRB at 500 fn. 1 (*Katz* requires maintenance of past practice program, "however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the amounts), becomes a matter as to which the bargaining agent is entitled to be consulted").

[84] 149 NLRB 283, 288 (1964).

[85] Id. at 286, 290.

[86] 150 NLRB 1574 (1965).

elimination of jobs.[87] Indeed, in the years following *Westinghouse* and *Shell Oil*, the potential adverse impact on employees' job tenure was the determinative factor as to whether an employer's subcontracting decision was lawful. Where the subcontracting decision was consistent with a past practice and was based on limited managerial discretion that had no demonstrable adverse impact on unit employees' work, the Board found no violation. See, e.g., *General Electric Company;*[88] *Rochester Telephone Corp.*;[89] and *Allied Chemical Corp.*[90] By contrast, where the subcontracting decision had an adverse impact on unit employees' work, the Board found a violation of Section 8(a)(5) and (1). See, e.g., *Assonet Trucking Co.*[91]*; The Weston and Brooker Company.*[92]

In sum, the majority's assertion that "decades-long" precedent and "numerous Board and court cases" support its position is wholly unfounded. To the extent that any precedent supports the majority's past practice position, it originated in the two *Courier Journal* cases, 342 NLRB 1093 (2004) (*Courier I*), and 342 NLRB 1148 (2004) (*Courier II*), neither of which cited *Shell Oil* or *Westinghouse*. The Board majority in *Courier I* found that unilateral changes made to employees' healthcare benefits during bargaining for a successor contract were lawfully in accord with a past practice of making similar unilateral changes authorized by a management-rights clause during the term of an expired contract. The Board overruled that case in *DuPont* because the changes were entirely discretionary and thus contrary to the past practice doctrine developed in accord with *Katz* and uniformly applied by the Board and courts in the 55 years since *Katz*. The Board noted that *Courier* was a clear departure from this half-century of precedent and, despite its revival by the majority today, remains so.

Finally, the majority claims that even if the Respondent exercised discretion, its discretion was "significantly constrained" by the requirement that the healthcare plan it offered to bargaining unit employees would be "on the same basis as" the plan offered to the Respondent's unrepresented employees. In *DuPont*, we explained that such a requirement provides no limitation at all on the Respondent's discretion because the Respondent is free to make any changes it desires, including elimination of health benefits entirely. That the unbounded discretion applied even-handedly does not make it any less unbounded. And the exercise of such unbounded discretion effectively eliminates any ability for the union to negotiate over health benefits for the employees it represents. As explained by the administrative law judge,"[t]ying bargaining unit employees' benefits to those of non-bargaining unit employees who are unrepresented . . . , in effect removes them from represented status and undermines the Union." That is why the Board consistently has held that an employer's history of providing the same benefits to both union and nonunion employees does not establish a past practice exempting the employer from its bargaining obligation over uniformly applied changes to those benefits. See e.g. *Larry Geweke Ford*, 344 NLRB 628, 632 (2005)(employer history of providing the same health plan to all employees, company-wide, did not exempt it from its bargaining obligation pertaining to represented employees); *Mid Continent Concrete*, 336 NLRB 258, 259, 268 (2001), and *United Hosp. Med. Ctr.*, 317 NLRB 1279, 1282 (1995).

4. The majority's standard undermines collective bargaining

The Board's statutory duty is to promote and preserve collective bargaining and advancing this obligation was at the core of the Board's decision in *DuPont*. The majority here claims that our holding in *DuPont* would have had the opposite effect by "disregard[ing] the . . . parties['] . . . particular need for certainty and predictability," "produc[ing] significant labor relations instability," and "substantially undermin[ing] employers' ability to operate their businesses." To rectify these purported ills, the majority claims that industrial peace will be ensured only by privileging employers' continued, untrammeled, discretionary unilateral changes to a mandatory bargaining subject like healthcare benefits, while the parties are engaged in negotiations on that very subject and before impasse is reached. According to the majority, this approach will not undermine collective bargaining because even after unilateral implementation, the employer will still have a duty to bargain with the union, upon request. This cynical view flies in the face of the precedent discussed here that makes clear that such unilateral changes "of necessity obstruct bargaining" and "frustrate the objectives of §8(a)(5) much as does a flat refusal." *Katz*.[93] The only logical certainty that flows from the majority's position is that the parties will know that employers can act wholly unchecked, while unions and the employees they represent can do nothing about it. The majority's preeminent focus on protecting employer interests is in

[87] 150 NLRB at 1576.

[88] 264 NLRB 306, 308–309 (1982).

[89] 190 NLRB 161, 164 (1971).

[90] 151 NLRB 718, 720–721 (1965), review denied sub nom. *District 50, United Mine Workers of Am., Local 13942,* 358 F.2d 234 (4th Cir. 1966).

[91] 156 NLRB 350, 351–353, 365–367 & fn. 13 (1965).

[92] 154 NLRB 747, 749 (1965).

[93] 369 U.S. at 743, 747.

sharp contrast with the statutory mandate of fostering collective bargaining.

To be sure, unions and employers face enormous challenges in contract negotiations. Among the most challenging issues parties face is the provision of health care benefits which, due to their costs, often drive bargaining and impact negotiations over other financial contract terms such as wages. But the majority's claim that the Board's holding in *DuPont* exacerbated those challenges for employers is simply unfounded. Echoing the dissent in *DuPont*, the majority claims that, under *DuPont*, an employer would have to drill down into all the circumstances surrounding its prior changes—to health care benefits or other terms and conditions of employment—in order to determine whether a postexpiration alteration in those terms and conditions could be made unilaterally or would constitute a "change" subject to bargaining. This claim could not withstand scrutiny then, and it fares no better today.

As the *DuPont* Board emphasized, consistent with *Katz* and *Litton*, the touchstone for identifying a "change" subject to bargaining is *discretion* exercised when making the change. Thus, *DuPont* held only that upon contract expiration an employer must refrain from continuing to make "discretionary, unilateral changes, not fixed as to timing and criteria," that it might have been permitted to make under the agreement.[94] Contrary to the majority, there was no need to exhaustively review the history of prior changes. Rather, the employer needed only to fairly assess whether the course of action under consideration involved the exercise of discretion (and thus required bargaining) or was sufficiently fixed as to timing and criteria as to essentially be automatic (no bargaining required). Compare *Garrett Flexible Products*[95] (discretionary allocation of increase in health insurance premium between employer and employees required bargaining) with *Post Tribune*[96] (no bargaining required where employer continued practice of allocating health insurance premiums according to a fixed-percentage ratio). See also *American National Red Cross*[97] (differentiating past practices involving significant management discretion from narrowly circumscribed changes that would be expected to continue in a nondiscretionary manner). If the changes made pursuant to an established past practice involved an exercise of significant discretion, the employer could no longer continue to make such unilateral changes post-expiration. Instead, the terms and conditions that existed at the time of expiration constitute the status quo and the baseline from which the parties bargain.[98]

By contrast, the majority's misunderstanding of *Katz*, *Litton*, and *Dupont* actually does threaten the collective-bargaining process, especially for unions. Thus, particularly in the context of health insurance, unions need certainty as to what benefits are being offered by an employer and what costs for those proposed benefits the employer proposes that employees shoulder. If the employer, like the Respondent here, has complete discretion to change any and all aspects of health benefits, including the cost to employees, this unpredictability leaves the union in the dark and its ability to bargain over all finan-

[94] *DuPont*, above, 364 NLRB No. 113, slip op. at 12.

[95] 276 NLRB 704.

[96] 337 NLRB 1279.

[97] 364 NLRB No. 98, slip op. at 5 (2016).

[98] Member McFerran recognizes that after a collective-bargaining agreement expires, employers may face circumstances requiring them to take actions that cannot reasonably wait until the parties reach overall impasse or agreement on a successor contract. See generally *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (explaining the basic rule that when the parties are engaged in bargaining, an employer's "obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole."). Particularly in the case of health insurance, for example, employers may need to respond relatively quickly to third-party providers' decisions to alter or even terminate existing benefit plans in order to ensure that employees do not lose significant portions or all of their coverage. But, in Member McFerran's view, none of those circumstances warrants jettisoning collective-bargaining altogether. To the contrary, existing Board precedent provides employers with multiple alternatives to unfettered unilateral action. Most important, an employer may simply give the union notice and an opportunity to negotiate an interim agreement to resolve the matter until an overall agreement is in place. Moreover, even if those negotiations are unsuccessful, an employer faced with a true exigency still may take unilateral action before the parties reach an overall agreement, assuming the existence of a lawful impasse. See generally *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995). Alternatively, an employer in search of greater certainty may preemptively bargain for language in a collective-bargaining agreement that would permit it to take unilateral action with respect to specific terms and conditions of employment after the agreement expires. See, e.g., *Cauthorne Trucking*, 256 NLRB 721, 722 (1981), enfd. in part 691 F.2d 1023 (D.C. Cir. 1982) (finding that the parties' agreed-upon language in a pension trust agreement clearly and unmistakably gave the employer the right to unilaterally suspend pension contributions once the parties' collective-bargaining agreement expired). Relatedly, Member McFerran notes that even for newly organized employers, existing Board precedent (on which she expresses no view) allows such employers to act with respect to discrete, recurring events that happen to arise before or during negotiations for an initial collective-bargaining agreement, provided that the employer has given the union notice and an opportunity to bargain over the event. See *Stone Container Corp.*, 313 NLRB 336, 336 (1993) (dismissing allegation that employer violated Sec. 8(a)(5) by unilaterally implementing the results of an annual wage survey—which showed no wage increase was warranted—while the parties were negotiating an initial contract). Significantly, all of those options accommodate employers' legitimate needs while paying far greater respect than the majority's decision does to the Act's fundamental policy of "encouraging the practice and procedure of collective bargaining." Sec. 1 of the Act.

cial aspects of the contract is greatly compromised. This weakened bargaining position causes employee disaffection and destabilizes the entire bargaining process. As stated in *DuPont*, it is "difficult to imagine anything more disruptive to the collective-bargaining process than an employer's exercise of its broad discretion to unilaterally change . . . a major term and condition of employment, such as health insurance" during negotiations for a successor bargaining agreement.[99] In *McClatchy*, the Board explained the extent of the disruption, when finding that the respondent violated Section 8(a)(5) by implementing a proposal to retain complete discretion over merit increases:

> The [Union] also would be unable to explain to its represented employees how any intervening changes in wages were formulated, given the Respondent's retention of discretion over all aspects of these increases. Further, the Respondent's implementation of this proposal would not create any fixed, objective status quo as to the level of wage rates, because the Respondent's proposal for a standardless practice of granting raises would allow recurring, unpredictable alterations of wage rates and would allow the Respondent to initially set and repeatedly change the standards, criteria, and timing of these increases.[100]

These same disruptive effects to the collective-bargaining process are manifest here. Throughout negotiations, the Respondent insisted on its complete discretion over all aspects of Plan healthcare benefits, rejected all Union proposals to remove that discretion, and then unilaterally implemented changes to the benefits without reaching a bargaining impasse with the Union. It acted in contravention to the Supreme Court's view that "it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are subject to those negotiations." *Litton*.[101]

D. Waiver

The judge correctly rejected the Respondent's defense that the Union waived its right to bargain over changes to the health plan after contract expiration, by agreeing in the 2009–2012 collective bargaining agreement to grant the Respondent broad discretion to make changes to its plan.[102] The judge's finding is consistent with longstanding Board law, on which *DuPont* is based, where the Board held that when a union agrees to a contractual management-rights clause that permits an employer to act unilaterally on a mandatory subject of bargaining, the union thereby waives its statutory right to bargain about that subject only for the term of the contract. As the Board explained in *Du Pont*, because the source of the employer's authority to act unilaterally on that subject exists solely by virtue of the union's contractual waiver, the waiver expired on the termination date of the collective-bargaining agreement.[103] Thus, the Board found that the respondent failed to establish a waiver defense when it made postexpiration unilateral changes to health insurance benefits that it had been permitted to make during the term of the contract under a reservation of rights clause (which we found to be a management-rights clause).

Here, there is no dispute that the reservation of rights clause set forth in the Plan documents and incorporated in every contract since 2000 is a management-rights clause. Pursuant to that clause, the Union agreed—for the term of each contract—that the Respondent could exercise broad discretion in unilaterally changing employees' healthcare benefits set forth in the Plan without first bargaining with the Union. By agreeing to this clause and acquiescing to the Respondent's changes to the Plan during the term of each contract, the Union waived its right to bargain over a mandatory subject of bargaining. However, that waiver was effective only for the term of the contracts that contained the management-rights clause. Under well-established precedent, long predating *DuPont*, the Board has held that a management-rights clause containing a union's statutory bargaining waiver does not survive the contract that contains it, absent evidence that the waiver was intended to outlive the contract. See *Holiday Inn of Victorville*,[104] No such intent was shown here. Neither the language of the management right clause nor any other relevant contract provision specified that the clause was to remain in force after the 2009–2012 contract expired. And as the judge found, "[n]o evidence was presented that the parties ever discussed what would happen concerning [the] benefit plans when the collective-bargaining agreement expired, or that the Union ever agreed that it was ceding its right to bargain regarding health insurance when the agreement expired." Accordingly, the Respondent's waiver defense fails.

[99] 364 NLRB No. 113, slip op. at 12.

[100] 321 NLRB at 1391 (internal citations omitted).

[101] 501 U.S. at 198.

[102] The judge noted that the Respondent, "like any other employer, could have presented its precise proposed 2013 changes to the plan to the Union, [and] negotiated about them in good faith. . . . Instead, Respondent took the position that the Union had waived its right to bargain, in essence in perpetuity."

[103] 364 NLRB No. 113, slip op. at 4–5.

[104] 284 NLRB 916 (1987). See also, *Buck Creek Coal, Inc.*, 310 NLRB 1240, 1240 fn. 1 (1993); *Control Services, Inc.*, 303 NLRB 481, 484 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992); *Kendall College of Art*, 288 NLRB 1205, 1212 (1988).

Curiously, the majority asserts that it need not reach the question whether the Union waived its right to bargain over post-expiration changes to the Plan because, the majority says, "the Respondent's benefit changes did not alter the status quo." This statement confirms the majority's fundamental misunderstanding of basic "status quo" principles, and highlights the error in the majority's insistence that the appropriate way to identify a bargainable post-expiration "change" in an employment term is simply to ask whether the employer made comparable pre-expiration alterations to that term. If yes, then the majority says no bargaining required. But this plainly is the wrong comparison.

As explained, where, as here, parties are engaged in bargaining for a successor contract, the relevant "status quo" consists of the terms and conditions of employment that existed for employees at the time their last contract expired.[105] It is *those* terms and conditions that establish the baseline for determining whether any subsequent alterations constitute a bargainable "change." Whether a pre-expiration past practice may properly be deemed a term and condition of employment depends on whether it was fixed as to timing and criteria. If not—if the practice was infused with significant employer discretion—then the practice is not a term and condition of employment, and it most certainly is not part of the "status quo."[106]

Because it is undisputed that the Respondent exercised wide-ranging discretion to make changes to the Plan during the term of the contract, the Respondent's practice of altering the Plan never became a cognizable past practice and part of the expiration-day "status quo." Consequently, it is immaterial that the Respondent's post-expiration discretionary changes to the employee health benefits are comparable to its pre-expiration discretionary changes, *unless of course the Union has somehow waived its right to bargain.*[107] For reasons explained, there was no waiver here, but the majority's failure to recognize that waiver was the only remaining potentially viable defense speaks clearly to its basic misunderstanding of the principles that should have resulted in an affirmance of the judge's unfair labor practice findings in this case.

[105] See *E.I. DuPont*, slip op. at 5.

[106] See *Eugene Iovine*, above, 328 NLRB at 294 (employer's unilateral reductions of employees' hours was not excused by past practice that was characterized by unlimited discretion).

[107] See, e.g., *Cauthorne Trucking*, above, 256 NLRB at 722 (finding that the parties' agreed-upon language in a pension trust agreement clearly and unmistakably gave the employer the right to unilaterally suspend pension contributions once the parties' collective-bargaining agreement expired).

Conclusion

The majority then is simply wrong when it insists that today's decision will "do no harm." It is clear, rather, that permitting employers to unilaterally change—at their whim and in their sole discretion—significant terms of employment during negotiations over those very terms, is inimical to the collective-bargaining process, for reasons that the Supreme Court and other Federal courts have explained. Rather than promoting collective bargaining, the majority's decision is the quintessential "blueprint for how an employer might effectively undermine the bargaining process while at the same time claiming that it was not acting to circumvent its statutory bargaining obligation." *McClatchy*.[108] This result is flatly contrary to the expressed policy of the National Labor Relations Act, and it is based on a willful misreading of the Supreme Court's decision in *Katz*. The Board has no authority to deviate from Supreme Court precedent and no authority to adopt its own, flawed labor policy in place of that established by Congress.

Accordingly, we dissent.

Dated, Washington, D.C. December 15, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Frederic D. Roberson, Esq., for the General Counsel.

Kenneth B. Siepman, Esq. and *Matthew J. Kelley, Esq.,* of Indianapolis, Indiana, for the Respondent.

Daniel Kovalik, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was opened and closed on May 2, 2013, in Indianapolis, Indiana, to allow the parties to place into evidence a stipulation of facts, along with attached exhibits, whereupon all parties rested. The charge was filed by United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers International Union, AFL–CIO (the Union) on October 29, 2012, against Raytheon Network Centric Systems (Respond-

[108] 321 NLRB at 1391.

ent).[1] The complaint, issued on February 28, 2013, alleges Respondent violated Section 8(a)(1) and (5) by: announcing in late September that it would be making changes to health insurance plans of bargaining unit employees represented by the Union and implementing those changes on January 1, 2013, and that Respondent did so without affording the Union an opportunity to bargain concerning the implementation and the effects of the implementation, and implemented those changes without first bargaining with the Union to a good-faith impasse.

On the entire record, and after considering the briefs filed by the General Counsel, the Charging Party, and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has an office and place of business in Fort Wayne, Indiana, where it is engaged in the design, manufacture, testing, integration, and installation of electronic systems, radars, missile systems, and other goods and services for the U.S. Government and other customers. During the past 12 months, in conducting these business operations, Respondent sold and shipped goods valued in excess of $50,000 directly to points outside Indiana. Respondent admits and I find it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act and the Union is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At the outset of the hearing, the parties entered into evidence stipulated facts, with attachments, and thereafter rested, without calling any witnesses to testify. The stipulation reads as follows:

STIPULATED FACTS

Respondent, Raytheon Network Centric Systems, Ft. Wayne facility (Respondent or Raytheon), Counsel for the Acting General Counsel for the National Labor Relations Board, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), formerly the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE), and its Local 7–0254 (Local Union) (collectively Union) hereby stipulate to the following undisputed facts. By submitting these stipulated facts, all parties reserve the right to object to individual facts on the grounds of relevance.

1. PACE, Local 6–0254 represented production and maintenance employees at the Ft. Wayne facility for more than 20 years. In April 2005, PACE merged with the United Steelworkers of America and became USW. At some time between 2005 and 2009 PACE Local 6–0254 became USW Local 7–0254.

[1] At the hearing, counsel for the General Counsel moved, without objection, to amend the complaint to change the name of Respondent from Raytheon Company to Raytheon Network Centric Systems. The motion was granted. However, I have kept the case heading as Raytheon Company because that is how the parties continue to refer to the matter in their stipulated record and in their posthearing briefs. All dates are in 2012 unless otherwise indicated.

2. Prior to December 1997, the Ft. Wayne facility was operated by Hughes Aircraft. Raytheon finalized its merger with Hughes Aircraft in December 1997. Respondent recognized the Ft. Wayne bargaining unit and the contract in place at the time of the purchase.

3. There is one bargaining unit at the Ft. Wayne facility. The Ft. Wayne bargaining unit currently consists of 35 individuals across various job classifications.

4. Respondent and the Local Union were parties to collective bargaining agreements (CBA), covering the Ft. Wayne bargaining unit employees, which continued year to year unless reopened by one of the parties 60 days prior to the expiration date of the contract. The parties' most recent CBA covering the Ft. Wayne bargaining unit employees ran from May 3, 2009, to April 29, 2012.

5. Following the merger with Hughes Aircraft, Raytheon decided to create a uniform benefits program for its employees, nationwide. The plan was devised in 1998 and implemented on January 1, 1999, as the Raytheon Unified Benefits Program (the Raytheon Plan). It consisted of regional plans and pricing with four levels of coverage with Health Maintenance Organization (HMO) and Point of Service (POS) plan options. The Raytheon Plan included two options for dental insurance, vision insurance, short-term and long-term disability (STD and LTD) coverage, Paid Time Off (PTO) benefits, life insurance, Accidental Death & Dismemberment (AD& D) insurance, Employee Assistance (EAP) program, Business Travel Accident (BTA) insurance and participation in the Raytheon Savings and Investment Plan (RAYSIP).

6. On January 1, 1999, salaried and hourly non-union employees at the Ft. Wayne facility were covered by the new Raytheon Plan. The Raytheon Plan documents are attached as Exhibit 1. The terms of the Raytheon Plan allowed Respondent to alter costs for covered employees and/or levels of benefits for covered employees under the Raytheon Plan. Until January 1, 2001, the Ft. Wayne bargaining unit employees were not covered by the Raytheon Plan.

1999 Plan

- Regional plans and pricing with four levels of coverage
- Included POS and HMO options
- Two dental options, a "low" option with no employee contribution and a "high" option with an employee contribution
- Vision plan with a $10 copay on exams, frames and lenses

7. During negotiations for the 2000 CBA, the parties agreed to a proposal to have employees covered by the Raytheon Plan, including the various medical options (Raytheon Medical), beginning on January 1, 2001. Attached as Exhibit 2 is the 2000–2005 CBA that includes the language.

8. In addition, the parties agreed that contributions for the Medical/Vision Plan would not exceed the rates paid by salaried employees at the Ft. Wayne facility. Upon implementation of the Raytheon Plan, Respondent would pay the majority of the projected annual plan cost for Raytheon Medical and employees were responsible for the balance of the projected annual plan cost for Raytheon Medical. The premium payment was

split 85–15 percent between Raytheon and participating employees.

9. On April 28, 2000, PACE and Raytheon entered into a CBA citing the Raytheon Plan. Ft. Wayne bargaining unit employees participated in open enrollment from September 27—October 13, 2000. The Raytheon Plan, including Raytheon Medical, went into effect for the Ft. Wayne bargaining unit employees on January 1, 2001. See 2000–2005 CBA attached as Exhibit 2.

10. Prior to the 2000 CBA, employees at the Ft. Wayne facility were provided with medical coverage, for which Respondent paid most, if not all, of the premiums.

11. The Raytheon Plan is U.S. Region-wide, cafeteria style benefits plan, which includes a variety of benefit options in addition to health care coverage, such as dental coverage, vision coverage, and life insurance. Employees are provided with annual enrollment periods each fall, at which point the employee elects the level of health care coverage desired, and elects other benefit options. Raytheon Medical is a self-insured medical care option encompassed within the Raytheon Plan. All Raytheon sites in the United States participate in the Raytheon Plan. The Raytheon Plan is available to approximately 65,000 domestic employees, including approximately 5,000 union employees across 19 bargaining units. The USW does not represent any Raytheon employees other than those in the Ft. Wayne bargaining unit. Attached as Exhibit 3 is the current summary plan description for the Raytheon Plan.

12. Every year since 2001, Ft. Wayne employees, including bargaining unit employees in the Ft. Wayne facility, have participated in the open enrollment period as have all U.S. based Raytheon employees. The Ft. Wayne employees have selected from a variety of plan options, the medical and benefit plan most appropriate for themselves each year. At no time since 2001 has there been any hiatus period between CBAs overlapping with the open enrollment period.

13. Every year since 2001, and pursuant to the applicable CBA and health plan documents referenced therein, the Company has retained and exercised significant discretion to modify and/or terminate aspects of the Raytheon Plan. Throughout the year, a dedicated staff of benefits professionals, employed by Raytheon, surveys available options, costing structures, and other information, and the Company decides what plans/benefits to offer to its workforce. The Company then communicates the changes to its employees prior to the open enrollment period for the upcoming year.

14. In fall, 2001, Respondent mailed a document, entitled "Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by PACE. The "Raytheon Benefits" was a publication used and distributed by Respondent each fall to communicate changes to the Raytheon Plan, including any changes or premium increases to Raytheon Medical, to all participants in the Raytheon Plan for the upcoming calendar year. In addition to the "Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees in their personalized enrollment kit, each year prior to open enrollment. A true and correct copy of the 2001 "Raytheon Benefits" is attached as Exhibit 4. Open enrollment occurred from October 10 – October 31, 2001.

15. On January 1, 2002, Respondent, pursuant to Article XXII and Exhibit E of the 2000—2005 CBA and the referenced Raytheon Benefits Handbook, implemented the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2002 Changes

- Healthcare premiums increased
- Preferred Provider Organization ("PPO") option introduced
- M-Plan HMO introduced for Indiana
- Benefits coverage extended to same-sex partners
- GlobalFit Health Club benefit introduced

16. These changes were summarized in the 2001 "Raytheon Benefits" document. Exhibit 4. The CBA between Respondent and PACE was in effect at the time. PACE did not file any grievances or unfair labor practice charges contesting these changes.

17. In fall, 2002, Respondent mailed a document, entitled "Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by PACE. There were two versions of this document, one for Raytheon employees in California and one for all other U.S. Raytheon employees. In addition to the "Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees in their personalized enrollment kit, each year prior to open enrollment. A true and correct copy of the 2002 "Raytheon Benefits" is attached as Exhibit 5. Open enrollment occurred from October 16 – November 3, 2002.

18. On January 1, 2003, Respondent, pursuant to Article XXII and Exhibit E of the 2000—2005 CBA and the referenced Raytheon Benefits Handbook, implemented the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2003 Changes

- Healthcare premiums increased
- Definity Health Care Options added everywhere except California. Three levels of coverage are available (Definity Gold, Silver and Bronze)
- TRICARE Supplemental Medical Plan available to eligible employees
- Nationwide prescription services administered by Medco Health offered to eligible employees

19. These changes were summarized in the 2002 "Raytheon Benefits" document. Exhibit 5. The CBA between Respondent and PACE was in effect at the time. PACE did not file any grievances or unfair labor practice charges contesting these

changes.

20. In fall, 2003, Respondent mailed a document, entitled "For Raytheon Employees—Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by PACE. The "For Raytheon Employees—Benefits" was a publication used and distributed by Respondent each fall to communicate changes to the Raytheon Plan, including any changes or premium increases to Raytheon Medical, to all participants in the Raytheon Plan for the upcoming calendar year. In addition to the "For Raytheon Employees—Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. A true and correct copy of the 2003 "For Raytheon Employees—Benefits" is attached as Exhibit 6. Open enrollment occurred from October 15—November 2, 2003.

21. On January 1, 2004, Respondent, pursuant to Article XXII and Exhibit E of the 2000—2005 CBA and the referenced Raytheon Benefits Handbook, implemented the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2004 Changes

- Healthcare premiums increased
- United Health Care replaced Partners Health Plan as provider of POS and HMO services. Coverage automatically converted to the same type and level of coverage available under Partners, unless the employee elected otherwise

22. These changes were summarized in the 2003 "For Raytheon Employees—Benefits" document. Exhibit 6. The CBA between Respondent and PACE was in effect at the time. PACE did not file any grievances or unfair labor practice charges contesting these changes.

23. In fall, 2004, Respondent mailed a document, entitled "For Raytheon Employees—Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by PACE. In addition to the "For Raytheon Employees—Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. A true and correct copy of the 2004 "For Raytheon Employees—Benefits" is attached as Exhibit 7. Open enrollment occurred from October 13–29, 2004.

24. On January 1, 2005, Respondent, pursuant to Article XXII and Exhibit E of the 2000–2005 CBA and the referenced Raytheon Benefits Handbook, implemented the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2005 Changes

- Healthcare premiums increased
- Introduction of three year plan to increase premium percentage from 85% - 15% to 80% - 20% with final implementation in 2007

25. These changes were summarized in the 2004 "For Raytheon Employees—Benefits" document. Exhibit 7. The CBA between Respondent and PACE was in effect at the time. PACE did not file any grievances or unfair labor practice charges contesting these changes.

26. On February 2, 2005, Union bargaining representatives for the Ft. Wayne bargaining unit provided notice to Respondent to open negotiations on the CBA with Respondent.

27. On June 29, 2005, the Union and Raytheon finalized a new CBA for the Raytheon bargaining unit with language, in Article XXII and Exhibit E and the referenced Employee Benefits Handbook, confirming employees election of health benefits in accordance with the Raytheon Plan being offered to non-represented employees at the Ft. Wayne facility from year-to-year. Attached as Exhibit 8 is the 2005–2009 CBA that includes this language.

28. In fall, 2005, Respondent mailed a document, entitled "Your Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by PACE. The "Your Raytheon Benefits" was a publication used and distributed by Respondent each fall to communicate changes to the Raytheon Plan, including any changes or premium increases to Raytheon Medical, to all participants in the Raytheon Plan for the upcoming calendar year. In addition to the "Your Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. A true and correct copy of the 2005 "Your Raytheon Benefits" is attached as Exhibit 9. Open enrollment occurred from October 12–28, 2005.

29. On January 1, 2006, Respondent, pursuant to Article XXII and Exhibit E of the 2005—2009 collective-bargaining agreement and the referenced Raytheon Benefits Handbook, implemented the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2006 Changes

- Healthcare premiums increased
- Introduction of a High Deductible Health Plan with Health Savings Account
- Expansion of TRICARE program to include military reservists
- Definity Health Gold and Silver plans increase in prescription medication copays
- Definity Health Bronze plan discontinued

30. These changes were summarized in the 2005 "For Raytheon Employees—Benefits" document. Exhibit 9. The CBA between Respondent and the USW was in effect at the time. The Union did not file any grievances or unfair labor practice

charges contesting these changes.

31. In fall, 2006, Respondent mailed a document, entitled "Your Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by the Union. In addition to the "Your Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. A true and correct copy of the 2006 "Your Raytheon Benefits" is attached as Exhibit 10. Open enrollment occurred from October 11–27, 2006.

32. On January 1, 2007, Respondent, pursuant to Article XXII and Exhibit E of the 2005–2009 CBA and the referenced Raytheon Benefits Handbook, implemented the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2007 Changes

- Healthcare premiums increased
- Definity Plans undergo name change to Unified Healthcare
- Option of purchasing 90-day supplies of prescription medication through Medco at discount rate

33. These changes were summarized in the 2006 "Your Raytheon Benefits" document. Exhibit 10. The CBA between Respondent and the Union was in effect at the time. The Union did not file any grievances or unfair labor practice charges contesting these changes.

34. In fall, 2007, Respondent mailed a document, entitled "Your Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by the Union. In addition to the "Your Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. A true and correct copy of the 2007 "Your Raytheon Benefits" is attached as Exhibit 11. Open enrollment occurred from October 17—November 2, 2007.

35. On January 1, 2008, Respondent implemented, pursuant to Article XXII and Exhibit E of the 2005–2009 CBA and the referenced Raytheon Benefits Handbook, the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2008 Changes

- Healthcare premiums increased
- Fully subsidized preventative office visits and screenings for HMO, PPO and in-network POS providers
- Coverage of out-of-network preventative care – after deductible at 70% for POS providers
- Discontinued M-Plan HMO in Ft. Wayne and moved employees to United Healthcare Choice EPO, absent election to different plan
- Discontinued TRICARE and Definity Silver
- Increases in specialist copays to $30 for HMO and in-network POS increase specialist copays to $30 for PPO providers
- Increase outpatient surgery copay to $100 for HMO and in-network POS
- Additional nutritional counseling benefit offered
- Changes to prescription drug plans, instituting coinsurance payments with caps
- Changes to the High Option Dental plan to cover bridges and dentures every 8 years rather than every 5 years and to include coverage for dental implants

36. These changes were summarized in the 2007 "Your Raytheon Benefits" document. Exhibit 11. The CBA between Respondent and the Union was in effect at the time. The Union did not file any grievances or unfair labor practice charges contesting these changes.

37. In fall, 2008, Respondent mailed a document, entitled "Your Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by the Union. In addition to the "Your Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. Raytheon also provided a "Summary of Benefit Changes" Document in fall, 2008. A true and correct copy of the 2008 "Your Raytheon Benefits" and "Summary of Benefit Changes" is attached as Exhibit 12. Open enrollment occurred from October 17–November 5, 2008.

38. On January 1, 2009, Respondent, pursuant to Article XXII and Exhibit E of the 2005—2009 CBA and the referenced Raytheon Benefits Handbook for Employees in Indiana, implemented the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2009 Changes

- Healthcare premiums increased
- Additional vision plan option introduced – "Vision Plan Plus"
- Increase in contributions to HSAs under United Healthcare Definity High Deductible Health Plan allowed
- United Healthcare adds Cancer Support Program

39. These changes were summarized in the 2008 "Your Raytheon Benefits" and "Summary of Benefit Changes" documents. Exhibit 12. The CBA between Respondent and the Union was in effect at the time. The Union did not file any grievances or unfair labor practice charges contesting these changes.

40. On February 26, 2009, Union bargaining representatives for the Ft. Wayne bargaining unit provided notice to Respond-

ent to open negotiations on the CBA with Respondent. No proposals to amend or eliminate the "pass through" language found in the expiring contract were made by either party during those negotiations.

41. On May 28, 2009, the Union and Raytheon finalized a new CBA for the Raytheon Ft. Wayne bargaining unit. The agreed-to language concerning year-to-year changes to Raytheon's Medical Plan remained unchanged in the 2009 CBA from the 2005 CBA. Attached as Exhibit 13 is the 2009–2012 CBA that includes the language.

42. In fall, 2009, Respondent mailed a document, entitled "Your Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by the Union. In addition to the "Your Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. A true and correct copy of the 2009 "Your Raytheon Benefits" is attached as Exhibit 14. Open enrollment occurred from October 16, 2009–November 4, 2009.

43. On January 1, 2010, Respondent, pursuant to Article XXII and Exhibit C of the 2009—2012 CBA and the referenced Raytheon Benefits Handbook, implemented the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2010 Changes

- Healthcare premiums increased
- Implemented two-year plan to change cost share from 80% - 20% to 75% - 25%. 2010 cost share at 77.5% - 22.5%
- Emergency Room copay increased to $150 for HMO, POS and PPO plans
- HMO outpatient diagnostic labs and X-rays covered at 80% and the 20% coinsurance applied towards employees "out of pocket" maximum
- HMO inpatient copay increased to $300, plan covers 90% of cost of inpatient hospitalizations after copay
- HMO out of pocket maximums increased to $1,500 for individuals and $3,000 for families
- Decreases to Company contribution to HRA through United Healthcare Definity Gold program with increased deductibles for in-network and separate deductibles for out-of-network
- CVS/Caremark replaces Medco as the administrator for prescription drug program

44. These changes were summarized in the 2009 "Your Raytheon Benefits" document. Exhibit 14. The CBA between Respondent and the Union was in effect at the time. The Union did not file any grievances or unfair labor practice charges contesting these changes.

45. In fall, 2010, Respondent mailed a document, entitled "Your Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by the Union. In addition to the "Your Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. A true and correct copy of the 2010 "Your Raytheon Benefits" is attached as Exhibit 15. Open enrollment occurred from October 15–November 3, 2010.

46. On January 1, 2011, Respondent, pursuant to Article XXII and Exhibit C of the 2009–2012 CBA and the referenced Raytheon Benefits Handbook, implemented the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2011 Changes

- Healthcare premiums increased
- Completed two-year plan to change cost share from 80% - 20% to 75% - 25%
- TRICARE Supplement returns but not as a Raytheon-sponsored program
- Medical insurance to cover dependents up to age 26 for medical, dental, and vision, pursuant to the Affordable Care Act
- Over-the-counter medications no longer considered eligible expenses for health care FSAs, HSAs or HRAs, pursuant to the Affordable Care Act
- Removal of lifetime maximums from medical plans, pursuant to the Affordable Care Act
- Change in-network outpatient copay to $20
- Delta Dental PPO Plus Premier administering the high/low dental care options (change from Metlife). Institution of a roll over maximum for the high option

47. These changes were summarized in the 2010 "Your Raytheon Benefits" document. Exhibit 15. The CBA between Respondent and the Union was in effect at the time. The Union did not file any grievances or unfair labor practice charges contesting these changes.

48. In fall, 2011, Respondent mailed a document, entitled "Your Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by the Union. In 2011, Raytheon also provided its employees with a "Highlights of Benefit Changes for 2012" document. In addition to the "Your Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. A true and correct copy of the 2011 "Your Raytheon Benefits" and "Highlights of Benefit Changes for 2012" is attached as Exhibit 16.

49. On January 1, 2012, Respondent, pursuant to Article XXII and Exhibit C of the 2009—2012 CBA and the referenced Raytheon Benefits Handbook, implemented the changes

to the Raytheon Plan listed below. The terms of the Raytheon Plan allowed Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Raytheon Plan. Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

2012 Changes

- Healthcare premiums increased
- United Healthcare Choice PPO and United Healthcare Choice POS consolidated into the United Healthcare Choice Plus Plan
- Waiver credit of $1,000 for waiving of Raytheon-sponsored medical coverage no longer offered
- All United Healthcare plans as well as Geisinger and Optima plans will have consistent coverage for infertility-related care with a $15,000 lifetime maximum
- Wellness Reward introduced
- Health care reform issues continue. All plans other than United, dependent eligibility up to age 26, pursuant to the Affordable Care Act
- Introduced Pharmacy Advisor Program for diabetes
- Generic step-therapy for certain high blood pressure medications
- Delta Dental program pays for space maintainers to age 14 rather than age 20. Replacement bridgework and dentures reverts to once every five years instead of every eight years

50. These changes were summarized in the 2011 "Your Raytheon Benefits" document. Exhibit 17. The CBA between Respondent and the Union was in effect at the time. The Union did not file any grievances or unfair labor practice charges contesting these changes.

51. On February 24, 2012, the Union informed Raytheon that it wanted to schedule bargaining sessions and open negotiations for a successor CBA to the current CBA, set to expire on April 29, 2012 at 12:01 a.m. The Union also provided Raytheon with written information requests. Exhibit 18.

52. On March 30, 2012, Raytheon provided a memorandum to the Union regarding the information requests made by the Union, along with the requested information. Exhibit 19.

53. The parties met for the first time to bargain over the terms of the next CBA on April 24, 2012. Over the course of the next five months, the parties would meet ten times in an attempt to reach a complete agreement (4/24, 4/25, 4/26, 4/27, 4/28. 5/17, 6/7, 7/25, 7/26, and 9/26). Raytheon's negotiating team consisted of Nickole Tushan, Bruce Menshy, Sara Spinney and Christen Shiman. The Union's negotiating team consisted of Chris Lovitt, Joan Fleming, Jack Gross, Becky Kumfer and Jeff Mitchell. USW Sub-District Director Mike O'Brien also participated in one negotiating session.

54. On April 24, 2012, the Union presented Raytheon with its non-economic contract proposals.[2] During the session, the Union presented Raytheon with UNE 6, 7, and 9. Exhibit 20. These proposals sought to strike the "pass through" language contained in Article X, Article XVI, and Exhibit C of the CBA. The "pass through" language contained in the expiring CBA highlighted that the same disability/leave of absence, paid time off and Raytheon Plan offered to all of the approximately 65,000 domestic Raytheon employees, would be offered to the Ft. Wayne bargaining unit employees on a year to year basis. The Union's proposals sought to designate that the disability/leave of absence, paid time off and Raytheon Plan benefits offered to the Ft. Wayne bargaining unit employees would remain the same for the life of the CBA.

55. Raytheon presented its non-economic proposals during the afternoon on April 24, 2012. On April 25, 2012, Raytheon responded to UNE 6, 7, and 9 and explained to the Union negotiating team that the "pass through" language had been in place for at least the previous three contracts. Raytheon stated that all 19 bargaining units across the country, comprising 5210 employees, were on the same benefit plan with the same year to year pass through language. The Union responded that it was no longer willing to waive its right to bargain over a mandatory subject of bargaining such as health benefits. Raytheon rejected the Union's proposals to modify the contract language and requested alternative proposals from the Union.

56. During bargaining on April 25, 2012, the Union proposed the "pass through" language be revised to state that changes may be made "by mutual agreement." The Union proposed this language in UNE 6(a) and intended that the proposal applied to the same language in UNE 7 and UNE 9. Exhibit 21.

57. On April 26, 2012, Raytheon presented a counter-proposal. Raytheon's proposal included language in each of the relevant provisions that "in the event that a change to this benefit is planned, the Company will provide the Union with advanced notice of those changes, to the extent possible and clarify any questions regarding them, prior to implementation." Exhibit 22. The Union rejected this counter-proposal.

58. On April 27, 2012, the Union stated that its medical insurance proposal (UNE 9) had not changed.

59. Raytheon presented the Union with its last, best and final offer on April 28, 2012. During bargaining that same day, the Union informed Raytheon that after a meeting with the membership, no vote had been taken on Raytheon's last, best and final offer. According to the Union, the two biggest issues for the membership were proposed changes in the PTO policy and in continuing to agree to the "pass through" language. Bargaining continued on April 28, 2012, concerning the PTO policy, wages and the "pass through" language with no resolution. The CBA expired on April 29, 2012, at 12:01 a.m. The Ft. Wayne bargaining unit employees continued to work under the status quo.

60. Union and Raytheon representatives met on May 17, 2012, to discuss outstanding bargaining issues. Raytheon and the Union discussed options to the "pass through" language.

[2] Throughout the course of the 2012 bargaining, the Union provided its proposals as "Union Non-Economic" proposal # and "Union Economic" proposal #, and the bargaining notes reflect these proposals as UNE and UE. By the same token, the Company provided its proposals as Company Non-Economic and Company Economic or CNE and CE. That nomenclature is used herein, for consistency. Whenever a proposal was modified by the party that introduced the proposal, a letter was introduced noting the updated proposal (i.e. UNE 6(a), etc.).

Union Negotiator Mike O'Brien made several suggestions concerning potential solutions to the "pass through" language issue, including proposing to explore whether employees could be insured through the Steelworkers Health & Welfare Fund. No formal proposals were exchanged by either side. The parties continued to negotiate on wages, union security clause language and proposed changes to the PTO policy.

61. Union and Raytheon representatives met again on June 7, 2012. The parties continued to make no headway on the "pass through" language and no proposals were exchanged on that issue. The parties requested the intervention of an FMCS mediator for the next bargaining session.

62. The parties met on July 25–26, 2012, with FMCS Mediator Tim Bower. The mediator identified four outstanding issues: (1) pass through; (2) Right-to-Work law issues; (3) the attendance policy/PTO language; and (4) wages. During bargaining on July 26, 2012, Raytheon presented the Union with another last, best and final offer. The offer did not include any modifications to the "pass through" language from the expired CBA. The bargaining unit did not vote on Raytheon's last, best and final offer.

63. On September 26, 2012, the parties met to continue bargaining over outstanding issues, including wages, timing of implementation of wage increases and the "pass through" language. The parties were close to agreement on holidays, the attendance policy and right-to-work language. Raytheon maintained its position on the "pass through" issue, but said it would entertain any options the Union wanted to put on the table. The Union again stated it would not waive its right to bargain over a mandatory subject of bargaining. Raytheon explained that without a new proposal from the Union on the "pass through" issue, it believed the parties were at impasse. The Union, for its part, stated its belief that the parties were not in fact at an impasse. Neither party exchanged any proposals on "pass through."

64. Raytheon and the Union had no bargaining sessions after September 26, 2012. During the 2012 bargaining, Raytheon and the Union did not reach impasse.

65. During the negotiations on September 26, 2012, the Union solicited Raytheon's position on whether the Ft. Wayne bargaining unit employees would be asked to participate in the upcoming open enrollment period for the Raytheon Plan. Raytheon informed the Union that open enrollment for the 2013 benefits period was about to commence and that it would proceed as planned for all Raytheon employees, based upon Raytheon's belief this was required by the terms of the expired CBA. The Union asked Raytheon to exclude the Ft. Wayne bargaining unit employees from the upcoming open enrollment period.

66. Raytheon instituted changes to its 2013 benefit package for all domestic employees and subsequently mailed a document, entitled "Your Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by the Union. In addition to the "Your Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. A true and correct copy of the 2012 "Your Raytheon Benefits" is attached as Exhibit 23. Open enrollment commenced on October 12, 2012, and closed on October 31, 2012.

67. On January 1, 2013, Respondent implemented the changes to the Raytheon Plan listed below. The terms of the Raytheon Plan referenced in the CBA allowed Respondent to alter costs incurred by plan participants and/or levels of benefits received by plan participants under the Plan.

2013 Changes

- Healthcare premiums increased
- Conversion of the United Healthcare Gold plan to HSA 2
- Higher in-network deductible for employee and employee children ($2,500) than under the Gold plan
- Expanded list of women's health services covered at 100% with no deductible as preventative care, pursuant to the Affordable Care Act
- Generic use requirement for employees to receive 100% coverage for preventative care prescriptions, pursuant to the Affordable Care Act
- United Healthcare HSA covers various preventative drugs as outlined on the Treasury Guidance List without first meeting deductibles
- Expansion of Wellness Reward to $250
- Increase in out-of-pocket costs if employees purchase brand name prescription when a generic equivalent is available. Employee pays the cost difference, plus the copayment
- Flexible Spending Account lowered to $2,500 on medical, dental and vision, pursuant to the Affordable Care Act

68. These changes were summarized in the 2012 "Your Raytheon Benefits" Document. Exhibit 23. The CBA between Respondent and the Union was expired at the time these changes were implemented.

69. To the extent the health insurance plan change summaries contained herein are inconsistent with the attached exhibits, the exhibits are controlling.[3]

In addition to the written stipulated facts some of the attached exhibits reveal the following:

As reflected in exhibit 1, entitled "Raytheon Health Benefits Plan" "Plan Document" effective January 1, 1999, at article 1.3: "The Benefit Programs and the Benefit Program Documents, in their entirety, as amended from time to time, are hereby incorporated by reference and made a part of this Plan." Article 5.2(a) provides that "Participant contributions, if any, shall be determined by Company." It also provides, "Participants contributions shall be subject to change by and in the sole discretion of the Company, and each Participant shall be ad-

[3] Some of the exhibits presented by way of the stipulation were numbered incorrectly. In this regard, it is stated in the General Counsel's brief that the official record identifies Exh. 17 as to what is labeled Exh. 18 in the stipulated facts, and that similarly: Exh. 19 is what is identified as Exh. 20 in the stipulation; Exh. 20 is what is identified as exhibit 21 in the stipulation; Exh. 21 is what is indentified as Exh. 22 in the stipulation; and Exh. 22 is what is identified as Exh. 23 in the stipulated record.

vised in writing of any such change in the amount of such contributions prior to the effective date of such change." Article 8.1, states: "Right to Amend. Notwithstanding any provisions of any other communication, either oral or written, made by the Employer, an Administrative Services Provider, or any other individual or entity to Employees, any service provider, or any other individual or entity, the Company reserves the absolute right to amend the plan and any or all Benefit Programs incorporated herein from time to time, including, but not limited to, the right to reduce or eliminate benefits provided pursuant to the provisions of the Plan or any Benefit Program as such provisions currently exists, or may hereinafter exist." Article 8.2 states, "the Company reserves the absolute and unconditional right to terminate the Plan and any and all Benefit Programs, in whole or in part, with respect to some or all of the Employees."

The language for the 2000 to 2005 collective-bargaining agreement pertaining to medical benefits is included in Exhibit E attached to that agreement. The relevant language reads as follows:

> SECTION 1. MEDICAL/VISION PLAN.
> A detailed description of the Medical/Vision Plan is available in the Raytheon Benefits Handbook for Employees in Indiana. This plan provides employees and eligible covered income dependents with group hospital, medical, and surgical coverage, behavioral healthcare for mental health and substance abuse, prescription drugs and vision care. Employee contributions for the Medical/Vision Plan will not exceed the rates paid by salaried employees at our Ft. Wayne facilities.

The language in the parties' 2005 to 2009 collective-bargaining agreement contained the following change pertaining to medical benefits. It stated:

> The Raytheon United Benefit Plans will be available for all employees, offered on the same basis as is offered to salaried employees at the Ft. Wayne, Indiana, location from year-to-year. All benefit coverages for new hires, except the pension plan, will begin upon the hire date.

The remaining language was the same as in the 2000 to 2005 collective-bargaining agreement set forth above. The language pertaining to medical benefits remained the same in the 2009 to 2012 collective-bargaining agreement as it was in the 2005 to 2009 agreement.

The fall 2003 distribution to employees states the replacement of Partners Health Plan by United Health Care was limited to Fort Wayne employees. The record contains a benefit summary distribution to employees entitled, "Your 2013 Benefits Handbook" and it issued in January 2013. It states on the first page that, "Raytheon reserves the right to amend or terminate any of the plans at any time. Such amendments or modifications may be retroactive, if necessary, to meet statutory requirements or for any other appropriate reason. Benefits for employees represented by a bargaining unit will be in accordance with their collective-bargaining agreement."

A. Analysis

In *NLRB v. Katz,* 369 US 736, 743, 745–747 (1962), following a union's recent certification by the Board as collective bargaining representative the parties began contract negotiations. While no impasse in negotiations was reached the respondent employer made three unilateral changes concerning mandatory subjects of bargaining, one pertaining to merit increases, one to sick leave, and a new system of automatic wage increases. Court stated:

> We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of s 8(a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of s 8(a)(5) much as does a flat refusal.[FN11]
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> * * *
>
> The respondents' third unilateral action related to merit increases, which are also a subject of mandatory bargaining. *National Labor Relations Board v. J. H. Allison & Co.,* 6 Cir., 165 F.2d 766. The matter of merit increases had been raised at three of the conferences during 1956 but no final understanding had been reached. In January 1957, the company, without notice to the union, granted merit increases to 20 employees out of the approximately 50 in the unit, the increases ranging between $2 and $10. [FN13] This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of s 8(a)(5), unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews-in effect, were a mere continuation of the status quo-differentiates them from the wage increases and the changes in the sick-leave plan. We do not think it does. Whatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.[FN14]

In *E.I. DuPont de Nemours,* 355 NLRB 1084 (2010), enf. denied 682 F.3d 65 (D.C. Cir. 2012),[4] the respondent's Beneflex Plan, under which it provided health care and a range of other benefits to many of its employees nationwide was incorporated into the parties 1994 and 1997 collective-bargaining agreements. The Beneflex Plan included a reservation of rights provision granting the Respondent authority to modify benefits under the plan on an annual basis. During the term of those collective-bargaining agreements, the respondent made unilateral changes to the Beneflex Plan annually under the reservation of rights provision without objection by the union. The issue in *DuPont* before the Board was when the union filed charges over DuPont's continuing to make such changes during a contractual hiatus period. The Board majority in finding *DuPont* violated the Act set forth following principles at 1084–

[4] The court remanded the matter to the Board. The Board accepted the remand, but has not as yet issued a decision.

1085:

> It is settled law that when parties are engaged in negotiations for a collective-bargaining agreement an employer is obliged to refrain from making unilateral changes, absent an impasse in bargaining for the agreement as a whole. See, e.g., *Register-Guard*, 339 NLRB 353, 354 (2003); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). As the Supreme Court has recognized, "[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).
>
> It is undisputed that, at the time that the Respondent unilaterally implemented changes in the Beneflex Plan, the parties were engaged in bargaining and were not at impasse. But relying on the Board's *Courier-Journal decisions*, the Respondent asserts that its unilateral actions were lawful because they were consistent with the parties' past practice. The Respondent bears the burden of establishing this affirmative defense. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), enfd. 317 F.3d 316 (D.C. Cir. 2003).
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> We find that the Respondent has not carried that burden. In the *Courier-Journal* cases, a Board majority found that the employer's unilateral changes to employees' health care premiums during a hiatus period between contracts were lawful because the employer had established a past practice of making such changes both during periods when a contract was in effect and during hiatus periods. The Respondent's asserted past practice in this case, in contrast, was limited to changes that had been made when a contract, which included the reservation of rights language, was in effect. It is apparent that a union's acquiescence to unilateral changes made under the authority of a controlling management-rights clause has no bearing on whether the union would acquiesce to additional changes made after that management-rights clause expired. The Respondent has simply not carried its burden of showing relevant past practice under the *Courier*-Journal cases—annual unilateral changes during hiatus periods. As a result, the Respondent's prior unilateral changes do not establish a past practice justifying the Respondent's unilateral actions during a hiatus between contracts. The *Courier-Journal* decisions are plainly distinguishable on this basis, as the judge explained in a decision we adopt today in *E.I. DuPont*, 355 NLRB 1096 (2010), presenting a similar bargaining issue but at a different facility of the Respondent.
>
> This factual distinction is key because it implicates important collective-bargaining principles. Extending the *Courier-Journal* decisions to the situation presented here would conflict with settled law that a management-rights clause does not survive the expiration of the contract embodying it, absent a clear and unmistakable expression of the parties' intent to the contrary,[FN1] and does not constitute a term and condition of employment that the employer must continue following contract expiration.[FN2] Those principles apply to a broad management-rights clause as well as to more narrow contractual reservations of managerial discretion addressing, as here, a specific subject of bargaining[FN3] and embodied in a plan document that has been incorporated in a collective-bargaining agreement.[FN4] Moreover, extending *Courier-Journal* to circumstances such as those presented here would render the expiration of the management-rights clause meaningless wherever the employer had acted under its authority to make changes during the contract period. This, in turn, "would vitiate an employer's bargaining obligation whenever a contract containing a broad management-rights clause expired." *Beverly Health & Rehabilitation Services*, 335 NLRB at 637. Such an outcome would discourage, rather than promote, collective bargaining, in particular, making unions wary of granting any discretion to management during the contract's term.[FN5]

In *E.I. DuPont,* supra at 1085 fns. 1 and 2, the Board majority cited the following cases for the principle that a management rights clause does not survive the expiration of a contract, absent a clear and unmistakable expression of the parties' intent to the contrary:

> FN1. See, e.g., *Beverly Health & Rehabilitation Services*, supra, 335 NLRB at 636 fn. 6 (collecting cases), enfd. 317 F.3d 316 (D.C. Cir. 2003). "The law is quite clear that, when a collective agreement expires, any management-rights … clause it contains expires with it." Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* § 20.16 at 638 (2d ed. 2004) (footnote omitted).
>
> FN2. *Control Services*, 303 NLRB 481, 484 (1991) (management-rights clause "is not, in itself, a term or condition of employment that outlives the contract that contains it, absent some evidence of the parties' intention to the contrary"), enfd. mem. 975 F.2d 1551 (3d Cir. 1992); accord: *Furniture Renters of America*, 311 NLRB 749, 751 (1993) (quoting *Control Services*, supra), enfd. in rel. part 36 F.3d 1240, 1245 (3d Cir. 1994); *Holiday Inn of Victorville*, 284 NLRB 916 (1987).

Along these lines, in *WKYC-TV, Inc.,* 359 NLRB 286, 288 (2012), the Board majority stated:

> It is certainly true that a select group of contractually established terms and conditions of employment—arbitration provisions, no-strike clauses, and management-rights clauses—do *not* survive contract expiration, even though they are mandatory subjects of bargaining. In agreeing to each of these arrangements, however, parties have waived rights that they otherwise would enjoy in the interest of concluding an agreement, and such waivers are presumed not to survive the contract. The Board has also held that a management-rights clause normally does not survive contract expiration, because "the essence of [a] management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls." *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003).[FN9

For other cases finding the expiration of a managements rights clause at a contracts end see *Guard Publishing,* 339 NLRB 353, 355 (2003); *Paul Mueller Co.,* 332 NLRB 312, 313 (2000); *Presbyterian University Hospital,* 325 NLRB 443, 443 fn. 2, enfd. 182 F.3d 904 (3d Cir. 1999); *Ironton Publications*, 321 NLRB 1048 (1996); *Blue Circle Cement Co.*, 319 NLRB 954 (1995), enf. granted in part, denied in part on other grounds 106 F.3d 413 (10th Cir. 1997); *Buck Creek Coal*, 310 NLRB 1240 fn. 1 (1993); *Control Services*, 303 NLRB 481, 484 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992); and *U.S. Can Co.*, 305 NLRB 1127 (1992), enfd. 984 F.2d 864 (7th Cir. 1993).[5]

The Board majority also stated in *E. I DuPont,* supra at 1085 fn 5 that:

> FN5. We further observe that the *Courier-Journal* decisions are in tension with previously settled principles. First, it is well established that silence in the face of past unilateral changes does not constitute waiver of the right to bargain. See *Owens-Corning Fiberglass*, 282 NLRB 609 (1987); *Exxon Research & Engineering Co.*, 317 NLRB 675, 685–686 (1995).

In this regard in *Verizon New York, Inc. v. NLRB,* 360 F.3d 206, 209 (D.C. Cir. 2004), the court stated:

> (a) "union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time," *Owens-Corning Fiberglas Corp.,* 282 N.L.R.B. 609, 1987 WL 90160 (1987). *See Ciba-Geigy Pharmaceuticals Div. v. NLRB,* 722 F.2d 1120, 1127 (3d Cir.1983).

Similarly, in *NLRB v. Miller Brewing Co.,* 408 F.2d 12, 15 (9th Cir.1969), the court stated:

> Respondent next contends that because Union failed to object to the previous unilateral issuance of plant rules by other employers and because of the clause in the collective bargaining agreement allowing discharge for 'cause,' it has waived any right to now request negotiations. The first part of this argument is unconvincing because it is not true that a right once waived under the Act is lost forever. *Pacific Coast Ass'n of Pulp & Paper Mfrs. v. NLRB,* 304 F.2d 760 (9th Cir. 1962). Each time the bargainable incident occurs- each time new rules are issued- Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent 'close-out;' as in contract law, an offer once declined but then remade can be subsequently accepted. Cf. *Leeds & Northrup Co. v. NLRB,* 391 F.2d 874 (3d Cir. 1968); *General Tel. Co. v. NLRB,* 337 F.2d 452 (5th Cir. 1964).

In the instant case, Respondent, in its brief, cites *Courier-Journal,* 242 NLRB 1093 (2004). In *Courier-Journal,* the parties' collective bargaining agreements expired on August 7, 2000. The most recent agreements for the engraving and pressroom departments contained language that bargaining unit health insurance plans were to be "on the same terms as are in effect for employees not represented by a labor organization. Any changes (benefits and Premiums) in such plans shall be on the same basis as for non-represented employees." The pressroom contract also contained language that "the company reserves the right to modify or terminate any (or all) benefits in this Article, at any time." Earlier contracts contained those provisions. The respondent employer made changes in the costs or benefits of employee's health insurance each year since July 1991 for represented and non-represented employees without bargaining with the union. The Board specifically noted some changes were made during the open period or hiatus between contracts. Until the fall of 2001, the Union never objected that the unilateral changes were unlawful. As it had done in July 1992, and each year through 2000, on July 1, 2001, the respondent increased employee contributions towards healthcare insurance premiums for represented and non-represented employees. On September 24, 2001, the respondent issued a memo to employees announcing another increase in employees' contributions to healthcare premiums and a number of more far reaching changes in health care insurance

[5] In terms of waiver of a statutory right, in *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983) the Court stated:

> Thus, we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.[FN12]
>
> [FN12]. The Courts of Appeals have agreed that the waiver of a protected right must be expressed clearly and unmistakably. See, *e.g., Chesapeake & Potomac Telephone Co. v. NLRB,* 687 F.2d 633, 636 (2nd Cir. 1982); *NLRB v. Southern California Edison Co.,* 646 F.2d 1352, 1364 (9th Cir. 1981); *Communication Workers of America, Local 1051 v. NLRB,* 644 F.2d 923, 927 (1st Cir. 1981).

In *Provena St. Joseph Medical Center,* 350 NLRB 808, 810-811, 816 (2007), the Board majority set forth a detailed description of the lengthy history of the Board's application of waiver analysis in terms of a union's statutory right to bargain. There the Board stated:

> This case presents us with the opportunity to explain and reaffirm our adherence to one of the oldest and most familiar of Board doctrines, the clear and unmistakable waiver standard, in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of a collective-bargaining agreement. The clear and unmistakable waiver standard is firmly grounded in the policy of the National Labor Relations Act promoting collective bargaining. It has been applied consistently by the Board for more than 50 years, and it has been approved by the Supreme Court. *NLRB v. C & C Plywood*, 385 U.S. 421 (1967). By contrast, the contract coverage approach, urged by the Respondent and endorsed by the dissent, is a relatively recent judicial innovation, adopted by two appellate courts.[FN14] In the framework established by Congress, however, it is the function of the Board, not the courts, to develop Federal labor policy. See, e.g., *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 266 (1975).[FN15]
>
> [FN15]. Our colleague states that the Board, in developing federal labor policy, should "pay close attention to what the courts are saying." We have done so. First, the Supreme Court and a majority of the appellate courts have approved the waiver standard. Second, our decision here thoroughly explains our reasons for adhering to the waiver standard and therefore fully responds to the minority of courts that have held otherwise.

For a more detailed discussion of the history concerning the Board's waiver analysis see the complete *Provena St. Joseph* decision. See also, *Verizon New York, Inc., v. NLRB,* 360 F.3d 206, 208 (D.C. Cir. 2004), quoting *Metropolitan Edison Co.* and stating that "Waiver of a right protected by the National Labor Relations Act must be 'clear and unmistakable.'"

benefits of unit employees that would go into effect on January 1, 2002. At a bargaining session on October 3, 2001, the respondent informed the union about these latter changes, to which the union objected and wanted to negotiate. The respondent responded that it had the right to make the changes without bargaining as long as it kept the benefits for unit employees the same as those for nonrepresented employees.

In *Courier-Journal* at 1094, the Board majority stated, "a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo–not a violation of Section 8(a)(5)." The Board majority found the respondent's January 2002 changes in unit employees health care premiums of benefits did not violate Section 8(a)(5) as the changes were implemented pursuant to a well-established past practice. The Board majority specifically stated, "For some 10 years, the Respondent had regularly made unilateral changes in the costs and benefits of the employees' health care program, both under the parties' successive contracts and during hiatus periods between contracts." The union did not oppose those changes and like the prior changes the January 2002 changes for unit employees were identical to those for unrepresented employees, consistent with the 'same basis as' clause of the parties successive contracts. The Board majority stated, "The significant aspect of this case is that the Union acquiesced in a past practice under which premiums and benefits for unit employees were tied to those of nonunit employees." The Board majority stated they did not pass on the issue of whether a contractual wavier of the right to bargain survives the expiration of the contract, stating their decision was not grounded in waiver but on past practice and the continuation thereof. The Board majority found inapposite cases which hold that the union acquiescence in prior unilateral changes does not operate as a waiver of its right to bargain over such conduct for all time. The Board majority went on to state at 1095:

> Our colleague fears that the Union's acquiescence in past unilateral action on a matter means that the Union can never regain bargaining rights as to the matter. In our view, the fear is groundless. The Union, in bargaining, can seek to take away that discretion, and can seek definite terms. Of course, the Employer can oppose and seek to retain its discretion. If impasse is reached, consistent with current Board law, the employer cannot implement its proposal, because it vests complete discretion in the Employer.[7]
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> [7] *McClatchy Newspapers,* 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997).

McClatchy Newspapers, supra, cited by the Board majority in *Courier-Journal,* involved the Board's finding a 8(a)(5) violation over the respondent employer's implementation after impasse of a proposal for unilateral discretion over future merit increases. The Board stated at 1390–1391 that:

> As explained below, we find that if the Respondent was granted carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the Guild's agreement), it would be so inherently destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasses and restore active collective bargaining.
>
> Were we to allow the Respondent here to implement its merit wage increase proposal and thereafter expect the parties to resume negotiations for a new collective-bargaining agreement, it is apparent that during the subsequent negotiations the Guild would be unable to bargain knowledgeably and thus have any impact on the present determination of unit employee wage rates. The Guild also would be unable to explain to its represented employees how any intervening changes in wages were formulated, given the Respondent's retention of discretion over all aspects of these increases. Further, the Respondent's implementation of this proposal would not create any fixed, objective status quo as to the level of wage rates, because the Respondent's proposal for a standardless practice of granting raises would allow recurring, unpredictable alterations of wages rates and would allow the Respondent to initially set and repeatedly change the standards, criteria, and timing of these increases. The frequency, extent, and basis for these wage changes would be governed only by the Respondent's exercise of its discretion. [FN21] The Respondent's ongoing ability to exercise its economic force in setting wage increases and the Guild's ongoing exclusion from negotiating them would not only directly impact on a key term and condition of employment and a primary basis for negotiations, [FN22] but it would simultaneously disparage the Guild by showing, despite its resistance to this proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment.

Thus, by its reference to *McClatchy Newspapers* in *Courier-Journal,* the Board majority concluded that declaring impasse and implementing a proposal giving a respondent employer unlimited discretion over health insurance, like that in the case of merit raises, was inimical to the bargaining process and prohibited by Section 8(a)(1) and (5) of the Act.[6]

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[6] The General Counsel contends that cases such as *Courier-Journal*, supra and *Capitol Ford,* 343 NLRB 1058 (2004), are irreconcilable with the Court's decision in *NLRB v. Katz,* 369 U.S. 736 (1961), and should be overruled by the Board. I concur with the recommendation to the Board that the rationale in *Courier* and like cases be overturned. In *NLRB v. Katz,* the Court specifically held the unilateral implementation during negotiations of an alleged past practice pertaining to merit increases violated Section 8(a)(1) and (5) of the Act because "the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases." In *Courier-Journal,* the Board specifically held that the health changes were informed by discretion therefore concluded that the respondent employer could not insist to impasse and implementation of the health care changes for to do so would violate Section 8(a)(1) and (5) of the Act. Yet, contrary to the teachings of the Court in *Katz,* the Board majority in *Courier* allowed the Respondent to implement those changes post contract expiration without reaching an impasse. The Court in *Katz*, in a pre-impasse situation, found that the unilateral implementation of a proposal, allegedly derived from a past practice, during negotiations, which allowed an employer unlimited discretion violated Section 8(a)(5) of the Act. Thus, the Board's inter-

In *McClatchy Newspapers, Inc. v. NLRB,* 131 F.3d 1026, 1032–1033, 1035 (D.C. Cir. 1997), in enforcing the Board's decision the court held:

> Here, as in *Bonanno Linen,* the Board has denied the employer a particular economic tactic for the sake of preserving the stability of the collective bargaining process.
>
> The post-impasse rule itself regulates process through power. The Board has told us that its rationale for permitting an employer to unilaterally implement its final offer after impasse is that such an action breaks the impasse and therefore encourages future collective bargaining.[FN4] The theory might well be thought somewhat strained, for it does not explain why the Board decided to handle impasse with this rule instead of another. The Board could have adopted, for example, a rule requiring the status quo to remain in effect until either the union or the employer was willing to resume negotiations. Stagnancy might pressure both the employer and the union to bend. But the rule it did choose-allowing the employer to implement its final offer-moves the process forward by giving one party, the employer, economic leverage. And in this case, where the employer has advanced no substantive criteria for its merit pay proposal, the Board has decided that the economic power it has granted would go too far. Rather than merely pressuring the union, implementation might well irreparably undermine its ability to bargain. Since the union could not know what criteria, if any, petitioner was using to award individual salary increases, it could not bargain against those standards; instead, it faced a discretionary cloud. As the Board put it, "the present case represents a blueprint for how an employer might effectively undermine the bargaining process while at the same time claiming that it was not acting to circumvent its statutory bargaining obligation." *McClatchy II* at 6. We think that it is within the Board's authority to prevent this development:
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> [T]he Board, employing its expertise in the light of experience, has sought to balance the 'conflicting legitimate interests' in pursuit of the 'national policy of promoting labor peace through strengthened collective bargaining.' The Board might have struck a different *balance* from the one it has, and it may be that some or all of us would prefer that it had done so. *But assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment that Buffalo Linen ruled should be left to the Board.*
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> * * *
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> Not only does an employer's implementation of a proposal such as petitioner's deprive the union of "purchase" in pursuing future negotiations, the Board also concluded that by excluding the union from the process by which individual rates of pay are set petitioner "simultaneously disparag[ed] the Guild by showing ... its incapacity to act as the employees' representative in setting terms and conditions of employment." *McClatchy II* at 6. It knew no specifics about the merit raises, therefore it had no information to relay. In that regard, the Board echoed concerns expressed in Chief Judge Edwards' prior concurring opinion that petitioner's implementation of its proposal could be seen as seeking de-collectivization of bargaining.[FN5] The Board concluded that petitioner's action was "so *inherently* destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining." *McClatchy II* at 6 (citations omitted). Petitioner particularly objects to this passage, arguing that the phrase "inherently destructive"-which, as the Board acknowledges, comes from *NLRB v. Great Dane Trailers,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967)-applies only to employer behavior that is claimed to violate § 8(a)(3), the anti-discrimination provision of the Act. But the Board explained that it was using the term only to show that, as in *Great Dane,* the employer's action will have "foreseeable consequences" notwithstanding its motive. We do not see why that observation is independently objectionable.
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> * * *
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> We think the Board is free to draw on its expertise to determine that wages are typically of paramount importance in collective bargaining and to suggest that wages, unlike scheduling or a host of other decisions generally thought closely tied to management operations, are expected to be set bilaterally in a collective bargaining relationship.[FN8]

In *E.I. Du Pont De Nemours and Co. v. NLRB,* 682 F.3d 65, 68–70 (D.C. Cir. 2012) the court stated:

> We hold Du Pont, by making unilateral changes to Beneflex after the expiration of the CBAs, maintained the status quo expressed in the Company's past practice; those changes were therefore lawful under *Courier–Journal.* While the CBAs were in effect, Du Pont annually made unilateral changes to the package of benefits offered under Beneflex, including changes to the premiums the employees paid and to the benefits they received. Du Pont made the unilateral changes in dispute here after the CBAs had expired, but those changes were similar in scope to those it

nal findings and conclusions in *Courier-Journal* are inconsistent with the Court's conclusions in *Katz.*

Moreover, the Board's conclusions in *Courier-Journal* appear to contradict basic concepts of impasse, leaving the parties as to we have here in labor limbo. Under Board law, once the parties reach a lawful impasse in bargaining an employer may implement its last offer to a union. *NLRB v. Katz*, 369 U.S. 736 (1961); *E. I. du Pont de Nemours & Co*., 346 NLRB 553 (2006); *Gloversville Embossing*, 314 NLRB 1258 (1994); *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1967), rev. denied 395 F.2d 622 (D.C. Cir. 1968), Yet, in *Courier-Journal* the Board majority found that the Respondent could unilaterally implement terms and conditions pertaining to health insurance during ongoing negotiations, although it could not lawfully insist to the same proposal to impasse. That has brought about the unusual circumstance in the instant case in which no party is claiming impasse has been reached despite the Respondent's implementation of its health care changes. In short, there is an underlying inconsistency, at least to the undersigned, in allowing an employer to unilaterally implement changes to terms and conditions of employment during negotiations, but at the same time state that the employer cannot lawfully insist to bargaining to impasse and implement that same proposal.

had made in prior years. Du Pont's discretion in making those changes was limited by the terms of the reservation of rights clause in the Beneflex plan documents, which permitted changes during—and only during—the annual enrollment period. Moreover, here as in *Courier–Journal,* the employer was obligated under its past practice to "treat the [union] employees exactly the same as [the non-union] employees," and so the employer's "discretion was limited" because it "did not have the freedom to grant [non-union] employees a benefit and deny same to [union] employees." 342 N.L.R.B. at 1094. Under the Board's precedent, therefore, Du Pont's making annual changes to Beneflex became a term and condition of employment the company could lawfully continue during the annual enrollment period, irrespective of whether negotiations for successor contracts were then on-going.

The Board concluded Du Pont violated the Act because it failed to show "relevant past practice under the *Courier–Journal* cases-annual unilateral changes during hiatus periods." *E.I. Du Pont De Nemours, Louisville Works,* 355 N.L.R.B. No. 176, 2010 WL 3452312 at 2 (Aug. 27, 2010). The Board distinguished *Courier–Journal* on the ground that the employer there had "established a past practice of making [health care premium] changes both during periods when the contract was in effect and during hiatus periods" whereas Du Pont has made uncontested unilateral changes to Beneflex only while CBAs were in effect. *Id.* The Board emphasized the importance of this "factual distinction" as follows:

> Extending the *Courier–Journal* decisions to the situation presented here would conflict with settled law that a management-rights clause does not survive the expiration of the contract ... and does not constitute a term and condition of employment that the employer must continue following contract expiration. Id.

Be that as it may, whether a management-rights clause survives the expiration of the contract is beside the point Du Pont is making. The Board has previously recognized that the lawfulness of a change in working conditions made after the CBA has expired depends not upon "whether a contractual waiver of the right to bargain survives the expiration of the contract" but rather upon whether the change "is grounded in past practice, and the continuance thereof." *Courier–Journal,* 342 NLRB at 1095. The Sixth Circuit captured the point precisely in *Beverly Health and Rehabilitation Services, Inc. v. NLRB,* 297 F.3d 468, 481 (2002): "[I]t is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract." A subsequent Board decision unambiguously incorporates that teaching: "[T]he mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice." *Capitol Ford,* 343 NLRB 1058, 1058 fn. 3 (2004). Therefore, although the employer "cannot rely upon the management rights clause of that contract to justify unilateral action," the "past practice is not dependent on the continued existence of the [expired] collective-bargaining agreement." Id.

Because an employer may make unilateral changes insofar as doing so is but a continuation of its past practice, we see no reason it should matter whether that past practice first arose under a CBA that has since expired. Nor did the Board in *Capitol Ford,* where it upheld as lawful the employer's unilateral changes to employee compensation and paid holidays on the basis of an established practice even though the employer (and its predecessor) had never before made such changes when a CBA was not in force. 343 NLRB at 1058. The Board has not offered any reason whatsoever for thinking a unilateral action being taken during a hiatus period, although expressly deemed immaterial in *Capitol Ford,* should be dispositive in this case. Indeed, the Board did not so much as cite *Capitol Ford* or *Beverly Health & Rehabilitation Services, Inc.,* 346 NLRB 1319 (2006), where the Board again said that "without regard to whether the management-rights clause survived, the [employer] would be privileged to have made the unilateral changes at issue if [its] conduct was consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract," id. at 1333 fn. 5. Although the Board had in several earlier cases held unilateral changes made pursuant to a past practice developed under an expired management-rights clause were unlawful, see *Beverly Health & Rehab. Servs.,* 335 NLRB 635, 636–637 (2001); *Register-Guard,* 339 NLRB 353, 355–356 (2003), the Board clearly took a different position in its more recent decisions.

Accordingly, we hold the Board failed to give a reasoned justification for departing from its precedent. On remand, the Board must either conform to its precedent in *Capitol Ford* and in the 2006 iteration of *Beverly Health Services* or explain its return to the rule it followed in its earlier decisions. See *Manhattan Ctr. Studios, Inc. v. NLRB,* 452 F.3d 813, 816 (D.C.Cir. 2006) ("If we conclude that the Board misapplied or deviated from its precedent, we often remand with instructions to remedy the misapplication [or] deviation").[FN*]

Thus, in *Du Pont,* the court, citing *Courier-Journal* concluded that the respondent employer would be free to make changes in health care benefits for bargaining unit employees because it had done so as part of a past practice, and because its discretion was circumscribed by the fact that changes were limited to the annual enrollment period, and by past practice required to be the same as those implemented for non-bargaining unit employees. Yet, the court did not address the fact that the Board in *Courier-Journal* also found those types of limitations are in fact no limitations at all in that they provided an employer with unlimited discretion and therefore the employer could not insist to impasse and then implement a proposal giving it the right to unilaterally change healthcare benefits based on what it provided to nonbargaining unit employees. See, *Courier-Journal,* supra at 1095.

In the instant case the Ft. Wayne bargaining unit consists of 35 employees. As of January 1, 1999, salaried and hourly non-union employees at the Ft. Wayne facility were covered by the new Raytheon Plan. Raytheon Medical is a self-insured medical care option encompassed within the Raytheon Plan. All Raytheon sites in the United States participate in the Raytheon Plan. The Raytheon Plan is available to approximately 65,000

domestic employees, including approximately 5000 union employees across 19 bargaining units. The Union does not represent any Raytheon employees other than those in the Ft. Wayne bargaining unit.

On January 1, 2001, the Ft. Wayne bargaining unit employees, pursuant to their recent collective-bargaining agreement became covered by the Raytheon Plan. Plan documents provided that "the Company reserves the absolute right to amend the plan and any or all Benefit Programs incorporated herein from time to time, including, but not limited to, the right to reduce or eliminate benefits . . ." They also provided that, "the Company reserves the absolute and unconditional right to terminate the Plan and any and all Benefit Programs, in whole or in part, with respect to some or all of the Employees." In the parties 2000–2005 collective-bargaining agreement the parties agreed that contributions for the Medical/Vision Plan would not exceed the rates paid by salaried employees at the Ft. Wayne facility. As reflected in the stipulated record, it was agreed upon implementation of the Raytheon Plan, Respondent would pay the majority of the projected annual plan cost for Raytheon Medical and employees were responsible for the balance of the projected annual plan cost. The premium payment was split 85–15 percent between Raytheon and participating employees. Prior to the 2000 collective-bargaining agreement, bargaining unit employees at the Ft. Wayne facility were provided with medical coverage, for which Respondent paid most, if not all, of the premiums. The language in the parties' 2005 to 2009 collective-bargaining agreement changed pertaining to medical benefits stating "The Raytheon United Benefit Plans will be available for all employees, offered on the same basis as is offered to salaried employees at the Ft. Wayne, Indiana, location from year-to-year." The language pertaining to medical benefits remained the same in the 2009 to 2012 collective bargaining agreement as it was in the 2005 to 2009 agreement.

The parties stipulated that every year since 2001, the Company has retained and exercised significant discretion to modify and/or terminate aspects of the Raytheon Plan. It was stipulated that throughout the year, a dedicated staff of benefits professionals, employed by Raytheon, surveys available options, costing structures, and other information, and the Company decides what plans/benefits to offer to its workforce. The Company then communicates the changes to its employees prior to the open enrollment period for the upcoming year. The changes each year as reflected in the parties' stipulation were as follows:

2002 Changes
- Healthcare premiums increased
- Preferred Provider Organization ("PPO") option introduced
- M-Plan HMO introduced for Indiana
- Benefits coverage extended to same-sex partners
- GlobalFit Health Club benefit introduced

2003 Changes
- Healthcare premiums increased
- Definity Health Care Options added everywhere except California. Three levels of coverage are available (Definity Gold, Silver and Bronze)
- TRICARE Supplemental Medical Plan available to eligible employees
- Nationwide prescription services administered by Medco Health offered to eligible employees

2004 Changes
- Healthcare premiums increased
- United Health Care replaced Partners Health Plan as provider of POS and HMO services. Coverage automatically converted to the same type and level of coverage available under Partners, unless the employee elected otherwise

2005 Changes
- Healthcare premiums increased
- Introduction of three year plan to increase premium percentage from 85% - 15% to 80% - 20% with final implementation in 2007

2006 Changes
- Healthcare premiums increased
- Introduction of a High Deductible Health Plan with Health Savings Account
- Expansion of TRICARE program to include military reservists
- Definity Health Gold and Silver plans increase in prescription medication copays
- Definity Health Bronze plan discontinued

2007 Changes
- Healthcare premiums increased
- Definity Plans undergo name change to Unified Healthcare
- Option of purchasing 90-day supplies of prescription medication through Medco at discount rate

2008 Changes
- Healthcare premiums increased
- Fully subsidized preventative office visits and screenings for HMO, PPO and in-network POS providers
- Coverage of out-of-network preventative care – after deductible at 70% for POS providers
- Discontinued M-Plan HMO in Ft. Wayne and moved employees to United Healthcare Choice EPO, absent election to different plan
- Discontinued TRICARE and Definity Silver
- Increases in specialist copays to $30 for HMO and in-network POS increase specialist copays to $30 for PPO providers
- Increase outpatient surgery copay to $100 for HMO and in-network POS
- Additional nutritional counseling benefit offered
- Changes to prescription drug plans, instituting coinsurance payments with caps
- Changes to the High Option Dental plan to cover bridges and dentures every 8 years rather than every 5 years and to include coverage for dental implants

2009 Changes
- Healthcare premiums increased
- Additional vision plan option introduced – "Vision Plan Plus"

- Increase in contributions to HSAs under United Healthcare Definity High Deductible Health Plan allowed
- United Healthcare adds Cancer Support Program

2010 Changes

- Healthcare premiums increased
- Implemented two-year plan to change cost share from 80% - 20% to 75% - 25%. 2010 cost share at 77.5% - 22.5%
- Emergency Room copay increased to $150 for HMO, POS and PPO plans
- HMO outpatient diagnostic labs and X-rays covered at 80% and the 20% coinsurance applied towards employees "out of pocket" maximum
- HMO inpatient copay increased to $300, plan covers 90% of cost of inpatient hospitalizations after copay
- HMO out of pocket maximums increased to $1,500 for individuals and $3,000 for families
- Decreases to Company contribution to HRA through United Healthcare Definity Gold program with increased deductibles for in-network and separate deductibles for out-of-network
- CVS/Caremark replaces Medco as the administrator for prescription drug program

2011 Changes

- Healthcare premiums increased
- Completed two-year plan to change cost share from 80% - 20% to 75% - 25%
- TRICARE Supplement returns but not as a Raytheon-sponsored program
- Medical insurance to cover dependents up to age 26 for medical, dental, and vision, pursuant to the Affordable Care Act
- Over-the-counter medications no longer considered eligible expenses for health care FSAs, HSAs or HRAs, pursuant to the Affordable Care Act
- Removal of lifetime maximums from medical plans, pursuant to the Affordable Care Act
- Change in-network outpatient copay to $20
- Delta Dental PPO Plus Premier administering the high/low dental care options (change from Metlife). Institution of a roll over maximum for the high option

2012 Changes

- Healthcare premiums increased
- United Healthcare Choice PPO and United Healthcare Choice POS consolidated into the United Healthcare Choice Plus Plan
- Waiver credit of $1,000 for waiving of Raytheon-sponsored medical coverage no longer offered
- All United Healthcare plans as well as Geisinger and Optima plans will have consistent coverage for infertility-related care with a $15,000 lifetime maximum
- Wellness Reward introduced
- Health care reform issues continue. All plans other than United, dependent eligibility up to age 26, pursuant to the Affordable Care Act
- Introduced Pharmacy Advisor Program for diabetes
- Generic step-therapy for certain high blood pressure medications
- Delta Dental program pays for space maintainers to age 14 rather than age 20. Replacement bridgework and dentures reverts to once every five years instead of every eight years

On February 24, 2012, the Union informed Respondent that it wanted to schedule bargaining sessions for a successor collective-bargaining agreement for the one set expire on April 29. The parties met for the first time to bargain on April 24. Over the course of the next five months, the parties met ten times in an attempt to reach a complete agreement. On April 24, in its proposals the Union sought to strike the "pass through" language contained in Article X, Article XVI, and Exhibit C of the collective-bargaining agreement. The "pass through" language contained in the expiring agreement which the Union sought to strike were the same in provisions concerning disability/leave of absence, paid time off, and the Raytheon Plan offered to all of the approximately 65,000 domestic Raytheon employees, that these same benefits would be offered to the Ft. Wayne bargaining unit employees on a year to year basis. The Union's proposals sought to designate that the disability/leave of absence, paid time off and Raytheon Plan benefits offered to the Ft. Wayne bargaining unit employees would remain the same for the life of the collective-bargaining agreement. On April 25, Respondent responded that the "pass through" language had been in place for at least the previous three contracts. Raytheon stated that all 19 bargaining units across the country, comprising 5210 employees, were on the same benefit plan with the same year to year pass through language. The Union responded it was no longer willing to waive its right to bargain over a mandatory subject of bargaining such as health benefits. Raytheon rejected the Union's proposals to modify the contract language and requested alternative proposals from the Union.

During bargaining on April 25, the Union proposed the "pass through" language be revised to state that changes may be made "by mutual agreement." The Union proposed this language in UNE 6(a) relating to funeral leave and jury duty, but intended that the proposal applied to the same language to paid time off, group insurance and pension plan, the medical and vision plan, dental insurance, life insurance, short and long term disability, reimbursement accounts, and the Raytheon Savings and Investment Plan. On April 26, Respondent presented a counter-proposal including language in each of the relevant provisions that "in the event that a change to this benefit is planned, the Company will provide the Union with advanced notice of those changes, to the extent possible and clarify any questions regarding them, prior to implementation." The Union rejected this counter-proposal. On April 27, the Union stated that its medical insurance proposal had not changed. Respondent presented the Union with its last, best and final offer on April 28. During bargaining on April 28, the Union informed Respondent that after a meeting with the membership, no vote had been taken on Raytheon's last, best and final offer. According to the Union, the two biggest issues for the member-

ship were proposed changes in the PTO policy and in continuing to agree to the "pass through" language.

During a bargaining session on May 17, the parties discussed options to the "pass through" language. The Union made several suggestions concerning potential solutions to the "pass through" language issue, including proposing to explore whether employees could be insured through the Steelworkers Health & Welfare Fund. No formal proposals were exchanged by either side. During bargaining on July 26, Respondent presented the Union with another last, best and final offer. The offer did not include any modifications to the "pass through" language from the expired collective-bargaining agreement. The bargaining unit did not vote on the offer.

During the September 26, bargaining session, Respondent maintained its position on the "pass through" issue, but said it would entertain any options the Union wanted to put on the table. The Union again stated it would not waive its right to bargain over a mandatory subject of bargaining. Respondent explained that without a new proposal from the Union on the "pass through" issue, it believed the parties were at impasse. The Union stated its belief that the parties were not in fact at an impasse. Neither party exchanged any proposals on "pass through." There were no bargaining sessions after September 26, although the parties stipulated that during 2012 bargaining, Respondent and the Union did not reach impasse. On September 26, the Union asked Respondent's position on whether the Ft. Wayne bargaining unit employees would be asked to participate in the upcoming open enrollment period for the Raytheon Plan. Raytheon informed the Union that open enrollment for the 2013 benefits period was about to commence and it would proceed as planned for all Raytheon employees, based upon Respondent's belief this was required by the terms of the expired collective-bargaining agreement. The Union asked Raytheon to exclude the Ft. Wayne bargaining unit employees from the upcoming open enrollment period.

Respondent instituted changes to its 2013 benefit package for all domestic employees and subsequently mailed a document, entitled "Your Raytheon Benefits" to all U.S. Region Raytheon employees, including Ft. Wayne employees represented by the Union. In addition to the "Your Raytheon Benefits" publication, each employee received, or was provided electronic access to, a "Your Benefits Handbook" outlining all of the benefits available to Raytheon employees, in their personalized enrollment kit each year prior to open enrollment. Open enrollment commenced on October 12, and closed on October 31. On January 1, 2013, Respondent implemented the changes to the Raytheon Plan listed below, which applied to the Ft. Wayne bargaining unit employees:

2013 Changes

- Healthcare premiums increased
- Conversion of the United Healthcare Gold plan to HSA 2
- Higher in-network deductible for employee and employee children ($2,500) than under the Gold plan
- Expanded list of women's health services covered at 100% with no deductible as preventative care, pursuant to the Affordable Care Act
- Generic use requirement for employees to receive 100% coverage for preventative care prescriptions, pursuant to the Affordable Care Act
- United Healthcare HSA covers various preventative drugs as outlined on the Treasury Guidance List without first meeting deductibles
- Expansion of Wellness Reward to $250
- Increase in out-of-pocket costs if employees purchase brand name prescription when a generic equivalent is available. Employee pays the cost difference, plus the copayment
- Flexible Spending Account lowered to $2,500 on medical, dental and vision, pursuant to the Affordable Care Act

I find Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally instituting changes to the bargaining unit health care coverage following the expiration of the collective-bargaining agreement. First, it is Board law, with which I agree, that the management rights clause, which includes language in the benefit plan, absent evidence of an agreement to the contrary, expires with the termination of the collective-bargaining agreement. See, *WKYC-TV, Inc,* 359 NLRB 286 (2012); *Omaha World-Herald,* 357 NLRB 1870 (2011) (regarding the 401(k) plan discussed there.); *E.I. DuPont de Nemours,* 355 NLRB 1084 (2010), enf. denied, 682 F.3d 65 (D.C. Cir. 2012); *Guard Publishing,* 339 NLRB 353, 355 (2003); *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 fn. 6, enfd. 317 F.3d 316 (D.C. Cir. 2003); *Paul Mueller Co.,* 332 NLRB 312, 313 (2000); *Presbyterian University Hospital,* 325 NLRB 443, 443 fn. 2, enfd. 182 F.3d 904 (3d Cir. 1999); *Ironton Publications*, 321 NLRB 1048 (1996); *Blue Circle Cement Co.*, 319 NLRB 954 (1995), enf. granted in part, denied in part on other grounds 106 F.3d 413 (10th Cir. 1997); *Buck Creek Coal*, 310 NLRB 1240 fn 1 (1993); *Control Services*, 303 NLRB 481, 484 (1991), enfd. mem. 975 F.2d 1551 (3rd Cir. 1992); *Furniture Rentors of America*, 311 NLRB 749, 751 (1993) enfd. in rel. part 36 F.3d 1240, 1245 (3d Cir. 1994); *U.S. Can Co.*, 305 NLRB 1127 (1992), enfd. 984 F.2d 864 (7th Cir. 1993); and *Holiday Inn of Victorville*, 284 NLRB 916 (1987). Here, I view the Respondent's right to make changes during the term of the existing collective-bargaining agreements to be nothing more than a creature of those agreements. No evidence was presented that the parties ever discussed what would happen concerning Respondent's benefit plans when the collective-bargaining agreement expired, or that the Union ever agreed that it was ceding its right to bargain regarding health insurance when the agreement expired. Nor, in my view does it make sense to find that the Union acquiesced in Respondent's right to make unlimited changes in health insurance once the agreement expired because Respondent was allowed to do so during the agreement. In this regard, since the Union had agreed to Respondent's contractual right to make those changes during the term of the agreement, it had no basis to protest those changes during the agreement when they were made. This should not establish a practice to make unlimited unilateral changes beyond the four corners of the contract which survives the contract, particularly on such an important term and condition of

employment such as health insurance. To hold otherwise, would clearly undermine the Union in front of bargaining unit members, and is inherently destructive of the right to collectively bargain.

The expiration of these management rights provisions at a contract's end is grounded in well-established principles protecting the statutory right of collective-bargaining. That is that a waiver of a statutory right must be clear and unmistakable. See for example, *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983); *Verizon New York, Inc., v. NLRB,* 360 F.3d 206, 208 (D.C. Cir. 2004); *Chesapeake & Potomac Telephone Co. v. NLRB,* 687 F.2d 633, 636 (2d Cir. 1982); *NLRB v. Southern California Edison Co.,* 646 F.2d 1352, 1364 (9th Cir. 1981); *Communication Workers of America, Local 1051 v. NLRB,* 644 F.2d 923, 927 (1st Cir. 1981); *NLRB v. C & C Plywood*, 385 U.S. 421 (1967); *Heartland Plymouth Court,* 359 NLRB No. 155, fn. 1, and *Provena St. Joseph Medical Center,* 350 NLRB 808, 810–811, 816 (2007). There is no evidence here that prior to entering the most recent collective-bargaining agreement, or any of the prior agreements, that the Union was apprised or agreed that the language concerning Respondent's right to modify healthcare benefits was a right that extended past the agreement. There is no evidence that Respondent ever made such amendments when no agreement was in effect. Thus, I cannot conclude it was in the contemplation of the parties or the Union when it entered the agreement that the language would go beyond the collective-bargaining agreement's expiration. In this regard, following the most recent contract's expiration the Union objected to any future unilateral changes by Respondent. Moreover, the fact that the Union abided by the terms of the management rights clause while the agreement was in effect merely confirms they were abiding by what they agreed to. It does not establish a past practice beyond the literal meaning of the management right's clause itself which was only in effect during the term of the contract.

Moreover, I do not find that Respondent's unilateral amendments of health benefits here was a mere preservation of the status quo, or a practice which independently survived the collective-bargaining agreement. In *NLRB v. Katz,* 369 US 736, 743, 745–747 (1962), the Court found the respondent's unilateral institution of merit increases where there was a newly certified union to be violative of Section 8(a)(1) and (5) of the Act. The Court held "This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of s 8(a)(5), unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews-in effect, were a mere continuation of the status quo…". The Court went on, "We do not think it does. Whatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases." Similarly, in *McClatchy Newspapers,* 321 NLRB 1386, 1390-1391 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1987), a case involving a long standing collective-bargaining relationship, the Board stated at 1390-1391 that, "if the Respondent was granted carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the Guild's agreement), it would be so inherently destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasses and restore active collective bargaining. Were we to allow the Respondent here to implement its merit wage increase proposal and thereafter expect the parties to resume negotiations for a new collective-bargaining agreement, it is apparent that during the subsequent negotiations the Guild would be unable to bargain knowledgeably and thus have any impact on the present determination of unit employee wage rates." The Board stated, "Further, the Respondent's implementation of this proposal would not create any fixed, objective status quo as to the level of wage rates, because the Respondent's proposal for a standardless practice of granting raises would allow recurring, unpredictable alterations of wages rates and would allow the Respondent to initially set and repeatedly change the standards, criteria, and timing of these increases." The Board held the respondent's ongoing ability to unilaterally set wage increases, excluding the Guild, would not only directly impact a key term and condition of employment but would simultaneously disparage the Guild to bargaining unit employees.[7]

In *Eugene Lovine, Inc.,* 328 NLRB 294, 294 (1999), enfd. 1

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[7] Noting that *McClatchy Newspapers* involved an established bargaining relationship, I do not find Respondent's argument that it should be able to engage in its conduct here because such conduct more adversely impacts a union in a new bargaining relationship than a longstanding one such as the one in the present case. First, to make such an argument is a tacit admission that the conduct serves to disparage the Union to the bargaining unit, but should nevertheless be tolerated. However, I do not find the conduct any less damaging to a union in an established relationship. Either way it sends a clear signal to employees that the union is powerless to negotiate about, or even explain changes in key terms of employment. Such conduct leads to instability and can only encourage the decertification of a union that is powerless to bargain in the hopes of finding a new one that can, or the conclusion that the employees are better off with no union at all. See, *Litton Business Systems, Inc. v. NLRB,* 501 U.S. 190, 198, (1991), where the Court stated:

> Sections 8(a)(5) and 8(d) of the NLRA, 29 U.S.C. §§ 158(a)(5) and (d), require an employer to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." The Board has taken the position that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations. The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment. See *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). In *Katz* the union was newly certified and the parties had yet to reach an initial agreement. The *Katz* doctrine has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed. See, *e.g., Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 544, n. 6, 108 S.Ct. 830, 833, n. 6, 98 L.Ed.2d 936 (1988).

Fed. Appx. 8 (2d Cir. 2001), the Board majority, in finding a respondent employer's unilateral change pertaining to work schedules violative of the Act, stated:

> As the judge found, under Bellantoni's explanation, there was no "reasonable certainty" as to the timing and criteria for a reduction in employee hours; rather, the employer's discretion to decide whether to reduce employee hours "appears to be unlimited."
>
> The Board and the courts have consistently held that such discretionary acts are, as stated by the judge, "precisely the type of action over which an employer must bargain with a newly-certified Union." See *NLRB v. Katz*, 369 U.S. 736, 746 (1962) (employer must bargain with union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion"); *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d 705, 711 (9th Cir. 1986) (employer must bargain with the union over economic layoff, which is "inherently discretionary, involving subjective judgments of timing, future business, productivity and reallocation of work"); *NLRB v. Allis-Chalmers Corp.*, 601 F.2d 870, 875-876 (5th Cir. 1979) (employer must bargain over wage increase which did not result from "purely automatic" policy and was not pursuant to "definite guidelines"); *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990) (despite past practice of instituting economic layoffs, employer, because of newly certified union, could no longer continue unilaterally to exercise its discretion with respect to layoffs). Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally reducing employee hours.

In *Dynatron/Bondo Corp.* 323 NLRB 1263, 1265 (1997), enfd. 176 F.3d 1310 (11th Cir. 1999), in finding that an employer's unilateral change pertaining to health insurance premiums was informed by its total discretion and therefore violative of the Act it was stated:

> In the instant case, from 1988 through 1990 when the Respondent claims it followed a settled practice, the employee contribution percentage changed annually. Thus, rather than following a settled practice of allocating costs, the Respondent exercised substantial discretion in allocating premium costs between it and employees. Accordingly, in the absence of a past practice and in light of the Respondent's substantial discretion, we find that the Respondent violated Section 8(a)(5) when it did not bargain with the Union about increasing employees' contributions to their health insurance program. *Garrett Flexible Products*, 276 NLRB 704, 706 fn. 4 (1985).

Similarly, in *Garrett Flexible Products,* 276 NLRB 704, 704 fn 1 (1985) pertaining to a unilateral change in health insurance the Board stated:

> FN1. Contrary to our dissenting colleague, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) by unilaterally increasing the health insurance premium paid by bargaining unit employees without bargaining with the Union. As found by the judge, the Respondent did not have an established past practice regarding the payment of premium increases. Rather, it exercised substantial discretion in allocating the increases between the Company and the employees. Thus, we agree with the judge that the Respondent was obligated to notify and bargain with the Union before passing on the entire premium increase to the employees in July 1984. See *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973).

A respondent employer has the burden of proof in establishing an affirmative defense that a unilateral postexpiration change was consistent with past practice. See, *Beverly Health and Rehabilitation Services, Inc.,* 335 NLRB 635, 636 (2001); and *Eugene Lovine, Inc.,* 328 NLRB 294 fn. 2 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001). I do not find Respondent has proven a past practice here which establishes reasonable certainty as to timing or criteria concerning the changing of medical benefits. First the stipulated records provides that:

> Every year since 2001, and pursuant to the applicable CBA and health plan documents referenced therein, the Company has retained and exercised significant discretion to modify and/or terminate aspects of the Raytheon Plan. Throughout the year, a dedicated staff of benefits professionals, employed by Raytheon, surveys available options, costing structures, and other information, and the Company decides what plans/benefits to offer to its workforce. The Company then communicates the changes to its employees prior to the open enrollment period for the upcoming year.

Thus, the terms of the stipulated record itself provide Respondent exercises "significant discretion" in the modification of and termination of health care benefits." The stipulation provides that in house benefits professionals are in essence given free rein to come up with whatever benefits they think is best, and these annual changes are then directly communicated to employees. In the collective-bargaining agreements themselves, the only requirement concerning the unilateral changes in benefits in the 2000 to 2005 agreement was that "Employee contributions for the Medical/Vision Plan will not exceed the rates paid by salaried employees at our Ft. Wayne facilities." This language was replaced in the 2005 to 2009, and 2009 to 2012 agreements with the requirement that the Raytheon benefit plans "will be available for all employees, offered on the same basis as is offered to salaried employees at the Ft. Wayne, Indiana, location from year-to-year." In *Courier-Journal,* 242 NLRB 1093, 1094 (2004), the Board majority noted that "For some 10 years, the Respondent had regularly made unilateral changes in the costs and benefits of the employees' health care program, both under the parties' successive contracts and during hiatus periods between contracts." The Board majority stated, "The significant aspect of this case is that the Union acquiesced in a past practice under which premiums and benefits for unit employees were tied to those of nonunit employees." The Board majority went on to state at 1095, citing *McClatchy Newspapers,* 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1987), that if an impasse was reached in bargaining for a new contract that, "Of course, the Employer can oppose and seek to retain its discretion. If impasse is reached, consistent with current Board law, the employer can-

not implement its proposal, because it vests complete discretion in the Employer." Thus, the Board found that a proposal based merely on keeping health benefit levels the same as for non-bargaining unit employees in fact was a proposal to keep total control of health care within the province of the respondent employer and was not implementable upon impasse. I have concluded, as set forth above, this confirms that Respondent's proposal here has no definable criteria concerning a past practice that survives the ending of the collective-bargaining agreement, and therefore it should not be allowed to be implemented by Respondent during negotiations in a pre or post impasse posture. See, *NLRB v. Katz,* 369 US 736, 743, 745–747 (1962); *McClatchy Newspapers,* 321 NLRB 1386, 1390-1391 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1987); *Eugene Lovine, Inc.,* 328 NLRB 294, 294 (1999), enfd. 1 Fed. Appx. 8 (2nd Cir. 2001); *Dynatron/Bondo Corp.,* 323 NLRB 1263, 1265 (1997), enfd. 176 F.3d 1310 (11th Cir. 1999); and *Garrett Flexible Products,* 276 NLRB 704, 704 fn 1 (1985), and the cases cited within those decisions.

This lack of a definable criteria is evident by the history of benefit changes since the parties began using the Raytheon Plan for bargaining unit employees. On January 1, 2001, the Ft. Wayne bargaining unit employees, pursuant to their recent collective-bargaining agreement became covered by the Raytheon Plan. Plan documents which the parties rely on here in formulating their stipulation state that "the Company reserves the absolute right to amend the plan and any or all Benefit Programs incorporated herein from time to time, including, but not limited to, the right to reduce or eliminate benefits" They also provided that, "the Company reserves the absolute and unconditional right to terminate the Plan and any and all Benefit Programs, in whole or in part, with respect to some or all of the Employees." Thus, while the history of changes following the implementation of the plan for bargaining unit employees show they have been theretofore limited to the annual fall enrollment period, the plan document itself provides no such limitation as to the timing of changes, nor did Respondent propose any limitation as to timing when it implemented the current plan changes in dispute. Moreover, when the plan was implemented for bargaining unit employees, the premium payment was an 85–15 percent split between Respondent and participating employees. Healthcare premiums increased annually in 2002, 2003, and 2004 based on that split. However, in 2005, Respondent introduced a three year plan to increase premium percentage paid by employees from 85–15 percent split to a 80–20 percent with final implementation in 2007. Thus, over the course of that period by 2007, the split in premiums changed on an annual basis until it was an 80–20 percent, with Respondent paying 80% and employees 20 percent. From 2007 to 2009, premiums remained at an 80 to 20 percent split. However, in 2010 Respondent introduced a two year plan to change the premium split to 75–25 percent, with a 2010 cost share at 77.5–2.5 percent in 2010 and a 75–25 percent in 2011. The 75–25 percent remained in effect for 2012 and 2013. Thus, while premiums increased annually, the divisions of premium percentages changed on a ad hoc basis, and the neither the bargaining unit employees nor the Union could predict those changes, and since there was no formula or criteria for the changes they could not be explained by the Union to the bargaining unit. Such changes in premium percentage allocations have been held to be too discretionary to establish a past practice status quo. See, *Dynatron/Bondo Corp.* 323 NLRB 1263, 1265 (1997), enfd. 176 F.3d 1310 (11th Cir. 1999), and *Garrett Flexible Products*, 276 NLRB 704, 706 fns 1and 4 (1985). Moreover, other changes to the plan over the years were completely random. For instance in 2008 specialist co-pays increased as did certain outpatient surgery copays. In 2010 emergency room copays increased, and in 2011 there was a change in-network outpatient copay to $20. In 2013, there was an increase in out-of-pocket costs if employees purchased brand name prescription when a generic equivalent is available. The employee pays the cost difference, plus the copayment. Thus, not only were premiums and premium percentages increasing on an ad hoc basis, co-pay were randomly changing some years and other years none. There was no basis for the Union to explain these increases to employees, and no way for either the Union or the employees to predict when they would take place. Locking the Union out from bargaining over these changes, over its protest, could only serve to disparage the Union to employees.

Thus, I do not find the bargaining unit's participation in Respondent's company-wide health plan constitutes an ongoing status quo when the collective-bargaining agreement ended. See, *Larry Geweke Ford,* 344 NLRB 628, 630 fn. 2 (2005), where in finding a violation concerning the unilateral changes pertaining to a company-wide health plan for a newly certified union to be violative of Section 8(a)(1) and (5), the judge, as affirmed by the Board, stated, "The Respondent has not established that it had a past practice of paying a fixed percentage of its employees' monthly health care premiums; rather, it appears that the Respondent determines the amount of its contribution on an ad hoc basis at each annual renewal of the contract and/or change of insurance carriers. Thus, there is no established status quo in this regard." Similarly in *Mid-Continent Concrete,* 336 NLRB 258, 259 (2001), it was stated:

> We agree with the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally changing bargaining unit employees' health insurance benefits. An employer's unilateral change in a mandatory subject of bargaining during collective-bargaining negotiations violates Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1961). *Bottom Line Enterprises*, 302 NLRB 373 (1991). Contrary to the Respondent's assertions, it is immaterial that its changes to the plan, a mandatory subject of bargaining, were companywide and as such involved both unit and nonunit employees. See *CompuNet Communications,* 315 NLRB 216, 222 (1994); and *United Hospital Medical Center*, 317 NLRB 1279, 1281-1283 (1995).

In the current case, Respondent raised premiums for 12 straight years for health insurance and also altered premium ratios to the disadvantage of employees on an adhoc basis during this period. It also increased certain copays and raised deductibles. This reached a point upon the expiration of the 2012 collective-bargaining agreement that, after meeting with bargaining unit employees, the Union would no longer agree with the "pass through" language, but wanted to bargain about

health insurance, as well as certain other benefits that theretofore were covered by the contractual pass through language. I do not find, as set forth above, that the contractual limitation that the bargaining unit employees be offered health care and these other benefits "on the same basis as is offered to salaried employees at the Ft. Wayne, Indiana, location from year-to-year" constitutes a discernible status quo which survives the collective-bargaining agreement." For it in essence allows Respondent to do anything it wants in terms of these benefits. Moreover, it is likely that salaried employees are earning more than bargaining unit employees and therefore can more easily absorb increases in healthcare costs. Even assuming that is not the case for some or all of them, the salaried employees interests are by definition are not in line with the employees of the bargaining unit, which in most instances are discrete groups of individuals whose jobs are sufficiently related to be included in a defined group of employees who are represented by the Union. Tying bargaining unit employees benefits to those of non-bargaining unit employees who are unrepresented, over the objections of the Union, in effect removes them from represented status and undermines the Union. Thus, as was urged by counsel for the General Counsel, I also recommend that the Board reconsider its holding in *Courier-Journal*. First, as set forth above, because there is a basic inconsistency, in finding that an employer can change benefits such as health insurance during the midst of negotiations for a new contract based on a proposal that the employer retain unlimited discretion in changing those benefits, but at the same time finding that the same employer would violate the Act by insisting to that proposal to impasse and then implementing it because it gives the employer unlimited discretion. Either way, the unilateral implementation of such a proposal pre or post impasse disparages the Union, undermines its status and is inherently destructive of its right to bargain and therefore the employees' right to union representation. Such a policy will inevitably lead to industrial instability by the necessity of unions being replaced by other labor organizations which had not been previously party to collective-bargaining agreements containing such pass through language.

Moreover, the fact in the past that a union may not have objected to an employer's changes in benefit plans during a contract hiatus, to which the Board relied on as distinction in *Courier-Journal,* should not be used as a vehicle to have the union waive its bargaining right in those matters in perpetuity at a contracts end. In this regard, circumstances change, such as here when benefit costs rose to a point that they could no longer be tolerated by bargaining unit members without collectively bargained safeguards. Rather, a union's acquiescence to changes during a contractual hiatus period means nothing more than the fact that the union found those changes acceptable at the time. It does not mean that the union has ceded its right to object and want to bargain about changes in the future when circumstances change, nor does it signal that union agrees that an employer has total control over a term and condition of employment when the Union in representing bargaining unit employees finds it necessary in representing those employees to bargain about the matter. Thus, the Board majority in

in *E. I DuPont,* supra at 1085 fn 5 stated, "We further observe that the *Courier-Journal* decisions are in tension with previously settled principles. First, it is well established that silence in the face of past unilateral changes does not constitute waiver of the right to bargain." See also *Owens-Corning Fiberglass*, 282 NLRB 609 (1987); *Exxon Research & Engineering Co.*, 317 NLRB 675, 685-686 (1995); *Rockwell International Corp.,* 260 NLRB 1346, 1347 (1982); *Ironton Publications,* 321 NLRB 1048 (1996); *Verizon New York, Inc. v. NLRB,* 360 F.3d 206, 209 (D.C. Cir. 2004); *Ciba-Geigy Pharmaceuticals Div. v. NLRB,* 722 F.2d 1120, 1127 (3d Cir.1983); *NLRB v. Miller Brewing Co.,* 408 F.2d 12, 15 (9th Cir.,1969); *Pacific Coast Assn. of Pulp & Paper Mfrs. v. NLRB,* 304 F.2d 760 (9th Cir. 1962); and Cf. *Leeds & Northrup Co. v. NLRB,* 391 F.2d 874 (3d Cir. 1968); *General Tel. Co. v. NLRB,* 337 F.2d 452 (5th Cir. 1964). Thus, I join in the General Counsel's view that the Board's decisions in *Courier-Journal* and its progeny should be revisited.[8]

However, regardless of whether *Courier-Journal* decisions are revisited, I find that Respondent violated Section 8(1) and (5) of the Act by notifying the bargaining unit employees of changes to their health care benefits in September 2012, and unilaterally implementing those changes on January 1, 2013, over the objections of the Union. I find based on the cases cited that the contractual provisions authorizing such changes during the duration of the collective-bargaining agreement did not survive the expiration of the agreement, and that changes during the term of the collective-bargaining agreement and its predecessor agreements were made on an ad hoc and unpredictable basis, and therefore did not create a status quo or past practice separate and apart from the agreement.

Concerning cases cited by Respondent, in *Beverly Health 7 Rehabilitation Systems v. NLRB,* 297 F.3d 468 (6th Cir. 2002), the court affirmed the Board's finding that a waiver of a bargaining right in a management's rights clause did not survive the term of the collective-bargaining agreement. The court also found, as I found here, that the respondent there had not established evidence of a past practice that independently survived the expiration of the collective-bargaining agreement and the court affirmed the Board's finding that the respondent's unilateral changes violated Section 8(a)(1) and (5) of the Act. In *Shell Oil Co.,* 149 NLRB 283, 289–290 (1964), cited by Respondent, the Board was careful to state, "we wish to make it clear that our present holding is limited to the particular circumstances of this case and that we do not pass upon whether or not Respondent may, in the future, lawfully expand its subcontracting practice without prior notice and consultation with the Union." I have found in the present case that Respondent's changes it made to the employees medical benefits on January 1, 2013, were made on an ad hoc basis, and were therefore not the type of past practice that survived the extant collective-bargaining agreement. *Uforma/Shelby Business Forms v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) and *Litton Microwave Cooking Prods. Div. v. NLRB,* 868 F.2d 854 (6th Cir. 1989) cited by Respondent, are inapposite to the issues presented here because they involved waiver issues concerning management

[8] There were in fact two *Courier-Journal* cases, 342 NLRB 1093 (2004), and 342 NLRB 1148 (2004).

rights clause for events that took place when the collective-bargaining agreement was in effect.

Brannan Sand and Gravel, 314 NLRB 282 (1994), cited by Respondent, involved a newly certified union. The Board found, in the circumstances there, that the respondent was not obligated to refrain from implementing its proposed changes to health care until an impasse was reached on collective bargaining negotiations as a whole. Nevertheless, the respondent was found to have violated Section 8(a)(1) and (5) of the Act by failing to provide the union with timely notice and a meaningful opportunity to bargain over the changes it implemented because it presented the changes in health care to the union as a fait accompli. In this regard, by the time the union was apprised of the contemplated changes, the respondent had already announced them to employees. In the instant case, the Union opposed the continuation of pass through language in the prior collective-bargaining agreement concerning health care and other benefit plans during negotiations and requested to bargain over health care over which bargaining ensued. Aware of that opposition, Respondent announced the 2013 changes to health insurance to employees as part of its annual enrollment, without first providing the specifics of those changes to the Union or the ability for the Union to negotiate about them. The announcement, as part of the enrollment process, was more than a benign announcement as it was a time limited announcement for employees to select between various benefit options for themselves and their families. Respondent's conduct presented the Union with a fait accompli as to the specific changes. I have concluded Respondent's announcement of nationally formulated changes directly to bargaining unit employees, along with its adamant stance in negotiations concerning the preservation of the pass through language, evidences a fixed intent to implement those changes regardless of any position taken by the Union. See, *Times Union, Capital Newspapers,* 356 NLRB No. 169 (2011); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1324 (7th Cir. 1983); *AT&T Corp.*, 325 NLRB 150 (1997); and *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41 (1997), enfd. 162 F.3d 513 (7th Cir. 1998). Moreover, Respondent's presenting its changes in distributions directly to employees served to undermine the Union. See *Inland Tugs v. NLRB,* 918 F.2d 1299 (7th Cir. 1990); and *Friederich Truck Service*, 259 NLRB 1294, 1299 (1982). The fact that local union officials may have obtained copies of Respondent's distributions with overall employee population does not alter the nature of Respondent's actions which were to clearly served employees with a fait accompli while by passing the Union negotiators. *Roll and Hold Warehouse and Distribution Corp*., supra at 42.[9] I do not find Respondent's argument that the Union failed to specifically request to bargain about the 2013 benefit changes to be persuasive. The Union asked to bargain about health insurance, the parties bargained about health insurance in general and proposals were made concerning health insurance provisions. The Union objected to Respondent's making a unilateral implementation of the 2013 changes, and it was incumbent upon Respondent to inform the Union of the specifics of those planned changes and offer to bargain about them with the Union prior to distributing them to employees as Respondent would be obligated with any other bargaining proposal.

In addition to my finding that Respondent gave the Union no opportunity to bargain about the specific changes announced to employees and then implemented on January 1, 2013, I find that the type of changes implemented here do not come within the *Stone Container Corp.,* 313 NLRB 336 (1993), exception to allow their implementation prior to an overall impasse. The changes announced here were ad hoc in nature and not part of a discrete repetitive event. Moreover, they involved changes to health benefits to 35 bargaining unit employees in a health plan covering 65,000 employees. The terms of the plan, were admittedly controlled by Respondent, and I do not find any business urgency allowing for implementation prior to an overall impasse in bargaining. In *Stone Container*, the employer notified the union in March during negotiations for a collective-bargaining agreement that it could not afford to give employees an annual April wage increase. The Board found the employer made its proposal in time to allow for bargaining over the matter, but the union made no counterproposal concerning the April wage increase and did not raise the issue again during negotiations. The Board concluded that the employer satisfied its bargaining obligation regarding the April wage increase and was not required to refrain from implementing the change until an overall impasse had been reached on bargaining for a collective-bargaining agreement as a whole. The Board reasoned that the annual April wage review was a discrete event that just simply happened to occur while contract negotiations were in progress. The annual wage increase ranged from 3 to 6 percent for hourly employees. However, in *E.I. DuPont De Nemours*

[9] I do not find *Nabors Alaska Drilling, Inc.,* 341 NLRB 610 (2004), cited by Respondent persuasive here. In *Nabors,* no violation was found where the respondent employer notified the union in advance of specific changes to be made in health care before notifying the employees, and the union failed to raise a timely objection. *A-V Corporation,* 209 NLRB 451 (1974), cited by Respondent, is distinguishable from the present case in that it involved the passing on a pro-rata share of insurance costs to employees based on a premium increase by an outside insurance company. The pro-rata share was defined by the past practice. I find this different than the wholesale changes made here, along with Respondent's ongoing demand to be able to unilaterally alter health benefits at its will. *Finley Hospital,* 359 NLRB 156 (2012), is also distinguishable from the present case in that it involved a discrete and clearly defined wage increase, the timing of which was specified in the collective-bargaining agreement, which the Board majority concluded the implementation of which survived the contract as a term of employment. There was no objection by the union there to the continuation of the increase.

Here, Respondent was seeking post contract total control of health care benefits, the Union objected, and Respondent unilaterally implemented multiple changes to the benefit plan despite the Union's objection. Finally, *Mt. Clemens General Hospital,* 344 NLRB 450 (2005), involved changes to a TSA plan during the term of collective-bargaining agreement in which the judge read the contractual language along with the bargaining history as the union there having consciously waived the right to bargain over those issues. That presents a different situation from that here, where the contract is expired, and Respondent seeks to continue its contractual ability to make unlimited changes to healthcare benefits in perpetuity and thereby eviscerating the Union's bargaining rights over a key term and condition of employment.

and Company, 355 NLRB 1096, 1106–1107 (2010), the Board approved the judge's findings that the respondent's changes to its benefit plans in 2005 did not fall under the permissible exception under *Stone Container* of an annual adjustment to a discrete subject. It was stated in *DuPont* that the respondent's changes there were not confined to an adjustment to a single plan, but included the initiation of a new healthcare savings account plan, the creation of penalties for employees who do not use a designated mail-order pharmacy for certain prescriptions, and wide-ranging changes to employee costs and/or coverages for financial planning, medical care, dental care, and vision care. It was concluded that the collection of changes bore no meaningful resemblance to the "discrete" events that were at issue in *Stone Container* and the cases applying it. It was stated the respondent's changes included a number of ad hoc actions that were not annually occurring events, and about which the Respondent was not required to take some action such as the new healthcare savings plan, the new prescription drug penalty, and the change in financial planning premiums. It was stated, "Acceptance of the Respondent's argument that changes to a wide range of benefits, and even the addition wholly new benefit plans, should all be considered part of one discrete, recurring, event would deprive that limitation of much of its meaning and would transform the *Stone Container* standard into what the Board indicated it should not be—i.e., an exception of "broad application" and "disruptive potential." id. at 1107. In the instant case, Respondent's 2013 changes to health care included, increased premiums, the conversion of the United Healthcare Gold plan to HSA 2, higher in-network deductible for employee and employee children ($2500) than under the Gold plan, expansion of wellness reward to $250, increase in out-of-pocket costs if employees purchase brand name prescription when a generic equivalent is available, all of which were not regularly occurring changes. Moreover, Respondent's conduct concerning health insurance must be viewed in the context that it was insisting on maintaining the "pass through" language on a multitude of benefits, such as paid time off, group insurance and pension plan, the vision plan, dental insurance, life insurance, short and long term disability, reimbursement accounts, and the Raytheon Savings and Investment Plan.

Respondent contends that it never agreed to provide benefits under its plan uncoupled from a unilateral right to make changes therein. However, there is no showing that the Union by agreeing to plan participation agreed to abandon its right to bargain over health insurance in perpetuity or for that matter beyond the confines of the contract, or any basis for Respondent to presume such. Here, Respondent, like any other employer, could have presented its precise proposed 2013 changes to the plan to the Union, negotiated about them in good faith, or if a lawful impasse was reached implemented them as offered. Instead, Respondent took the position that the Union had waived its right to bargain, in essence in perpetuity, insisted that such a waiver be incorporated in the next collective-bargaining agreement, and implemented plan changes on an ad hoc basis with no prior notice of those changes to the Union, and instead with direct communication with employees. I find Respondent's insistence on absenting the Union from the bargaining process, combined with its unilateral change concerning health care constitutes conduct inimical to the bargaining process.

Respondent argues that public policy requires dismissal of the complaint by quoting from the dissent in the Board's *DuPont* decision, supra, 355 NLRB at 1090, where it as asserted that the sky rocketing costs of health care and the questionable financial status of many multiemployer pension and health and welfare plans company-wide programs are frequently the only viable option. Respondent, citing the improvements it has made in its health plan, states Respondent never abused its privileges, and both parties benefited from their bargain. Agreeably, there are arguments in favor a large scale plans, but of course evaluating Respondent's self-described benevolence omits one detail, there is also a public policy in favor of collective-bargaining. Moreover, as demonstrated here, the Union went along with Respondent's changes to health insurance for a number of years, until it concluded, after meeting with bargaining unit employees, that it was no longer in their interest to do so. While large national plans have their place, they may be more advantageous to certain participants than others in that the cost of living in different parts of the country varies, thus the cost of healthcare and outside insurance in those areas may vary too, so while the plan based on a national average of costs may serve employees with high salaries or living in higher cost of living areas well, it may serve to the detriment of other groups of lower paid employees and perhaps for those groups of employees when they are represented by a union there is the necessary inconvenience of collective bargaining. This does not necessarily require those employees to be removed from the plan, because bargaining in good faith may result in a mutual agreement to leave them in.

Respondent also cites cases relating to benefit plan distribution and/or coverage arguing ERISA promotes uniformity of rules pertaining to national benefit plans. See, *e.g., Kennedy v. Plan Adm'r for Raytheon Say. & Inv. Plan,* 129 S.Ct. 865 (209). I do not find Respondent's argument to be persuasive here for the remedy sought is not to alter the plans benefits, but to determine if the plan changes were unlawfully implemented on January 1, 2013. The decisions Respondent cites do not relate to the remedial rights under the NLRA pertaining to ERISA based plans. See, *Décor Group, Inc.,* 356 NLRB 1391, 1391 fn. 2 (2011); and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 552–553 (1988). Moreover, Respondent stipulated that the Raytheon plan was not monolithic in that it consisted of regional plans. In the initial collective-bargaining agreement entered into between Respondent and the Union it provided that, "that contributions for the Medical/Vision Plan would not exceed the rates paid by salaried employees at the Ft. Wayne facility." This language implies at the time, the plan administrators were allowed to charge the bargaining unit employees lesser rates than salaried employees. In 2003, Definity Health Care Options were added to the plan everywhere except California. In 2008, it was noted in the annual changes that Respondent "Discontinued M-Plan HMO in Ft. Wayne and moved employees to United Healthcare Choice EPO, absent election to different plan." Thus, Respondent has made changes to the plan based on area

requirements. Moreover, I do not find the General Counsel seeks Respondent to modify the plan, for there are various options available to the parties through bargaining, including bargaining to a good-faith impasse over Respondent's proposed annual changes to the plan which was not done here, and thereafter implementing them, or bargaining to provide employees with an alternate plan, or increased compensation to help defray the costs of the plan, to state a few. Respondent has acknowledged this concept in its January 2013 distribution to employees concerning amendments to plan benefits wherein in it stated, "Benefits for employees represented by a bargaining unit will be in accordance with their collective-bargaining agreement." In sum, I do not find Respondent has raised any valid defense to its statutory duty to bargain and for the reasons stated I find it has violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Raytheon Network Centric Systems (Respondent) admits that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act; and that the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers International Union, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

2. The Union represents Respondent's employees in the following unit (the Unit) appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All hourly rated employees in the production, material handling, maintenance, and engineering assembly shop operators, test equipment and condenser engineering departments, employed at any plant, warehouse, and branch in Allen County, Indiana; excluding all foremen, supervisors, office help, laboratory technicians, guards, over-the-road truck drivers, Toolroom employees (Toolmakers, Tool Grinders, Machinists, Tool and Gauge Inspectors, Tool crib attendants and Apprentices as certified in NLRB Case No. 13-RC-6126 and limited exclusively to such certification) and all engineering departments except that listed above.

3. In September or October 2012, Respondent announced changes to its health insurance to employees in the Unit, and on January 1, 2013, Respondent implemented those announced changes for Unit employees, without affording the Union an opportunity to bargain with Respondent about those changes, and without bargaining with the Union to a good-faith impasse concerning those changes, and by such conduct Respondent has violated Section 8(a)(1) and (5) of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend it be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. With respect to the Respondents January 1, 2013 changes to bargaining unit employees health and medical insurance, I shall recommend that Respondent be required to make available to the unit employees the health insurance and medical coverage available prior to those changes at the pre-change rates and costs. In addition, the Respondent shall reimburse past, present, and future unit employees for any expenses and premium costs ensuing from the January 1, 2013, unilateral changes. See, *Larry Geweke Ford,* 344 NLRB 628 (2005). The reimbursement to employees shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the decision in *Latino Express, Inc.*, 359 NLRB 518 (2012), shall be applied by Respondent in compensating affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and the filing of a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[10]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, it is hereby ordered that Respondent Raytheon Network Centric Systems its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) announcing changes to health insurance to bargaining unit employees represented by the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers International Union, AFL–CIO (the Union), and implementing changes to health insurance for those employees without affording the Union an opportunity to bargain about those changes, and without bargaining with the Union to a good-faith impasse concerning those changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore, upon the Union's request, health insurance for bargaining unit employees represented by the Union to that in effect immediately prior to January 1, 2013, and continue it in effect until an agreement is reached with the Union to replace it, or until a good-faith impasse in bargaining allows Respondent to replace it.

(b) Make whole, with interest, bargaining unit employees by reimbursing them for any expenses and premium costs ensuing from the January 1, 2013 unilateral changes in health insurance in the manner set forth in the remedy section of the this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment rec-

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ords, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and/or other compensation due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Fort Wayne Indiana, or any other facilities where bargaining unit employees work copies of the attached notice marked Appendix.[11] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in this proceeding, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current or former bargaining unit employees employed by Respondent at any time since September 26, 2012.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply.

Dated, Washington, D.C. November 19, 2013.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT announce changes to health insurance to bargaining unit employees represented by the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers International Union, AFL–CIO (the Union), and implement changes to health insurance for those employees without affording the Union an opportunity to bargain about those changes, and without bargaining with the Union to an agreement and/or a good-faith impasse concerning those changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, restore health insurance for bargaining unit employees represented by the Union to that in effect immediately prior to January 1, 2013, and continue it in effect until an agreement is reached with the Union to replace it, or until a good-faith impasse in bargaining with the Union allows us to replace it.

WE WILL make whole, with interest, United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers International Union, AFL–CIO bargaining unit employees for any expenses and premium costs ensuing from the January 1, 2013, unilateral changes in health insurance in the manner described in the Board's decision.

RAYTHEON NETWORK CENTRIC SYSTEMS

[11] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."