

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 22, 2005

TO : Gary W. Muffley, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 530-6001-5017-5000
530-8049-0000

SUBJECT: Dayton Newspapers, Inc. 530-8054-1000
d/b/a/ Cox Ohio Publishing
Cases 9-CA-40093, 40198, 40608, 40765

E.I. DuPont de Nemours, Louisville Works
Cases 9-CA-40777, 40919

These two separate cases, in which complaints had already issued, were submitted for advice as to whether the Employers' unilateral changes in health insurance premiums, during the course of contract negotiations for successor agreements, violated Section 8(a)(5) in view of the Board's recent decisions in The Courier-Journal.¹ In Courier-Journal, the Board held that unilateral changes in health benefit programs during contract negotiations were not a violation when there was an established past practice of such changes in which the union had acquiesced both during the terms of and hiatuses between contracts. We conclude that the decision in Courier-Journal does not preclude complaint proceedings in Dayton Newspapers, Inc. because the Employer's past practice of unilateral changes was with a different union, rather than with the newly-recognized Union. We also conclude that the decision in Courier-Journal does not preclude complaint proceedings in E.I. DuPont de Nemours, because the Employer relied upon an expired contractual waiver, which had only been exercised during the life of the contract, and not an established non-contractual past practice, to justify increasing the insurance premiums. Therefore, both Employers' unilateral changes of their insurance premiums violated Section 8(a)(5).

FACTS

Dayton Newspaper, Inc.

Dayton Newspaper, Inc., d/b/a Cox Ohio Publishing (the Employer), a newspaper publisher, had a long-term

¹ 342 NLRB No. 113 (September 17, 2004). The Board reaffirmed this position in Courier-Journal, 342 NLRB No. 118 (September 22, 2004).

collective bargaining relationship with the Dayton Mailers Union, Teamsters Local 1137. Local 1137 represented the mailroom/packaging department employees. The parties' last collective-bargaining agreement was effective July 15, 1990 to July 17, 1993.

After four years of unsuccessful bargaining beginning in 1993 for a successor contract, the Employer posted "Conditions of Employment" effective July 1, 1997. The only reference to health insurance in the "Conditions of Employment" was an acknowledgement that employees would continue to earn flex/health insurance based on actual hours worked according to the Company's policy. Local 1137 eventually merged with another union, but the newly-merged union was also unable to reach an agreement with the Employer. On November 21, 2001, the newly-merged union informed the Employer that it was relinquishing its representation of unit employees to the GCIU and its Local 128N (the Union). By letter dated December 6, 2001, the Employer voluntarily recognized the Union and requested permission to implement wage increases scheduled for January 1, 2002.

The parties began contract negotiations on May 6, 2002 and agreed to maintain the "status quo" until bargaining concluded. The Employer asserted that the expired 1990-93 contract as modified by the 1997 "Conditions of Employment" was the source of determining the "status quo." The Union claimed that it specifically rejected the following language in the "Conditions of Employment:"

All posted conditions are subject to change from time to time, provided such changes are made in accordance with applicable law. These conditions are not a contract.

The Following language appeared in the expired 1990-93 contract:

Effective January 1, 1990, and for the duration of the Agreement, the Company will provide a flexible benefit program as described in the attached Flex Plan Description. This plan will be offered to all employees on a Company-wide basis on the same terms and conditions.

In October or November 2002, the Employer informed the Union that health insurance premiums would increase effective January 1, 2003.² The Union made an information

² The Employer's contribution toward the Flex Plan would remain the same after the increase and the cost for part of

request concerning health insurance coverage, including an inquiry regarding the distribution of premium costs between the Employer and subscribing employees. The Union also requested that the Employer not implement the increases until the parties reached an agreement or impasse. The Employer responded that the premium increase was the consequence of a corporate-wide policy and that it had no discretion concerning the implementation.

On January 1, 2003, the Employer implemented the premium increase and on March 26, 2003, while the parties continued to negotiate, the Union filed charges alleging, inter alia, that the Employer violated Section 8(a)(5) by unilaterally implementing the changes. By letter dated November 8, 2003, the Employer informed the Union that it would again increase health insurance premiums effective January 1, 2004, which would result in as much as approximately a 30 percent increase for some employees. On December 24, 2003, the Union filed a charge alleging that the announcement was a Section 8(a)(5) violation, and the Region issued complaint.

E.I. DuPont

E.I. DuPont de Nemours, Louisville Works (the Employer) has operated the Louisville, Kentucky plant, which manufactures fluoroproducts, for over 50 years. The Neoprene Craftsmen Union was certified as the collective bargaining representative of the production and maintenance employees in 1953, and over the years has negotiated successive collective-bargaining agreements.³ The most recent contract was effective June 13, 1997 through March 21, 1999, and included a year-to-year extension unless one of the parties gave a termination notice 60 days prior to the annual expiration date.

Since 1995, the Employer has maintained a corporate-wide benefit plan (the BeneFlex Plan), which allowed the employees to make selections from a variety of benefits, including health care. In addition, since 1995 all the

the benefits offered to employees would remain essentially the same. The cost of enrolling in the HMO portion of the plan would increase approximately 10 percent, resulting in the total increase being passed on to the employees.

³ In 1995, the Employer formed a joint venture that resulted in two employers at the Louisville facility and two separate bargaining units represented by the Union. Since then, each unit has negotiated separate and independent contracts.

parties' successive collective-bargaining agreements included a provision that stated in pertinent part:

The Company will provide basic Hospital and Medical-Surgical coverage as set forth in the DuPont BeneFlex Medical Care Plan...

The employees' costs and the precise benefits available varied from year to year. Employees were required, during the fall of each year, to determine their benefits and coverage for the following year. The BeneFlex Plan itself included provisions that gave the Employer the right "(1) to determine the price of coverage; (2) to control and manage the operation and administration of the Plan and (3) to change or discontinue the plan without prior negotiation with the Union." During prior years, when a collective-bargaining agreement was in effect, the Employer made changes in the BeneFlex Plan and the employees' representative never objected to the changes.

By letter dated January 16, 2002,⁴ the Neoprene Craftsman Union notified the Employer that it wished to terminate the most recent contract and the parties began negotiating for a new contract on February 2. On March 31, the contract expired but the parties continued negotiating until May 22. On June 20, the Neoprene Craftsman Union voted to affiliate with PACE, and the Employer immediately recognized the newly-chartered PACE Local (the Union) as the bargaining representative for its employees. The affiliation agreement states in pertinent part:

The Neoprene Craftsman Union I.B.D.W. shall become a newly-chartered chapter Local of PACE known as PACE Local 5-2202 and shall be a continuation of and successor labor organization to the Neoprene Craftsman Union I.B.D.W. for all purposes, and the Neoprene Craftsman Union I.B.D.W. shall not be considered or deemed to be dissolved, terminated or discontinued, but shall be affiliated with PACE. PACE Local 5-2002 will continue its relationship with E.I. DuPont deNemours . . .

The Agreement further stated that "[a]ll of the current elected and appointed officers, stewards, committee members, etc. shall remain in office, shall continue to perform their current duties, and serve out their respective terms."

⁴ All dates hereafter are in 2002 unless otherwise noted.

On about August 14, the Employer resumed negotiations with the Union. On October 15, while still negotiating with the Union, the Employer announced plans to implement changes to the BeneFlex Plan that included premium increases as well as the elimination of some options previously offered. By letter dated October 24, the Union objected to the implementation and requested that the Employer bargain over the changes. In a letter dated November 21, the Employer responded that it had the right to make the changes under provisions in the BeneFlex Plan, that the Union had agreed that the Employer could exercise such rights, and therefore it would be inappropriate to bargain about the changes. The Union again objected and requested bargaining in a letter dated November 27. In a letter dated December 19, the Employer reiterated its position and on January 1, 2003, the Employer implemented changes to the BeneFlex Plan. On May 30, 2003, the Union filed an unfair labor practice charge alleging that the Employer had violated Section 8(a)(5) by unilaterally implementing the changes, but the charge was dismissed as being untimely.⁵

Throughout 2003, the Employer and Union continued to bargain but failed to reach an agreement. On October 10, 2003, the Employer announced changes to the BeneFlex Plan for the 2004 year. By letter dated October 15, 2003, the Union objected to the changes and requested bargaining. By letter dated October 22, 2003, the Employer again told the Union that it had the right to make the changes under provisions in the BeneFlex Plan. On November 4, 2003, the Union restated its position and requested bargaining. On January 1, 2004, the Employer implemented the changes. On January 2, 2004, the Union filed the charge in the instant case, and the Region issued complaint.

ACTION

We conclude that the decision in Courier-Journal does not preclude complaint proceedings in Dayton Newspapers because the Employer's past practice of unilateral changes was with a different union, rather than with the newly-recognized Union. We also conclude that the decision in Courier-Journal does not preclude the complaint in E.I. DuPont because the Employer relied upon an expired contractual waiver, which had only been invoked to privilege insurance changes during the term of the

⁵ See E.I. DuPont De Nemours, Louisville Works, Case 9-CA-40262, Advice Memorandum dated November 25, 2003. The Region had concluded that the Employer's conduct would have been a violation if the charge were not untimely.

contract, and thus was not an established non-contractual past practice to justify increasing the insurance premiums. Therefore, both Employers' unilateral changes of their insurance premiums violated Section 8(a)(5).

The Courier-Journal Decision

In Courier-Journal, the parties' expired collective-bargaining agreement contained a provision that stated that for the duration of the contract, health insurance plans were to be provided to represented employees on the same basis as nonrepresented employees, and that any changes to either the benefits or the premiums were to be made on the same basis as for nonrepresented employees. The employer unilaterally had made changes each year for both represented and nonrepresented employees, with the acquiescence of the union. However, the union objected to the last changes implemented by the employer. The Board majority held that "the changes were implemented pursuant to a well-established past practice,"⁶ since the changes were "consistent with the type of changes made over a 10 year period under successive contracts and during hiatus periods."⁷ The Board reasoned that the changes were, as previous changes, the same for unit employees as those for unrepresented employees, and that this was consistent with changes both under the "same basis as" clause of the parties' successive contracts and during hiatus periods. The Board specifically did not pass on the issue of whether a contractual waiver of a bargaining right would survive an expired contract, since the majority stated that their decision was grounded in past practice and the continuance thereof, not waiver.⁸

Dayton Newspaper, Inc.

The Dayton Newspaper case is distinguishable from Courier-Journal because the Union here was a newly-recognized union. In discussing its holding in Courier-Journal, the majority stated that the facts there were distinguishable from Eugene Iovine, Inc.,⁹ a case where the union was newly-certified. In Eugene Iovine, after the union was certified, the employer applied its past practice of reducing unit employees' hours unilaterally, which it

⁶ Courier-Journal, 342 NLRB No. 113, slip op. at 2.

⁷ Id.

⁸ Id., slip op. at 3.

⁹ 328 NLRB 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001).

had done at its discretion for a variety of reasons. The Board in Eugene Iovine held that such discretionary acts are the type of acts that employers must bargain about with newly-certified unions.¹⁰

In Dayton Newspaper, as in Eugene Iovine, there was a new union. After eight years of attempting and failing to reach a successor agreement with its employees' former representatives, the Employer voluntarily recognized the GCIU as its employees' representative.¹¹ As in Eugene Iovine, the Employer applied a discretionary past practice that it subjectively used to set insurance premiums.¹² In such circumstances, an employer is obligated to bargain to agreement or impasse with a new union.¹³ As to the issue of the parties' May 2002 agreement to maintain the "status quo," the Employer has failed to establish that the Union agreed that such a "status quo" included annual changes to the health insurance premiums. Indeed, the Union states that it specifically rejected the "subject to change" language in the Employer's posted Conditions of Employment.

Accordingly, we conclude that the ruling in Courier-Journal does not preclude the complaint issued in Dayton Newspaper because the Union was a newly-recognized union. Therefore, the Employer could not unilaterally follow a past practice to which this Union had never acquiesced, and absent settlement, the Region should proceed with the complaint as issued.

¹⁰ Id. at 294, citing, e.g., NLRB v. Katz, 369 U.S. 736, 746 (1962) (bargaining with new union required over merit increases where decision is largely discretionary); Adair Standish Corp., 292 NLRB 890 n.1, (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990) (despite past practice, because union was newly-certified, employer could no longer unilaterally exercise its discretion with regard to layoffs).

¹¹ We note that after the Employer recognized the Union, more than six months had passed until the Employer announced the changes. No party claims that the recognition was improper.

¹² See Maple Grove Health Care Center, 330 NLRB 775, 780 (2000) (employer may unilaterally require employees to pay increases if it can show that is the status quo; however, employer failed to show what, if any, understanding it had with employees regarding portion to be paid by each).

¹³ Eugene Iovine, 328 NLRB at 294.

DuPont

We first note that unlike the facts in Dayton, in DuPont the Union's affiliation with PACE did not create a new union; therefore, the principles of Eugene Iovine, and its distinction by Courier-Journal, do not apply. Here, the affiliation agreement allowed the then-current local elected and appointed officers to remain in office and to continue to perform their duties. Thus, the affiliation did not result in a new and different representative but instead in the continuity of the employees' chosen representative.¹⁴ Furthermore, the changes made were administrative rather than the substantial type that would change or alter the union's identity.¹⁵ Moreover, the bargaining between PACE and DuPont after the affiliation continued as before, and neither party asserted there was a change. Thus, unlike in Dayton, there was no change in the identity of the bargaining representative.

However, we still conclude that the ruling in Courier-Journal does not preclude the maintenance of the outstanding complaint in DuPont. Here, unlike in Courier-Journal, the Employer failed to establish the existence of a past practice of, as opposed to a union waiver of bargaining over, premium increases during the terms of contracts. The Employer attempts to support its assertion of a past practice based on unilateral changes, to which the Union did not object, and that it made only during the life of the contract but never during contract hiatus periods. However, a union's acquiescence in previous unilateral changes generally does not constitute a past practice,¹⁶ particularly when the acquiescence has been only to changes during the terms of a contract and not, as here, when no contract was in effect.

The Board has held that a past practice does not exist when the "unilateral changes" at issue were made only during the life of the contract, and that such conduct more properly is analyzed under the waiver principle. For example, in Register-Guard,¹⁷ the Board held that a past practice defense was not valid where the employer had

¹⁴ See Amoco Production Co., 239 NLRB 1195, 1195 (1979).

¹⁵ Id.

¹⁶ Register-Guard, 339 NLRB 353, 356 (2003), citing Johnston-Bateman Co., 295 NLRB 180, 188 (1989).

¹⁷ 339 NLRB at 355-56.

changed one of its incentive programs after the parties' contract arguably giving it discretion to do so had expired. During contract negotiations, the employer added additional commissions to a sales incentive program that was part of the parties' expired contract.¹⁸ As part of its past practice defense, the employer asserted that it had previously changed other sales incentive programs without objection from the union, that its action was a continuation of a past practice, and that the action did not change the status quo.¹⁹ The employer contended it was permitted to unilaterally make the changes because it had sole discretion based on contract language that gave it the right to pay wages in excess of the established wages. However, the Board noted that the contractual provision was a contractual reservation of managerial discretion, and, therefore, the provision did not survive expiration of the contract, absent evidence that the parties intended it to survive.²⁰ The Board further noted that in contrast to the employer's conduct regarding the new commissions, all but one of the other changes to the incentive programs occurred during the life of the contract. The Board concluded that even though the employer gave notice and the union did not object to the one other change that occurred after the contract expired, the union's acquiescence in that one change did not waive its right to bargain over the new commissions.²¹

Here, as in Register-Guard, the Employer is asserting that because it made changes to the BeneFlex Plan during the life of the contract, it should be entitled to continue to make similar changes after the contract expired as a continuation of a past practice. However, as in Register-Guard, the Employer's past unilateral changes to the plan all occurred during the life of the contract except the

¹⁸ Id. at 353.

¹⁹ Id. at 355.

²⁰ Ibid., citing 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).

²¹ Id. at 356, citing Johnston-Bateman Co., 295 NLRB 180, 188 (1989). Specifically, the Board stated "Nor does this one instance establish a past practice of unilaterally implementing advertising sales incentive programs after the contract expired." Id. at 355.

2002 changes, to which the Union never acquiesced.²² Additionally, as in Register-Guard, the Employer's right to unilaterally implement changes during the life of the contract depended on a contractual reservation of managerial discretion.²³ However, that reservation, like the one in Register-Guard, did not survive the expiration of the contract in the absence of any evidence that the parties intended that this reservation of discretion to survive expiration. Thus, as in Register-Guard, we conclude that the Union did not waive its right to bargain over changes to the plan during periods where there was not a contract. Nor did the Employer's unilateral changes during the life of the contract establish a past practice of permitting the Employer to unilaterally implement changes to the BeneFlex Plan after the contract expired.

As further support for our view that there was no past practice involved here, the Employer failed to establish that its changes amounted to a "reasonable certainty" as to timing and criteria.²⁴ Although the facts show that the unilateral changes occurred annually at the same time, they fail to show that the Employer used a set standard to determine what changes would occur, since the employees' costs and available options varied from year to year.²⁵ Thus, the Employer's conduct fails to meet the test for a past practice.

²² The Union filed an untimely objection to those unilateral changes.

²³ Thus, DuPont is distinguishable from Shell Oil Co., 149 NLRB 283 (1964), and its progeny. In that case, the Board found a post-contractual unilateral right to subcontract based on a "past practice" of subcontracting during the term of the collective-bargaining agreement; however, the employer's right to subcontract was not based on a collective-bargaining agreement clause allowing subcontracting. Here, on the other hand, the Employer's right to unilaterally change health premiums is pursuant to a collective-bargaining agreement clause concerning health insurance, in which the Union waived its right to bargain.

²⁴ See Id. applying "reasonable certainty" as to time and criteria as set forth in Eugene Iovine, supra.

²⁵ See Maple Grove Health Care Center, 330 NLRB at 780 (employer may unilaterally require employees to pay increases if it can show that constituted the status quo; however, employer failed to show what, if any, understanding it had with employees regarding portion to be paid by each).

Therefore, unlike Courier-Journal, DuPont requires a waiver analysis and not a past practice analysis. Unlike the "same basis as" clause relied on in Courier-Journal that granted the employer discretion to make changes, here the clause is direct and specific. The contract only allowed the Company to provide coverage as set forth in the Dupont BeneFlex Plan. Furthermore, there is no evidence establishing that the Union intended to waive its right to bargain over the health care premiums except for during the life of the contract. Neither the language of the contract nor the Union's conduct indicated such a waiver, and there is no indication that the parties intended otherwise.²⁶

Accordingly, we conclude that the Board's ruling in Courier-Journal does not preclude the complaint issued in DuPont for the reasons stated above and, absent settlement, the Region should proceed with the complaint as issued.²⁷

B.J.K.

²⁶ See Courier-Journal, 342 NLRB No. 113, slip op. at 5 (Liebman, dissenting in part) discussing the waiving of a statutory right to bargain.

²⁷ It should be noted that under the Board's ruling in Stone Container, 313 NLRB 336 (1993), the parties would not have had to reach impasse on collective bargaining negotiations as a whole; however, the Employer was required to bargain to impasse as to the insurance premium issue. Since the Employer refused to bargain to impasse, Stone Container does not apply.