UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matters of

E.I. DUPONT DE NEMOURS, LOUISVILLE WORKS

and Cases 9-CA-40777, 9-CA-41634

PAPER, ALLIED-INDUSTRIAL, CHEMICAL
AND ENERGY WORKERS INTERNATIONAL
UNION AND ITS LOCAL 5-2002

E.I. DUPONT DE NEMOURS AND COMPANY

and Case 4-CA-33620

UNITED STEEL, PAPER, AND FORESTRY
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION (USW) AND ITS
LOCAL 4-786

ACTING GENERAL COUNSEL'S STATEMENT OF POSITION

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On August 27, 2010, the Board issued two orders[1] finding that E.I. DuPont de Nemours, Louisville Works and E.I. DuPont de Nemours and Company (collectively, Respondent) violated Section 8(a)(5) and (1) of the Act by unilaterally changing the cafeteria-style benefits plan (known as the "Beneflex Plan") at facilities in Louisville, Kentucky and Edge Moor, Delaware at a time when the applicable collective-bargaining agreements had expired and the Respondent was in the midst

[1] The Board decisions at issue are 355 NLRB No. 176 and 355 NLRB No. 177. The invitation for statements of position erroneously lists the companion case as 354 NLRB No. 99 (2009).

of negotiating successor contracts. In particular, the Board rejected the defense that the post-expiration changes were privileged by past practice, even though the Respondent changed the Beneflex Plan annually during the life of the collective-bargaining agreements, pursuant to a reservation of rights provision in the benefit plan documents. The Board determined that the Respondent had not demonstrated a "relevant past practice" under *Courier-Journal*, 342 NLRB 1093 (2004), because it had not shown "annual unilateral changes during hiatus periods" between contracts. 355 NLRB No. 176, slip op. at 2. The Respondent's petitions for review of these decisions were consolidated before the D.C. Circuit.

On June 8, 2012, the D.C. Circuit remanded the cases to the Board for further consideration of whether the Respondent was privileged to make the changes unilaterally pursuant to past practice. *E.I. Du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 68-70 (D.C. Cir. 2012). The court found that the Board departed, without reasoned justification, from its precedent. *Id.* at 66, 70. In particular, the court found that the Board improperly distinguished *Courier-Journal*, given that it had recognized in two other cases, *Capitol Ford*, 343 NLRB 1058 (2004) and *Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB 1319 (2006), that an employer may rely on its mid-contract practice of making changes by virtue of a management-rights clause to justify post-contract changes. The court saw "no reason it should matter whether that past practice first arose under a CBA that has since expired," and determined that the Board offered no reason why it

should matter that the unilateral action in *Courier-Journal* was taken during a hiatus period. *Du Pont*, 682 F.3d. at 69.

Consequently, the court determined that, under extant Board law, annual changes to Beneflex had become a term and condition of employment. *Id.* at 68-69. It noted that the changes at issue were "similar in scope to those it had made in prior years." *Id.* at 68. And it found that the Respondent's discretion was limited because it could only make changes during the annual enrollment period and, as in *Courier-Journal*, it was obligated to treat union and non-union employees the same. *Id.* at 68-69. Accordingly, the court directed the Board to either conform to its precedent or "explain its return to the rule it followed in its earlier decisions." *Id.* at 70.

The Board subsequently accepted the remand and invited the parties to file statements of position on this issue. Pursuant to the Board's invitation, the Acting General Counsel submits his position that the Board should overrule *Courier-Journal*, *Capitol Ford*, and *Beverly Health* because they erroneously hold that an employer's pattern of exercising its discretion under a management-rights clause constitutes a legally-cognizable past practice, and should revise its approach to analyzing changes arising during negotiations for a successor agreement where a management-rights clause has expired.

Summary of Argument

On remand, the Board should reject the proposition that an employer can create a past practice by merely having regularly exercised its discretion pursuant

to a management-rights clause. This view cannot be reconciled with *NLRB v. Katz*, 369 U.S. 736 (1962). It is also inconsistent with the Board's treatment of past practice in the context of newly-certified unions. While the status quo may involve change where there is a "long-standing practice" of regular modifications, a change "informed by a large measure of discretion" simply cannot be a "mere continuation of the status quo." *Id.* at 746. Consequently, a prior practice does not privilege unilateral implementation after a union is certified, or, as here, after the management-rights clause expires, where the practice is discretionary. Because *Courier-Journal*, *Capitol Ford*, and *Beverly Health* allow managerial discretion to continue after the expiration of a contract with a management-rights clause, they are fundamentally inconsistent with *Katz*. In addition, they are in tension with longstanding Board precedent involving changes after the expiration of a management-rights clause and principles governing a union's waiver of the right to bargain. Thus, the Board should take this opportunity to overrule these cases.

Instead of following these erroneous decisions, the Board should revise its approach to analyzing changes arising during negotiations for a successor agreement where a management-rights clause has expired. An employer seeking to defend such changes should be required to demonstrate that the changes it made during the life of the contract pursuant to a management-rights clause were reasonably certain as to timing and criteria—the same standard that applies to changes arising during negotiations for a first contract. Under this approach, an employer may implement an "automatic" change unilaterally because the change

represents a continuation of the status quo. But if the change involves an element of discretion, the employer must bargain before implementation.

In the instant case, the Respondent's mid-contract changes to Beneflex did not constitute a past practice because they were not made according to fixed criteria and involved a significant degree of discretion. Thus, the Respondent had a duty to bargain over the post-contract Beneflex changes, which it failed to fulfill. The Respondent's rule of treating unionized employees the same as non-union employees is not a sufficient limitation on its discretion so as to transform its mid-contract benefit changes into a legally-cognizable "past practice," and the Board should overrule *Courier-Journal* on this ground as well.

Background Principles

Section 8(d) of the Act confers on employers a duty to meet and confer in good faith about wages, hours, and other terms and conditions of employment. An employer violates this statutory bargaining duty by changing terms and conditions of employment without giving the union notice and an opportunity to bargain, unless the union waives its statutory right to bargain. *Katz*, 369 U.S. at 743; *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 811 (2007); *Control Svcs., Inc.*, 303 NLRB 481, 484 (1991), *enforced mem.*, 975 F.2d 1551 (3d Cir. 1992). Unilateral changes are unlawful because they are "tantamount to an outright refusal to negotiate" and represent a "circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal." *Katz*, 369 U.S. at 743, 746. In addition, unilateral action "minimizes the influence of organized

bargaining" and "interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). As a practical matter, it is difficult to bargain if an employer is free, during the course of bargaining, to modify the very terms and conditions that are the subject of those negotiations. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

The prohibition on unilateral changes means that existing terms and conditions of employment continue by operation of statute while the parties bargain for a collective-bargaining agreement. *Litton*, 501 U.S. at 206-07; *Holiday Inn of Victorville*, 284 NLRB 916, 916 (1987). Importantly, the obligation to maintain the status quo while bargaining is the same whether the circumstances involve a newly-certified union or the expiration of a collective-bargaining agreement. *Litton*, 501 U.S. at 198. In the context of an expired contract, the existing status quo reflects the terms explicitly established by that expired agreement as well as implied contract terms. *Intermountain Rural Elec. Ass'n*, 305 NLRB 783, 784, 787-88 (1991), *enforced*, 984 F.2d 1562 (10th Cir. 1993); *Holiday Inn*, 284 NLRB at 916.

The status quo that must be maintained during bargaining encompasses not only the existing wage and benefit rates, but also may include regular patterns of changes to those terms and conditions of employment. *See Mission Foods*, 350 NLRB 336, 337 (2007); *Oneita Knitting Mills, Inc.*, 205 NLRB 500, 500 n.1 (1973). Thus, change itself can be a part of the status quo. If change occurs with such frequency that employees can reasonably expect the practice to continue or reoccur

on a regular and consistent basis, this pattern of change becomes a term and condition of work itself, a form of past practice. *Caterpillar, Inc.*, 355 NLRB No. 91, slip. op. at 3 (Aug. 17, 2010). *See also Mission Foods*, 350 NLRB at 337. These so-called "past practices" are an essential part of the status quo that must be maintained during negotiations for a contract. Thus, an expected change that is consistent with past practice represents a "mere continuation of the status quo" and does not violate Section 8(a)(5). *Katz*, 369 U.S. at 746; *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002). Correspondingly, the cessation of a past practice represents a deviation from the status quo and is therefore unlawful. *Daily News of Los Angeles*, 315 NLRB 1236, 1236-41 (1994), *enforced*, 73 F.3d 406 (D.C. Cir. 1996).

Whether a regular, preexisting practice constitutes a legally-cognizable "past practice" that may be implemented without bargaining depends on the degree of discretion involved. Purely "automatic" changes may be imposed without bargaining. *Katz*, 369 U.S. at 746; *City Cab Co. of Orlando, Inc. v. NLRB*, 787 F.2d 1475, 1479-80 (11th Cir. 1986); *NLRB v. Allis-Chalmers Corp.*, 601 F.2d 870, 875 (5th Cir. 1979). But where a practice is "informed by a large measure of discretion," a union may insist that the employer "negotiate as to the procedures and criteria" for implementing its practice. *Katz*, 369 U.S. at 746-47. *See also Washoe Med. Ctr., Inc.*, 337 NLRB 202, 202 (2001); *Adair Standish Corp.*, 292 NLRB 890, 890 n.1 (1989), *enforced in relevant part*, 912 F.2d 854 (6th Cir. 1990) (employer could no longer continue to exercise its discretion over layoffs because of the intervention of the union). Thus, a pattern of wholly discretionary changes fails to satisfy the

definition of a "past practice." *See Dynatron/Bondo Corp.*, 323 NLRB 1263, 1265 (1997), *enforced in relevant part*, 176 F.3d 1310 (11th Cir. 1999) (no past practice where only "pattern" was that employer retained total discretion to make annual changes to employee medical contributions); *Garett Flexible Prods., Inc.*, 276 NLRB 704, 704 n.1 (1985).

As a means of cabining discretion, the Board requires that an asserted practice be at least reasonably certain as to timing and criteria. *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999), *enforced*, 1 Fed. Appx. 8 (2d Cir. 2001). *See also Mission Foods*, 350 NLRB at 337 (whether wage increase program is established practice depends on duration, regularity, whether fixed criteria are used, and amount). Even when that standard is met, an employer still owes a bargaining obligation if its practice involves some discretionary elements, such as the amount of a regularly-recurring wage increase. *See Mission Foods*, 350 NLRB at 337-38 (wage increase amount); *Hanes Corp.*, 260 NLRB 557, 557 (1982) (discretionary aspects of wage increase, safety rule, and layoff); *Oneita Knitting Mills,* 205 NLRB at 500 n.1 (union entitled to be consulted over implementation of preexisting wage practices "to the extent that discretion has existed in determining the amounts or timing of the increases").

Applying these principles, an employer is not privileged to continue a wholly or largely discretionary practice without bargaining or obtaining a waiver. Nor may it unilaterally implement changes pursuant to a reasonably certain practice if some elements of that practice are discretionary. In short, a bargaining duty inevitably

attaches whenever an employer seeks to exercise its discretion to change wage or benefit levels during negotiations. *See Eugene Iovine*, 328 NLRB at 294 (discretionary acts are "'precisely the type of action over which an employer must bargain with a newly-certified [u]nion'").

It is well settled that the right to unilaterally change working conditions pursuant to a management-rights clause does not continue after the contract has expired. Such management rights are not terms and conditions of employment themselves, but are rather waivers of a union's right to bargain over particular terms and conditions to the extent they authorize unilateral action. *Holiday Inn of Victorville*, 284 NLRB 916, 916 (1987). *See also Control Svcs., Inc.*, 303 NLRB 481, 484 (1991), *enforced mem.*, 975 F.2d 1551 (3d Cir. 1992). Thus, management-rights clauses do not normally survive the expiration of the collective-bargaining agreement, absent evidence that the parties intended the waiver to extend beyond the contract. *Id.* *See also Paul Mueller Co.*, 332 NLRB 312, 313 (2000); *Ironton Publ'ns, Inc.*, 321 NLRB 1048, 1048 & n.5 (1996). Consequently the unqualified right to make changes according to management's discretion ceases when the collective-bargaining agreement and management-rights clause expire. The issue in this case is the extent to which the mid-contract *exercise* of that right may create a past practice that privileges post-contract changes as part of the continuing status quo.

Argument

I. The Board should overrule cases holding that the mere exercise of discretion under a management-rights clause creates a legally-cognizable past practice

The D.C. Circuit remanded these cases due to its concern that the Board improperly disregarded the Respondent's mid-contract practice of changing the Beneflex program annually. The court determined that the Board's treatment of the Respondent's purported past practice was not in conformity with *Courier-Journal*, *Capitol Ford*, and *Beverly Health*, which stand for the proposition that an employer's mid-contract exercise of discretion pursuant to a management-rights clause constitutes a past practice that continues as part of the status quo after a contract expires and privileges further unilateral actions. This proposition is erroneous and should be overruled.

In *Courier-Journal*, 342 NLRB 1093 (2004), the Board concluded that the employer's health insurance changes were lawful because it had regularly made changes in costs and benefits, pursuant to a management-rights clause, for ten years under successive contracts and during hiatus periods without objection from the union. The contracts granted management the right to modify or terminate the benefits, so long as any changes would be made on the same basis as for non-represented employees. *Id.* at 1093. The Board concluded that even if the

employer's discretion was "not limited," the purported "past practice" privileged its post-contract actions. *Id.* at 1094.[2]

The Board solidified this view in cases subsequent to *Courier-Journal*. In *Capitol Ford*, 343 NLRB 1058 (2004), the Board found that an employer's discretionary use of bonus programs was part of the status quo where its predecessor had a practice, pursuant to an expired collective-bargaining agreement, of "act[ing] on bonuses at its discretion." *Id.* at 1058. And the Board articulated this principle again in *Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB 1319 (2006), although it did not affect the outcome in that case.[3] There the Board found the employer's unilateral actions unlawful, but a majority noted that the post-contract changes would have been privileged if they were "consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract." *Id.* at 1319 n.5.

The Acting General Counsel urges the Board to overrule *Courier-Journal* and *Capitol Ford* because they are irreconcilable with the meaning of past practice

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[2] *Courier-Journal*'s rationale was applied in a companion case, 342 NLRB 1148 (2004), which issued a few days later against the same respondent. That companion case should likewise be overruled on both grounds discussed in this brief.

[3] Although not cited by the D.C. Circuit's opinion, the Board also expressed this view in *Long Island Head Start Child Development Services, Inc.*, 345 NLRB 973, 973 n.5 (2005), *enforcement denied on other grounds*, 460 F.3d 254 (2d Cir. 2006). As in *Beverly Health*, the Board found a violation in that case, but noted that the employer had failed to demonstrate a past practice of "exercising its own discretion in changing its health insurance plan." *Id.* Thus, in addition to overruling *Courier-Journal* and *Capitol Ford*, the Board should disavow *Beverly Health* and *Long Island Head Start*, and any similar cases, to the extent they recite this misguided principle.

under *Katz*, they improvidently depart from longstanding Board law, and they create unnecessary tension with settled waiver principles. In addition, they undermine the collective-bargaining process by allowing an employer to circumvent the union concerning discretionary changes while the parties are at the bargaining table, thereby giving employees the impression that their bargaining agent is ineffectual.

a. *Courier-Journal* and *Capitol Ford* are irreconcilable with *Katz*

The Board should overrule *Courier-Journal* and *Capitol Ford* because their view of past practice is fundamentally irreconcilable with *NLRB v. Katz*, 369 U.S. 736 (1962). *Katz* plainly holds that a union may insist on bargaining whenever an employer seeks to implement a change that is "in no sense automatic" but rather is "informed by a large measure of discretion." *Id.* at 746. In those situations, a union is entitled to negotiate over the "procedures and criteria" for such contemplated changes. *Id.* at 746-47. In essence, *Katz* teaches that changes informed by discretion are not the type of practice that can be unilaterally implemented; they must be bargained over so as to cabin management's discretion.

Katz's prohibition on the unilateral exercise of discretion has been applied in a broad range of circumstances, including changes to health benefits. *See Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999), *enforced*, 1 Fed. Appx. 8 (2d Cir. 2001) (work schedules); *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1263-65 (1997), *enforced in relevant part*, 176 F.3d 1310 (11th Cir. 1999) (health insurance and merit raises); *Adair Standish Corp.*, 292 NLRB 890, 890 n.1 (1989), *enforced in relevant part*, 912

F.2d 854 (6th Cir. 1990) (layoffs); *Garett Flexible Prods., Inc.*, 276 NLRB 704, 704 n.1 (1985) (health insurance). *See also Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994), *enforced*, 73 F.3d 406 (D.C. Cir. 1996) (listing variety of contexts in which *Katz* applies). And *Katz*'s prohibition on unilateral changes has been applied not only to first-contract bargaining, but also bargaining for a successor agreement. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). The bargaining duties are the same in each situation, and thus an employer has an equivalent duty to refrain from changing the status quo in each circumstance. *Id.* at 198, 206-07. Just as the D.C. Circuit in remanding rejected the distinction between past practices arising prior to a union's arrival and those arising under a contract, there is no reason to distinguish between the level of discretion an employer should be allowed to unilaterally wield after a union's arrival versus after a collective-bargaining agreement expires. Because *Courier-Journal* and *Capitol Ford* enable employers to continue making discretionary adjustments to terms and conditions of employment after a management-rights clause expires and without any bargaining, they are contrary to *Katz* and must be overruled.[4]

The Board essentially already acknowledged this conflict in its Louisville decision. 355 NLRB No. 176. There it noted that *Courier-Journal* is "in tension" with the principle that an employer is prohibited from adjusting terms and

[4] Although *Katz* allows the Board the latitude to carve out situations where a unilateral change might be excused, *Courier-Journal* and *Capitol Ford* do not purport to create such a carve-out. 369 U.S. at 747-48. Rather, they simply distort the meaning of past practice as envisioned by *Katz*.

conditions of employment "if they amount to the exercise of unbounded managerial discretion" during first-contract bargaining. *Id*., slip op. at 2 n.5 (citing *Eugene Iovine*, 328 NLRB 294). In *Eugene Iovine*, the Board found that the employer's unilateral reduction in hours of work, a decision that "admittedly involved management discretion," was an unlawful unilateral change. 328 NLRB at 294. Citing *Katz*, among other cases, the Board noted that it "and the courts have consistently held that such discretionary acts are . . . 'precisely the type of action over which an employer must bargain with a newly-certified [u]nion." *Id*. In the instant matter, because the Board originally distinguished *Courier-Journal* in its Louisville decision, it did not find it necessary to reconsider *Courier-Journal*'s holdings at that time. On remand, the Board should take the opportunity to declare that *Eugene Iovine* properly interprets *Katz*, and that *Courier-Journal* and *Capitol Ford* are inconsistent with *Eugene Iovine* and are contrary to Supreme Court law and therefore cannot stand.

b. *Courier-Journal* and *Capitol Ford* are inconsistent with longstanding Board law

The effect of *Courier-Journal* and *Capitol Ford*—that the mere exercise of discretion can constitute a past practice, and thus, that employers may continue exercising their discretion as part of the status quo after a contract expires—is inconsistent with longstanding precedent. Once the Board decided that a management-rights clause does not outlive the expiration of the contract in *Holiday Inn of Victorville*, 284 NLRB 916, 917 (1987), it routinely determined that subsequent changes that might have been authorized by that expired waiver were

unlawful, that is, until *Courier-Journal* was decided.[5] In many cases, the Board determined that the post-contract action was unlawful simply because the management-rights clause had expired; there was no consideration of whether the employer had exercised that right and thereby created a "practice." *See Ky. Fried Chicken*, 341 NLRB 69, 70, 84 (2004); *Paul Mueller Co.*, 332 NLRB 312, 313 & n.4 (2000) (with Member Hurtgen noting that the changes were not consistent with past practice); *Ryder/Ate, Inc.*, 331 NLRB 889, 889 n.1, 893 (2000), *enforced per curiam sub nom. First Transit, Inc. v. NLRB*, 22 Fed. Appx. 3 (D.C. Cir. 2001); *Ironton Publ'ns, Inc.*, 321 NLRB 1048, 1048 (1996); *Furniture Renters of Am., Inc.*, 311 NLRB 749, 751 & n.14 (1993), *enforcement denied on other grounds*, 36 F.3d 1240 (3d Cir. 1994); *Kendall College of Art & Design,* 288 NLRB 1205, 1212 (1988). Even where the Board considered arguments that a post-contract action was consistent with past practice, it nonetheless found that the changes were not privileged. *See Univ. of Pittsburgh Med. Ctr.*, 325 NLRB 443, 443 & n.2 (1998), *enforced mem.*, 182 F.3d 904 (3d Cir. 1999) (past practice does not entitle employer to continue practice "as much . . . as it chooses"); *Blue Circle Cement Co.*, 319 NLRB 954, 954 (1995), *enforced in part on other grounds mem.*, 106 F.3d 413 (10th Cir. 1997) (no "consistently applied seasonal fluctuation" to justify schedule changes). Thus, the pre-*Courier-Journal* cases did not support the broad proposition that the

[5] The one exception may be *EIS Brake Parts*, 331 NLRB No. 195, slip op. at 3-4 (Aug. 25, 2000), where the Board sanctioned the combination of jobs because such changes were contemplated by the expired contract's provision for altering production methods and consistent with its prior practice. This case, however, has not been relied on by the Board since.

mere exercise of discretion during the life of the contract constitutes a past practice that would thereafter authorize discretionary changes after the contract expired.

Indeed, the Board explicitly declined to adopt such an expansive view of past practice in decisions issued shortly before *Courier-Journal*. In a 2001 *Beverly Health* decision, the Board majority rejected the dissent's suggestion that the "practice of taking unilateral action" under a management-rights clause and the "discretion exercised by the [employer] . . . was as much a part of the status quo as were the employees' wages and benefits." *Beverly Health & Rehab. Svcs., Inc.*, 335 NLRB 635, 636-37, 646 (2001), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003). The majority noted that the status quo "after contract expiration cannot include the right to make unilateral changes since such changes cannot be made in the absence of a waiver." *Id.* at 636 n.7. And it explained that under the dissent's view, "such a fluid status quo would vitiate an employer's bargaining obligation whenever a contract containing a broad management-rights clause expired. In that event, the expiration of the management-rights clause would be meaningless wherever the employer had taken advantage of the waiver to make changes." *Id.* at 637. Likewise, in *Register-Guard*, 339 NLRB 353, 355-56 (2003), the Board explicitly rejected the employer's contention that the prior institution of sales incentive programs pursuant to a contractual reservation of managerial discretion created a past practice privileging the creation of new bonuses during a contract hiatus.

Thus, prior to *Courier-Journal*, the Board squarely rejected the proposition that the exercise of discretion under a management-rights clause constitutes a past practice that would justify post-contract, discretionary changes. The Board should return to this earlier view and overrule the intervening cases that contradict this view.

c. *Courier-Journal* and *Capitol Ford* are in tension with settled waiver principles

As the Board already noted in this case in its original Louisville decision, *Courier-Journal*'s holding is also in tension with settled waiver principles. 355 NLRB No. 176, slip op. at 2 n.5. Ordinarily, a union's relinquishment of its statutory right to bargain must be "clear and unmistakable" for an employer to take unilateral action pursuant to a waiver. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708-09 (1983); *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 810-11 (2007). Thus, a union's silence or acquiescence in the face of previous unilateral changes does not normally constitute a waiver. *See, e.g.*, *Verizon N.Y., Inc.*, 360 F.3d 206, 209 (D.C. Cir. 2004); *Owens-Corning Fiberglass Corp.*, 282 NLRB 609, 609 (1987). And, as previously discussed, it is well-settled that a union's waiver, as expressed in a management-right clause, normally expires along with the rest of the agreement. *Holiday Inn of Victorville*, 284 NLRB 916, 916 (1987). Extrapolating from these principles, one would expect that an employer could only take unilateral action during a hiatus period if the union clearly surrenders its bargaining right. Yet the view of past practice espoused in *Courier-Journal* and *Capitol Ford* effectively

allows an employer to make unilateral changes in the absence of a continuing waiver.

Although *Courier-Journal* and *Capitol Ford* purport to apply past practice, not waiver, principles, in actuality these decisions so distort the concept of past practice that they undermine well-settled waiver principles. Past practice and waiver principles should work in a complementary manner. Automatic changes that merely continue the status quo should be permissible without a union's waiver. But practices that are discretionary, in whole or in part, should only be implemented if there is a meaningful opportunity to bargain as to the discretionary elements, or if the union has waived its right to bargain. *Courier-Journal* and *Capitol Ford* upset this doctrinal relationship by essentially allowing an employer to make discretionary changes after the expiration of a management-rights clause without bargaining, regardless of whether a union has waived its statutory rights. Because these cases create unnecessary tension with these settled waiver principles, the Board should abandon the distorted view of past practice espoused in these cases.

II. The Board should require employers to prove that an asserted past practice arising under a management-rights clause was reasonably certain as to both timing and criteria

When an employer alters wage rates, benefit levels, working hours or other terms of employment in the midst of bargaining with a newly-certified representative, the Board scrutinizes whether the purported past practice justifying that change is reasonably certain as to timing and criteria. *Eugene Iovine, Inc.*, 328

NLRB 294, 294 (1999), *enforced*, 1 Fed. Appx. 8 (2d Cir. 2001). *See also Mission Foods*, 350 NLRB 336, 337 (2007). When an employer defends its actions based on past practice, it bears the burden of demonstrating that such a practice existed. *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. at 3 (Aug. 17, 2010); *Eugene Iovine*, 328 NLRB at 294 n.2. To the extent that a change is consistent in part with a reasonably certain practice but involves some discretion, such as the amount of a wage increase, a bargaining duty still attaches as to that discretionary component. *Mission Foods*, 350 NLRB at 337; *Oneita Knitting Mills, Inc.*, 205 NLRB 500, 500 n.1 (1973). These standards properly ensure that any changes are reasonably predictable from the perspective of employees and that the bargaining representative is not circumvented as to any discretionary elements of a change.

The Acting General Counsel urges the Board to apply these same standards in the context of an asserted past practice arising under a management-rights clause. Under the proposed rubric, an employer may not make unilateral adjustments after a contract expires unless it followed fixed criteria when it made regular changes, by virtue of a management-rights clause, during the life of the contract and the new adjustment is consistent with that practice. To the extent that post-contract adjustments involve discretion, such as with regard to the amount of a wage or benefit change, the employer must bargain with the union over those discretionary elements.[6] This approach is consistent with prior Board cases,

[6] As a practical matter, an employer may satisfy its bargaining obligation without waiting until impasse on an agreement as a whole when a change concerns a discrete event that happens to occur while negotiations are in progress. *See Stone*

which did not reject out-of-hand the possibility that a past practice could arise under a management-rights clause. *See Register-Guard*, 339 NLRB 353, 355-56 (2003); *Blue Circle Cement Co.*, 319 NLRB 954, 954 (1995), *enforced in part on other grounds mem.*, 106 F.3d 413 (10th Cir. 1997); *Univ. of Pittsburgh Med. Ctr.*, 325 NLRB 443, 443 & n.2 (1998), *enforced mem.*, 182 F.3d 904 (3d Cir. 1999). Just as in the context of a new bargaining relationship, this approach recognizes that some practices designed solely by an employer represent the status quo and may continue to be implemented in limited circumstances.[7]

The proposed framework for regulating post-contract unilateral changes is advisable for several reasons. First, by harmonizing the rules governing the past

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Container Corp., 313 NLRB 336, 336 (1993) (an employer need not bargain to overall impasse over issues that "could not await an impasse in overall negotiations" where a proposal concerns a "discrete event" that "simply happens to occur while contract negotiations are in progress"). However, it still must timely notify the union and provide a meaningful opportunity to bargain over that matter. *Id.* at 336-37.

[7] This approach differs from the one taken in *Shell Oil Co.*, 149 NLRB 283, 288 (1964). In that case, the Board found that the employer was authorized to subcontract certain work during a hiatus period because that action did not "materially var[y] in kind or degree from what had been customary in the past." *Id.* *Shell Oil* is best understood as a subcontracting case, in the vein of *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965). Thus, its "kind or degree" standard should be confined to that narrow factual circumstance. This clarification is important because, although the Board has already overruled *Shell Oil* with respect to the survival of the management-rights clause, *Beverly Health & Rehab. Svcs., Inc.*, 335 NLRB 635, 636 n.6, (2001), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003), the case still has continuing vitality on the past practice issue in a few Board cases and in the courts of appeals. *See, e.g.*, *Winn-Dixie Stores, Inc.*, 224 NLRB 1418, 1434 (1976), *enforced in part*, 567 F.2d 1343 (5th Cir. 1978) (authorizing shift changes that did not vary "in degree or kind from those historically made" under a management-rights clause); *Beverly Health & Rehab. Svcs., Inc. v. NLRB*, 297 F.3d 468, 480-81 (6th Cir. 2002).

practice defense in the post-contract context with those that apply during first-contract negotiations, it streamlines the legal standard and removes artificial distinctions. This objective is in line with the D.C. Circuit's observation that it saw "no reason it should matter whether [a] past practice first arose under a CBA that has since expired." Second, it alleviates the Board's concern that recognizing a past practice arising under a management-rights clause might render the expiration of that clause meaningless. 355 NLRB No. 176, slip op. at 2. Under the proposed approach, the expiration of the management-rights clause would mean the revocation of management's authority to act according to its discretion, which represents a significant shift in managerial prerogative when a contract expires. Third, this model would promote bargaining because unions will be more willing to grant management some discretion during the contract's term, knowing that the discretion would be limited to that period and any post-contract adjustments would consequently be predictable or bargainable. *Id*. Finally, by allowing changes that are consistent with employee expectations and prohibiting changes that are discretionary, the proposed framework promotes the objectives of the Act by ensuring that employers are not perceived as freely circumventing the bargaining representative during negotiations. *See May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945).

III. The Respondent's changes to Beneflex were not privileged by past practice because its in-contract practice was not reasonably certain as to both timing and criteria

a. The past annual changes were not made according to fixed criteria or guidelines

Applying the above standard, the Respondent plainly failed to demonstrate that its mid-contract changes to the Beneflex program were reasonably certain as to both timing and criteria. Although the prior annual changes went into effect at the same time each year, they were informed by a large measure of discretion, and thus, its failure to bargain over the continued implementation of such changes after the collective-bargaining agreements expired was unlawful.[8]

In the Edge Moor case, the judge observed that the changes the Respondent made from 1995 to 2004 included increases and decreases in premiums, modifications in insurance co-payment and deductible levels, alterations of coverage rules, and the creation of new benefits. 355 NLRB No. 177, slip op. at 5. While some types of changes, such as adjustments to medical premium and coverage levels, were made almost every year, other changes were "nonroutine" and occurred "intermittently" or "only once" during this period. *Id.* Applying pre-*Courier-Journal* case law, the judge determined that the 2005 changes in question, which

[8] The Board already determined that the Respondent did not satisfy its bargaining obligation, even taking into account the *Stone Container* exception. In the Louisville case, the Respondent "flatly refused" the Union's request to bargain. 355 NLRB No. 176, slip op. at 3. And in the Edge Moor case, the Board affirmed the judge, who concluded that the *Stone Container* exception did not apply because the changes were not a discrete, recurring event and because the Respondent did not satisfy even a diminished bargaining duty. 355 NLRB No. 177, slip op. at 11.

included changes to employee contributions, benefit rules, coverage levels and options, and the creation of a new health savings account plan, were "too discretionary, variable, and ad hoc to be considered part of an established past practice." *Id.* at 4-5, 11.

Likewise, in the Louisville case, the Respondent had a history of changing employee premiums, co-payments and deductibles as well as coverage levels and plan rules. (Stip. Facts ¶ 15, 17, 22, 26, 28, 33, 42, 55.) But not every benefit plan and coverage type experienced such changes each year, and it did not introduce a single new benefit from 1996 to 2003.[9] (*Id.*) In this case, the challenged changes in 2004 and 2005 involved: adjustments to premiums for medical, dental, and financial services plans; changes to the prescription drug benefit; various modifications to plan options, coverage, and rules; and the introduction of a new legal services plan. (Stip. Facts ¶ 62, 66.) Despite these facts, the judge found no violation because the Respondent did not make changes "arbitrarily" to the "disadvantage" of employees, and that the implemented changes did not deviate from the "established pattern." 355 NLRB No. 176, slip op. at 11-12. Indeed, the judge found that the "Respondent has 'demonstrated an established past practice of exercising its own discretion in changing its health care plan.'" *Id.*, slip op. at 12.

Under these circumstances, the Respondent failed to meet its burden of demonstrating that a past practice privileged its post-contract changes because the

[9] For example, while Dental Option A experienced premium changes from 1996 to 1999, the next change did not occur until 2005. (Stip. Facts ¶ 15, 17, 22, 26, 28, 33, 42, 55.)

prior annual Beneflex changes did not follow fixed criteria, but rather reflect unbounded discretion. *See Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999), *enforced*, 1 Fed. Appx. 8 (2d Cir. 2001). Some of the modifications it defends were unprecedented rule or coverage changes or entirely new programs, and thus necessarily involved discretion. These were the changes the judge in the Edge Moor case focused on in concluding that the 2005 changes were too discretionary, variable and ad hoc. 355 NLRB No. 177, slip op. at 11. Moreover, even as to the modifications that occurred on multiple occasions, there was no way to predict which programs and benefit options would be modified each year, and what those modifications would be. In fact, a senior consultant in DuPont's Global Rewards Strategy department testified that she recommended changes based on "trends and things that are happening in the market place" and her assessment of "what might be attractive to employees." (Louisville Works Tr. 25-26.) Thus, the Board should find that even these changes were too unpredictable and variable to establish a real practice under *Eugene Iovine*. *See also Caterpillar, Inc.*, 355 NLRB No. 91, slip op. at 3 (Aug. 17, 2010) (series of prescription drug changes too dissimilar to establish a practice, even assuming regularity and frequency).

Even as to those benefit features that did change nearly annually, such as medical premiums, the Respondent has not identified any fixed rule or formula governing the change in employee contributions. The Board has previously explained that an employer may lawfully pass part of an externally-imposed premium increase on to employees without bargaining if it had a practice of

splitting the costs with employees at a fixed ratio, paying a set amount itself, or having employees contribute a set amount. *Maple Grove Health Care Ctr.*, 330 NLRB 775, 780 (2000). *See also Post-Tribune Co.*, 337 NLRB 1279, 1280-81 (2002); *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1265 (1997), *enforced in relevant part*, 176 F.3d 1310 (11th Cir. 1999); *Intermountain Rural Elec. Ass'n*, 305 NLRB 783, 785-86 (1991), *enforced*, 984 F.2d 1562 (10th Cir. 1993); *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), *enforced*, 772 F.2d 421 (8th Cir. 1985); *A-V Corp.*, 209 NLRB 451, 452 (1974). Here the Respondent's changes to employees' medical contributions were not made pursuant to any set formula governing cost-sharing. Thus, those changes were discretionary and subject to a duty to bargain, which the Respondent failed to fulfill.

In short, while employees might have expected that the panoply of benefit options available to them would change from year to year, there is no way they or their representatives could predict which benefits would change, how their financial obligation would change, and what rules or programs would be added, eliminated or altered in some way. Thus, the Board should find that the prior changes the Respondent made were too discretionary to justify unilateral implementation after the contracts expired, and overrule the judge's contrary determination in the Louisville case.[10]

[10] The judge's finding in the Louisville case that the Respondent did not abuse its asserted right to effectuate changes "to the detriment" or "to the disadvantage of the represented employees" is misplaced. 355 NLRB No. 176, slip op. at 11-12. In fact, an employer is "'not at liberty unilaterally to change [a] benefit either for better or worse.'" *Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994), *enforced*, 73 F.3d

b. The Respondent's equivalent treatment of union and non-union employees does not sufficiently constrain its discretion so as to privilege unilateral action

Respondent's rule of treating union employees the same as unrepresented employees does not provide a sufficient limitation on its discretion to convert the Respondent's past changes into a legally-cognizable past practice. Because *Courier-Journal* erroneously treats a similar practice as sufficiently cabining managerial discretion, it should also be overruled on this ground as well. 342 NLRB 1093, 1094 (2004).

As the Board already noted in its Louisville decision, an employer is not exempt from bargaining simply because it commits itself to treating unionized and nonunionized employees identically. 355 NLRB No. 176, slip op. at 3. Thus, it would be incongruous to allow an employer to circumvent its bargaining duty merely by labeling such treatment a "past practice." Aside from *Courier-Journal*, the Board has consistently held that past equal treatment does not justify subsequent unilateral changes. In *Larry Geweke Ford*, the judge rejected just such a claim, and the Board affirmed that decision. 344 NLRB 628, 632 (2005). Likewise, in *Mid-Continent Concrete*, 336 NLRB 258, 259, 268 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002), the Board found it "immaterial" that the employer's changes to the health plan were companywide and covered union and non-union

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406 (D.C. Cir. 1996) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970)). The Charging Party unions will have an opportunity in compliance to decide whether to retain any changes that were beneficial to bargaining-unit members.

employees, ultimately concluding that these changes violated Section 8(a)(5). *Cf. J. P. Stevens & Co., Inc.*, 268 NLRB 89, 96-97 (1983) (personnel policy changes and grant of general wage increase unlawful despite asserted practice of making wage and benefit changes system-wide at the same time); *United Hosp. Med. Ctr.*, 317 NLRB 1279, 1282 (1995) (employer obligated to bargain over changes to health benefits, even though it continued to offer the same benefits as rest of workforce, where union did not waive bargaining).

Logically, Respondent's purported "limitation" on its discretion is no limitation at all. The Respondent was free to make whatever changes it pleased with regard to unrepresented employees, and by extension, it could do the same with respect to its unionized workforce. *See Courier-Journal*, 342 NLRB at 1096-97 (Member Liebman, dissenting). While tying union employees' fate to that of non-union employees might make an employer less likely to radically curtail benefits, or at least less likely to curtail them for discriminatory reasons, this by no means limits its authority to alter benefits in any direction and to any degree, at its sole discretion, should it choose to exercise that authority. Ultimately, the Respondent's tradition of implementing changes for union and non-union employees alike does not guarantee that any particular change is reasonably predictable from the perspective of employees, and thus this custom does not sufficiently cabin Respondent's discretion to constitute a practice that warrants unilateral action.

Courier-Journal's finding that the employer's discretion was "limited," merely because it had committed to provide benefits on the "same basis" for its represented

and unrepresented employees, 342 NLRB at 1094, conflicts with other Board decisions and is logically unsound. Thus, it should be overruled on this basis as well.

Conclusion

By holding in *Courier-Journal* and *Capitol Ford* that an employer can continue to unilaterally exercise its managerial discretion after the expiration of a management-rights clause, the Board created unnecessary and irreconcilable tension with fundamental principles governing the past practice defense. The Board should overrule these cases, and should require that an employer attempting to defend a post-contract unilateral action, on the ground that it was consistent with past practice, meet the same burden as is required in other contexts; that is, the employer must demonstrate that it had a regular practice of changing terms and conditions of employment with reasonable certainty as to timing and criteria. Under this approach, post-contract unilateral action would only be lawful when an employer followed fixed criteria in making changes authorized by the management-rights clause while that clause was in effect. The Respondent here failed to demonstrate that the annual changes it made to Beneflex prior to the expiration of the collective-bargaining agreements followed reasonably certain criteria. Thus, the Respondent's unilateral changes to Beneflex after the expiration of the contracts were unlawful.

Respectfully submitted,

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December 19, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of ACTING GENERAL COUNSEL'S STATEMENT OF POSITION in Cases 09-CA-040777, 09-CA-041634, and 04-CA-033620 was served in the manner indicated to the parties listed below on this 19th day of December, 2012.

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