

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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E.I. DUPONT DE NEMOURS, )  
LOUISVILLE WORKS, )  
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Respondent, )  
 )  
and )  
 )  
UNITED STEEL, PAPER AND )  
FORESTRY, RUBBER, )  
MANUFACTURING, ENERGY, )  
ALLIED INDUSTRIAL AND )  
SERVICE WORKERS )  
INTERNATIONAL UNION, )  
 )  
Charging Party. )  

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Case Nos. 9-CA-40777  
9-CA-41634

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E.I. DUPONT DE NEMOURS )  
AND COMPANY, )  
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Respondent, )  
 )  
and )  
 )  
UNITED STEEL, PAPER AND )  
FORESTRY, RUBBER, )  
MANUFACTURING, ENERGY, )  
ALLIED INDUSTRIAL AND )  
SERVICE WORKERS )  
INTERNATIONAL UNION, )  
 )  
Charging Party. )  

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Case No. 4-CA-33620

**POSITION STATEMENT OF CHARGING PARTY  
UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION**

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STATUTES:

National Labor Relations Act, as amended

(29 U.S.C. § 151 et seq.)

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**POSITION STATEMENT OF CHARGING PARTY  
UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND  
SERVICE WORKERS INTERNATIONAL UNION**

In response to the notice issued by the National Labor Relations Board (NLRB or the Board) on October 31, 2012, Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the Union) submits this position statement to the NLRB on remand of the Board's decisions in *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB 1084 (2010) ("*DuPont (Louisville Works)*"), and *E.I. DuPont de Nemours and Co.*, 355 NLRB 1096 (2010) ("*DuPont (Edge Moor)*"), from the D.C. Circuit's decision in *E.I. DuPont de Nemours and Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012).

The NLRB should accept the D.C. Circuit's suggestion in remanding this case that the Board may "return to the rule it followed in its earlier decisions." *Id.* at 70. The Court remanded based on "the Board's fail[ure] to give a reasoned justification for departing from its precedent," specifically, its decisions in *The Courier-Journal*, 342 NLRB 1093 (2004) ("*Courier-Journal I*"), *The Courier-Journal*, 342 NLRB 1148 (2004) ("*Courier-Journal II*"), *Capitol Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319 (2006). *DuPont*, 682 F.3d at 70. The Court ordered the Board, on remand, to "either conform

to its precedent . . . or explain its return to the rule it followed in its earlier decisions.” *Ibid.*

As we explain below, the Board should take the latter option, overruling the *Courier-Journal* cases and *Capitol Ford* and returning to its earlier decisions, which were firmly rooted in the Supreme Court’s decision in *NLRB v. Katz*, 369 U.S. 736 (1961). In doing so, the Board should take this opportunity to clarify the operation of the dynamic status quo doctrine in several regards implicated by this case.

## STATEMENT

The relevant facts are summarized in the Board’s previous decisions in these cases. A number of facts are, however, worth emphasizing here.

First, the unilateral changes to employee benefits at issue in these cases were wide-ranging. DuPont’s changes to employee benefits at the Louisville Works on January 1, 2004, involved increases in employee medical premiums, modification of various insurance coverage levels, changes to the Health Care Spending Account benefit, elimination of one option within the financial planning benefit plan, and the creation of a new legal benefit plan. *DuPont (Louisville Works)*, Joint Ex. A, ¶ 62. DuPont’s changes at the Louisville Works and at the Edge Moor plant on January 1, 2005 “included increases in employee premiums for certain medical and

dental options, increases in prescription drug costs, modification of various insurance coverage levels, increases in premiums for the financial planning benefit, and the creation of a health savings account.” *DuPont (Edge Moor)*, 355 NLRB at 1102; *DuPont (Louisville Works)*, Joint Ex. A, ¶ 66;

DuPont’s prior practice of annually making unilateral changes to employee benefits at both plants was similarly wide-ranging, including both regular changes to employee medical premiums and coverage levels and “intermittent[]” changes to a wide variety of other employee benefits, such as the creation and elimination of entire categories of benefit plans and of options within benefit plans. *DuPont (Edge Moor)*, 355 NLRB at 1100; *DuPont (Louisville Works)*, Joint Ex. A, ¶¶ 15, 17, 22, 26, 28, 33, 42, 55. DuPont has never alleged that any of these changes were based on any fixed criteria, although the company claims that has generally applied the same changes to employees at all of its facilities regardless of union representation.

Most of the benefits that DuPont provided to employees, including the employee medical plan, were self-insured rather than provided through a third-party insurer. *DuPont (Louisville Works)*, 355 NLRB at 1092. “This means the contributions of [DuPont] and the participating employees pay the cost of claims under the plans, as well as the costs for administration. It also

means that [DuPont], rather than a third-party insurer, is responsible for implementing any modifications to those plans.” *DuPont (Edge Moor)*, 355 NLRB at 1100.

As a self-insurer, DuPont had the authority to vary the cost and substance of benefits from facility to facility. The plan documents specifically state that “[b]enefits under th[e] Plan shall not apply to any employee or the dependent(s) of any employee in a bargaining unit represented by a union for collective bargaining unless and until collective bargaining on the subject has taken place and any requisite obligations thereunder have been fulfilled.” *DuPont (Edge Moor)*, Joint Ex. 3C, ¶ IV. The plan document for the medical plan also sets forth a number of plan options that *may* be available at different DuPont facilities, such as a Preferred Provider plan or a Consumer Choice option, and then states, in addition, that “Alternative Coverage may be elected, including but not limited to Blue Cross/Blue Shield or a health maintenance organization (HMO) if it is available at the employee’s location.” *Id.*, Joint Ex. 4A, ¶ VIII. And, DuPont told employees at both facilities at issue in this case that what plan options would be available at their facility would depend on “[w]hat specific needs and concerns have been expressed by employees.”

*DuPont (Louisville Works)*, Joint Ex. 16, p. 2, needs and concerns that could have been conveyed by the employees' chosen representatives in bargaining.

As a factual matter, DuPont did vary the cost and substance of employee benefits from plant to plant. For example, in the mid-1990s, DuPont exempted employees at the Louisville Works from insurance premium increases that it applied to employees at other facilities. *Id.*, Joint Ex. 5. The company similarly exempted employees at its Tonawanda, New York plant from changes to benefits during several years beginning in the late 1990s and continuing into the early 2000s. *Id.*, Joint Ex. A, ¶8.

Finally, when DuPont announced its planned changes to employee benefits at the Louisville Works and at the Edge Moor plant, both local unions demanded bargaining. *DuPont (Louisville Works)*, 355 NLRB at 1084; *DuPont (Edge Moor)*, 355 NLRB at 1101. At Louisville Works, DuPont "flatly refused the Union's request . . . to bargain over the Respondent's proposed changes to employee benefits." *DuPont (Louisville Works)*, 355 NLRB at 1086. At the Edge Moor plant, DuPont bargained for a time and then unilaterally implemented its proposed changes, while "conced[ing] that the parties were not at impasse when it made those changes." *DuPont (Edge Moor)*, 355 NLRB at 1102.

## SUMMARY OF ARGUMENT

The Supreme Court's decision in *Katz* holds that an employer must maintain the status quo while bargaining such that an employer's unilateral change to terms and conditions of employment constitutes an unlawful refusal to bargain. *Katz* and its progeny provide a narrow exception for the "dynamic status quo" – a recurring change to a term or condition of employment that is either fully automatic or, in certain cases, that contains a mix of automatic and discretionary elements. In the latter case, the automatic elements of the change must be sufficiently fixed as to timing and criteria that the union can meaningfully bargain with the employer over the discretionary aspects of the change. But a wholly discretionary employer change cannot constitute the dynamic status quo at all, since such a change would conflict with the core holding of *Katz*.

In its previous consideration of these cases, the Board should have overruled, rather than distinguished, the *Courier-Journal* cases and *Capitol Ford* as fundamentally inconsistent with *Katz*. In those cases, the Board confused its waiver doctrine with the dynamic status quo, holding that a union's past waiver of its right to bargain over a term of employment allows the employer to continue to make unilateral discretionary changes to that same term in the future. That holding conflicts both with the Board's well-

established rule that a union's waiver of bargaining over a mandatory subject is revocable as well as with the core holding of *Katz* that an employer's discretionary unilateral change to a term of employment not only does not itself constitute a term of employment, but also violates the National Labor Relations Act (NLRA or the Act).

In addition to overruling the *Courier-Journal* cases and *Capitol Ford*, the Board should also take this opportunity to clarify its law regarding two closely-related issues that arise in these cases. First, an employer's practice of applying the same changes to the terms of employment of union-represented employees as to unrepresented employees is not a fixed criteria for purposes of the dynamic status quo because the employer has unrestrained authority to change terms of employment for unrepresented employees. The Board should also clarify that its *Stone Container* doctrine – which in certain circumstances allows an employer to insist on bargaining over a discrete term of employment outside of overall bargaining – is a variation on the dynamic status quo and, therefore, must be applied in a manner consistent with *Katz*. An employer, therefore, can only insist on *Stone Container* bargaining where the particular change at issue is sufficiently fixed as to both timing and criteria.

In these cases, DuPont’s wide-ranging unilateral changes to employee benefits at its two plants violated the Act because they were not based on any fixed criteria. DuPont’s claim that its practice of changing employee benefits for union-represented employees in the same manner as for unrepresented employees constituted the dynamic status quo is unavailing because nothing limited the company’s discretion to make changes to employee benefits for unrepresented employees. Finally, DuPont cannot rely on *Stone Container* to justify its unilateral changes for the same reason that *Katz* more generally did not privilege the company to make the changes – because no fixed criteria defined DuPont’s practice of making unilateral changes to employee benefits.

## **ARGUMENT**

1. The proper analysis of this case begins with *Katz*. *Katz* holds that “an employer’s unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.” 369 U.S. at 743.

In *Katz*, the Court allowed for a narrow exception from this general rule against unilateral changes for a limited category of changes that represent nothing more than “a mere continuation of the status quo.” *Id.* at

746. In the context of bargaining over merit pay increases, the Court explained:

“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 . . . 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.” *Id.* at 745-47 (footnote omitted).

Employer discretion to set a term of employment does not itself constitute a part of the status quo that the employer may maintain. It is easy enough to see why this is true when, as in *Katz*, the parties are bargaining for an initial contract; an employer’s routine exercise of its discretion to set terms and conditions of employment when the union is not on the scene is the antithesis of the duty to bargain with employees’ chosen representative set forth in Sections 8(a)(5) and 8(d) of the Act. If an employer were permitted to continue making unilateral discretionary changes as part of the status quo, there would be nothing left of *Katz*’s holding that such unilateral changes constitute a refusal to bargain. *Cf., Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (“[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.”).

The rule that an employer’s unilateral exercise of its discretion does not constitute the status quo applies equally, however, where there is an established bargaining relationship between the parties. The Board has long recognized that where a union waives its right to bargain over an employer’s unilateral exercise of discretion in setting a term of employment – either

explicitly through agreement or implicitly by acquiescing in such a change without immediately demanding bargaining – that waiver does not transform the employer’s exercise of discretion into a term and condition of employment. *See Register-Guard*, 339 NLRB 353, 355 (2003) (“A contractual reservation of managerial discretion . . . does not survive expiration of the contract that contains it, absent evidence that the parties intended it to survive.”); *Owens-Corning Fiberglass*, 282 NLRB 609, 609 n.1 (1987) (“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.”).

As a practical matter, the law could not be otherwise. If it were, a union could never safely enter into an agreement allowing an employer to act unilaterally on any term or employment, or safely allow a unilateral change to pass without demanding bargaining, even if the particular change in question was not a matter of immediate concern. And, a rule that permitted an employer to make unilateral discretionary changes based on a past practice of such discretionary changes, as if no union were on the scene at all, would undermine *Katz*’s core holding that such unilateral changes constitute a refusal to bargain in violation of the Act.

2. In contrast to entirely discretionary changes, *Katz* and its progeny recognize that “automatic [changes] to which the employer has already

committed himself,” *Katz*, 369 U.S. at 746, and certain changes that “contain both automatic and discretionary elements,” *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981), constitute “a mere continuation of the status quo,” *Katz*, 369 U.S. at 746 – the so-called “dynamic status quo.”

Where a particular recurring change is wholly automatic, the employer is required by operation of the Act to make the change in order to maintain the status quo. “[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.” *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996). In either case, “[t]he 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.” *Ibid.* (citation and quotation marks omitted) (emphasis in *Daily News*).

Where a change “contain[s] both automatic and discretionary elements,” *Blevins Popcorn*, 659 F.2d at 1189, it will constitute the dynamic status quo provided that the automatic elements of the change are sufficiently well-defined to permit the “union to know whether or not there has been a substantial departure from past practice,” *Katz*, 369 U.S. at 746, so as to engage in meaningful bargaining over the remaining discretionary

aspects of the change. In such a case, the dynamic status quo doctrine obliges the employer to “maintain the fixed elements of the . . . program . . . and to negotiate with the Union over the discretionary element” such as “the amount” of a merit increase. *Mission Foods*, 350 NLRB 336, 337 (2007).

In defining how automatic a change must be in order to constitute the dynamic status quo, the D.C. Circuit and the Board have stated that a change must be “fixed as to timing *and* criteria,” even if it is “discretionary as to amount.” *Daily News*, 73 F.3d at 412 (emphasis added); *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999) (dynamic status quo requires “reasonable certainty as to the timing and criteria” for the change (quotation marks omitted)). In contrast, a change that is “fixed [as to] timing alone” is not “sufficient to bring the program under *Katz*.” *Id.* at 412 & n.3. *Accord Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1239 (D.C. Cir. 2011) (where “[t]he only common theme . . . is timing,” that “characteristic [is] insufficient to create a term or condition of employment”). For example, the D.C. Circuit has explained that, in a case where “the Company retained total discretion to grant [wage] increases based on any factors it chose, we doubt that discontinuing the policy would have resulted in a violation of section 8(a)(5) even though the raises had been awarded annually.” *Ibid.*

Although both *Katz* and *Daily News* applied the dynamic status quo to merit pay programs, the Board has routinely applied the same analysis to employee health benefits. For example, in the circumstance “of an externally imposed insurance premium increase,” “if an employer had a practice of paying, for example, 80 percent of the premiums and the employees 20 percent, no change in the status quo ante would be found if both the employer and the employees continued, after the increase, to pay the same percentages of the larger total.” *Maple Grove Health Care Center*, 330 NLRB 775, 780 (2000) (footnote omitted). *Accord The Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002) (“no violation of Section 8(a)(5) and (1) where . . . the employer had a past practice of sharing premium costs with employees according to a particular percentage, and simply allocated the carrier’s premium increase in a manner that maintained that percentage”).

In contrast, where the employer’s past exercise of discretion with regard to employee health benefits is not fixed as to both timing and criteria, the employer may not make unilateral changes to benefits without violating the Act. Like a wage increase program for which “the Company retained total discretion to grant the increases based on any factors it chose,” *Daily News*, 73 F.3d at 412 n.3, “changes [to health coverage] which [a]re wholly discretionary, variable (involving changes in carriers, deductibles, benefit

levels and premiums), and made on an ad hoc basis, d[o] not constitute an established past practice that bec[o]me[s] part of the status quo.” *Larry Geweke Ford*, 344 NLRB 628, 628 n.1 (2005) (opinion of Member Schaumber).

3. Over the years, the dynamic status quo doctrine has become muddied by a number of lines of Board precedent that have, at times, been applied without sufficient regard to the basic rules set forth in *Katz*. The Board should take the opportunity presented by this case – which raises several of these important issues – to clarify its law in this area generally.

a. First, the Board should overrule its decisions in the *Courier-Journal* cases and *Capitol Ford* in so far as those cases stand for the proposition that an employer is privileged to make a unilateral change to a term of employment based solely on the union’s acquiescence to a prior unilateral change to the same term – either through the union’s contractual agreement (through a management rights clause or otherwise) or through mere acquiescence in the employer’s unilateral action – and without regard to whether the particular change at issue constitutes the dynamic status quo within the meaning of *Katz*.<sup>1</sup>

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<sup>1</sup> In remanding this case, the D.C. Circuit stated that it viewed the Board’s decision “in the 2006 iteration of *Beverly Health Services*” as falling into the same category as the *Courier-Journal* cases and *Capitol Ford*.

The Board in the *Courier-Journal* cases and *Capitol Ford* confused its waiver doctrine with the dynamic status quo, to the detriment of both bodies of law. In the *Courier-Journal* cases, the Board, purporting to apply *Katz*, held that the employer’s discretionary unilateral changes to employee health benefits did not violate the Act because “even if the [employer’s] discretion

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*DuPont*, 628 F.3d at 70. But the language the Court cites from that case – 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 69-70 (quoting *Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319, 1319 n.5 (2006)) – is dicta from two Board members in a case in which those same Board members held that the employer’s “post-expiration unilateral changes were unlawful” because the employer “only asserted in conclusory manner that it had such a practice” and “failed to support its assertion with record evidence,” *Beverly Health*, 346 NLRB at 1319 n.5. The Board should thus disavow this dicta, clarifying that it does not constitute binding Board precedent.

The D.C. Circuit also cited with approval the Sixth Circuit’s statement in its earlier review of that same case 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,” *DuPont*, 682 F.3d at 69 (quoting *Beverly Health and Rehabilitation Services, Inc. v. NLRB*, 297 F.3d 468, 481 (2002)). That statement is also dicta, as the Sixth Circuit found that the employer failed to justify its unilateral changes even under the Court’s stated rule because it did “not introduce[] evidence of a pattern of unilateral change[s] . . . during the term of the parties’ CBA.” *Beverly Health*, 297 F.3d at 481. Moreover, the Sixth Circuit based its legal conclusion on the Board’s decision in *Shell Oil*, 149 NLRB 283 (1964), and its progeny, *see Beverly Health*, 297 F.3d at 480-81, decisions that had previously been overruled by the Board, *see Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 636 n.6 (2001).

is not limited, the past practice, accepted by the Union, privileged the Respondent's actions." *Courier-Journal I*, 342 NLRB at 1094. *See also Courier-Journal II*, 342 NLRB at 1148 (adopting same reasoning).

Similarly, in *Capitol Ford*, the Board permitted the employer to unilaterally implement and modify a productivity bonus program without bargaining with the union on the basis of the union's waiver under an expired contract that had allowed a predecessor employer to "act on bonuses at its discretion." 343 NLRB at 1058.

The relevant point in all three cases for determining whether the changes at issue constituted the dynamic status quo, as the dissent in *Courier-Journal I* explained, was whether there was "reasonable certainty" as to both the timing and criteria" of the employers' unilateral changes, 342 NLRB at 1096 (Liebman, M., dissenting in part) (quoting *Eugene Iovine*, 328 NLRB at 294), not whether the unions acquiesced in prior similar changes. That is so because a union's waiver of its right to bargain over a term of employment does not itself become a term of employment; such a waiver terminates either when the contract containing the waiver expires, *Register-Guard*, 339 NLRB at 355, or when the union ends its acquiescence in the employer's practice of making unilateral changes by demanding bargaining, *Owens-Corning*, 282 NLRB at 609 n.1.

By distinguishing the *Courier-Journal* cases rather than overruling them, the Board, in its earlier review of the present cases, implicitly accepted the conclusion that a union’s prior waiver of its right to bargain over a term of employment could mature into the status quo, at least when “the employer had established a past practice of making such changes both during periods when a contract was in effect and during hiatus periods.” *DuPont (Louisville Works)*, 355 NLRB at 1084. But, as we have explained, even that more limited conclusion is incorrect – because “[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*, 282 NLRB at 609 n.1, an employer’s “past practice of making . . . changes . . . during hiatus periods,” *DuPont (Louisville Works)*, 355 NLRB at 1089, even when combined with a union’s acquiescence to such changes, does not add up to the dynamic status quo. Rather, under *Katz*, it is only when an employer’s change to a term of employment is “automatic,” 369 U.S. at 746 – in the sense of being “fixed as to timing and criteria,” *Daily News*, 73 F.3d at 412 – that it constitutes the dynamic status quo.<sup>2</sup>

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<sup>2</sup> To the extent that, in a given case, the dynamic status quo may “contain both automatic and discretionary elements,” *Blevins Popcorn*, 659 F.2d at 1189, a union can, of course, through acquiescence waive its right to bargain over the discretionary elements. However, such a waiver has nothing to do with the determination in the first instance that the particular

b. In applying the *Katz* analysis, a central issue in the *Courier-Journal* cases, as in these cases, was whether an employer's practice of treating union-represented employees in the same manner as unrepresented employees is, by itself, a sufficiently fixed criteria to convert an otherwise wholly discretionary practice into the dynamic status quo. Because such a practice provides, as the dissent in *Courier-Journal I* pointed out, "no limitation at all" on the employer's discretion with regard to union-represented employees, 342 NLRB at 1096 (Liebman, M., dissenting in part), the Board should disavow its statements to the contrary in the *Courier Journal* cases, see *Courier-Journal I*, 342 NLRB at 1094; *Courier-Journal II*, 342 NLRB at 1148.

As the D.C. Circuit pointed out in refusing to enforce the Board's decisions in these cases:

"[H]ere 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 NLRB at 1094.

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change constitutes the dynamic status quo, a determination that turns on a finding that the change is sufficiently "fixed as to timing and criteria," *Daily News*, 73 F.3d at 412, as to be "automatic" within the meaning of *Katz*.

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." *DuPont*, 682 F.3d at 68-69 (brackets in original).

The Board's precedent is, in fact, more mixed than the D.C. Circuit's decision recognizes. Prior to the *Courier-Journal* cases, the Board held that, in determining whether an employer's unilateral change to health benefits violates the Act, it is "immaterial that [the employer's] changes to the plan . . . were companywide and as such involved both unit and non unit employees." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001). *See also Larry Geweke Ford*, 344 NLRB at 628, 632 ("[T]he fact that the Respondent has a past practice of providing the same health plan for all its employees on a companywide basis does not exempt it from its bargaining obligation."). As the dissent in *Courier-Journal I* explained, a "limitation on the changes the [employer] could make in the costs and benefits of health care coverage for unit employees . . . that they be the same as for unrepresented employees" "[i]s no limitation at all: the [employer] could do exactly as it pleased with regard to the latter group's coverage, and

therefore, by extension, it could do the same for unit employees.” 342  
NLRB at 1096 (Liebman, M, dissenting in part).

The Board should thus return to its prior view that an employer’s practice of treating union-represented employees in the same manner as unrepresented employees is not a sufficiently-fixed criteria to permit an employer to continue to make unilateral changes to terms and conditions of employment for union-represented employees without bargaining with the union.

c. Finally, the Board should clarify how its *Stone Container* rule – which provides a limited exception to the general rule that a party cannot insist on bargaining on a discrete topic outside of overall bargaining for a collective bargaining agreement – is to be applied in a manner consistent with *Katz*.

The Board’s general rule is that “when . . . the parties are engaged in negotiations, 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.” *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub. nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

This general rule is fully consistent with *Katz*'s core holding that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal," 369 U.S. at 743, a rule that contemplates that bargaining will take place in a holistic manner, with very limited exceptions.

*Stone Container Corp.*, 313 NLRB 336, 336 (1993), represents an exception to this general rule against piecemeal bargaining. As described in detail in a subsequent case, the Board has stated:

"We read *Stone Container* as standing for a broader proposition . . . that where . . . a discrete event occurs every year at a given time, and negotiations for a first contract will be ongoing at that time, an employer can announce in advance that it plans to make changes as to that event. The employer's bargaining position may be to continue the practice for that year, to modify it, or to delete it for that year. As long as the union is given notice and opportunity to bargain as to those matters, the employer can carry out the changes even if there is no overall impasse as of the time of the change." *TXU Electric Co.*, 343 NLRB 1404, 1407 (2004) (quotation marks omitted).

In so far as the particular “discrete event [that] occurs every year at a given time,” *ibid.*, is also “fixed as to . . . criteria,” *Daily News*, 73 F.3d at 412, the *Stone Container* rule is fully consistent with the dynamic status quo doctrine described in *Katz*. However, the “broader” reading of *Stone Container* set forth in *TXU Electric* and applied in other Board cases – that fixed timing *alone* is sufficient to permit an employer to insist on discrete changes to terms and conditions of employment outside of overall bargaining for a collective bargaining agreement – directly conflicts with the well-established proposition that “fixed timing alone” is not “sufficient to bring [a] program under *Katz*.” *Daily News*, 73 F.3d at 412 n.3.

To illustrate the extent to which the *Stone Container* rule had come unmoored from its basic anchoring in *Katz*, in *St. Mary’s Hospital*, 346 NLRB 776, 776 (2006), the Board held that *Stone Container* privileged the employer, who was engaged in bargaining for a first contract with the union, to unilaterally “implement[] changes in copremiums, copayments, deductibles, and other terms of health plan coverage” on the basis “that the changes were consistent with a past practice, established when the unit’s employees were unrepresented,” *i.e.*, a past practice that the employer would exercise sole discretion with regard to all aspects of health coverage. Clearly, under *Katz*, these unilateral changes to health coverage were so

“wholly discretionary, variable (involving changes in carriers, deductibles, benefit levels and premiums), and made on an ad hoc basis” that they “did not constitute an established past practice that became part of the status quo,” *Larry Geweke Ford*, 344 NLRB at 628 n.1 (opinion of Member Schaumber).

As illustrated by *St. Mary’s Hospital*, the Board’s overbroad reading of *Stone Container* threatens to allow that exception to the prohibition on unilateral changes set forth in *Katz* to swallow the basic rule. The Board should thus take this opportunity to clarify the proper scope of the *Stone Container* rule and to overrule those *Stone Container* decisions that fail to account for the dynamic status quo doctrine as set forth in *Katz* and its progeny.<sup>3</sup>

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<sup>3</sup> Where an employer obtains health insurance through a third-party provider, there may be occasions when, due to exigent circumstances, it becomes necessary for the parties to bargain in a piecemeal manner over health insurance-related matters to ensure continued employee health coverage, notwithstanding the absence of an established practice of doing so, *e.g.*, the third-party provider ceases offering a particular plan option or stops providing coverage altogether. Such circumstances are not governed by *Katz* and the dynamic status quo rule, however, but rather by the well-established exception from the general rule against piecemeal bargaining for situations “when economic exigencies compel prompt action.” *Bottom Line Enterprises*, 302 NLRB at 374. The Board has appropriately limited this exception to ““extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.”” *Paulus Enters.*, 349 NLRB 116, 120 (2007) (quoting *Hankins*

4. In these cases, DuPont violated Section 8(a)(5) of the Act by unilaterally making wide-ranging changes to employee benefits at the Louisville Works and the Edge Moor plant.

DuPont's practice of making changes to employee benefits at these plants did not constitute the dynamic status quo within the meaning of *Katz* because the company's practice of changes was not "fixed as to timing *and* criteria." *Daily News*, 73 F.3d at 412 (emphasis added). Although DuPont routinely made changes to employee benefits, there was no fixed criteria for those changes. Rather, those changes varied widely from year to year, encompassing both changes to the price and content of benefits as well as the elimination and addition of plan options within benefit plans and entire categories of benefits.

DuPont's claim that by limiting its changes to benefits for union-represented employees to those provided to unrepresented employees it provided a sufficiently-fixed criteria to transform its practice into the dynamic status quo is unavailing. Such a practice "[i]s no limitation at all: [DuPont] could do exactly as it pleased with regard to the latter group's coverage, and, therefore, by extension, it could do the same for unit

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*Lumber Co.*, 316 NLRB 837, 838 (1995)).

employees.” *Courier-Journal I*, 342 NLRB at 1096 (Liebman, M., dissenting in part). DuPont was therefore not entitled to impose changes to employee benefits on union-represented employees without bargaining.

Finally, the Board was correct to reject DuPont’s claim that it was privileged by *Stone Container* to unilaterally change employee benefits in each of these cases. As the Board explained, even if the changes at issue in these cases were covered by the *Stone Container* rule, DuPont failed to comply with that rule’s requirement that the company bargain to impasse before making the changes. More to the point, DuPont’s proposed changes were not covered by *Stone Container* at all for the same reason that the company’s practice of making such changes did not constitute the dynamic status quo – because the changes were wholly discretionary and lacked any fixed criteria. DuPont was therefore not entitled to unilaterally implement its proposed changes to employee benefits outside of overall bargaining with each local union for a new contract.

## **CONCLUSION**

The Board should find that DuPont violated Section 8(a)(5) of the Act by unilaterally implementing wholly discretionary changes to employee benefits at the Louisville Works and Edge Moor plant.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Matthew J. Ginsburg, certify that on December 19, 2012, the foregoing Position Statement of Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union was served on all parties or their counsel of record by electronic mail in compliance with Section 102.114(i) of the NLRB Rules and Regulations.

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