UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

RAYTHEON COMPANY

and Case 25-CA-092145

UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO

Frederic D. Roberson, Esq., for the General Counsel.
Kenneth B. Siepman, Esq., and Matthew J. Kelley, Esq., of Indianapolis, Indiana, for the Respondent.
Daniel Kovalik, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was opened and closed on May 2, 2013, in Indianapolis, Indiana, to allow the parties to place into evidence a stipulation of facts, along with attached exhibits, whereupon all parties rested. The charge was filed by United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers International Union, AFL-CIO (the Union) on October 29, 2012, against Raytheon Network Centric Systems (Respondent).[1] The complaint, issued on February 28, 2013, alleges Respondent violated Section 8(a)(1) and (5) by: announcing in late September that it would be making changes to health insurance plans of bargaining unit employees represented by the Union and implementing those changes on January 1, 2013, and that Respondent did so without affording the Union an opportunity to bargain concerning the implementation and the effects of the implementation, and implemented those changes without first bargaining with the Union to a good faith impasse.

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

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

Findings of Fact

I. Jurisdiction

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

II. Alleged Unfair Labor Practices

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

STIPULATED FACTS

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

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

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

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

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

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

Business Travel Accident ("BTA") insurance and participation in the Raytheon Savings and Investment Plan ("RAYSIP").

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

1999 Plan

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

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

8. In addition, the parties agreed that contributions for the Medical/Vision Plan would not exceed the rates paid by salaried employees at the Ft. Wayne facility. Upon implementation of the Raytheon Plan, Respondent would pay the majority of the projected annual plan cost for Raytheon Medical and employees were responsible for the balance of the projected annual plan cost for Raytheon Medical. The premium payment was split 85% - 15% between Raytheon and participating employees.

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

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

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

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

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

The Company then communicates the changes to its employees prior to the open enrollment period for the upcoming year.

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

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

2002 Changes

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

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

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

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

2003 Changes

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

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

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

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

2004 Changes

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

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

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

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

2005 Changes

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

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

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

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

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

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

2006 Changes

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

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

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

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

2007 Changes

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

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

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

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

2008 Changes

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

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

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

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

2009 Changes

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

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

40. On February 26, 2009, Union bargaining representatives for the Ft. Wayne bargaining unit provided notice to Respondent to open negotiations on the CBA with Respondent. No proposals to amend or eliminate the "pass through" language found in the expiring contract were made by either party during those negotiations.

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

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

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

2010 Changes

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

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

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

46. On January 1, 2011, Respondent, pursuant to Article XXII and Exhibit C of the 2009 – 2012 CBA and the referenced Raytheon Benefits Handbook, implemented the changes

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

2011 Changes

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

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

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

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

2012 Changes

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

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

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

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

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

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

55. Raytheon presented its non-economic proposals during the afternoon on April 24, 2012. On April 25, 2012, Raytheon responded to UNE 6, 7, and 9 and explained to the Union negotiating team that the "pass through" language had been in place for at least the previous three contracts. Raytheon stated that all 19 bargaining units across the country, comprising 5,210 employees, were on the same benefit plan with the same year to year pass through language. The Union responded that it was no longer willing to waive its right to bargain over a mandatory subject of bargaining such as health benefits. Raytheon rejected the Union's proposals to modify the contract language and requested alternative proposals from the Union.

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

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

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

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

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

60. Union and Raytheon representatives met on May 17, 2012 to discuss outstanding bargaining issues. Raytheon and the Union discussed options to the "pass through" language. Union negotiator Mike O'Brien made several suggestions concerning potential solutions to the "pass through" language issue, including proposing to explore whether employees could be insured through the Steelworkers Health & Welfare Fund. No formal proposals were exchanged by either side. The parties continued to negotiate on wages, union security clause language and proposed changes to the PTO policy.

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

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

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

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

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

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

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

2013 Changes

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

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

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

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

As reflected in exhibit 1, entitled "Raytheon Health Benefits Plan" "Plan Document" effective January 1, 1999, at article 1.3: "The Benefit Programs and the Benefit Program Documents, in their entirety, as amended from time to time, are hereby incorporated by reference and made a part of this Plan." Article 5.2(a) provides that "Participant contributions, if any, shall be determined by Company." It also provides, "Participants contributions shall be subject to change by and in the sole discretion of the Company, and each Participant shall be advised in writing of any such change in the amount of such contributions prior to the effective date of such change." Article 8.1, states: "Right to Amend. Notwithstanding any provisions of any other communication, either oral or written, made by the Employer, an Administrative Services Provider, or any other individual or entity to Employees, any service provider, or any other individual or entity, the Company reserves the absolute right to amend the plan and any or all Benefit Programs incorporated herein from time to time, including, but not limited to, the right to reduce or eliminate benefits provided pursuant to the provisions of the Plan or any Benefit Program as such provisions currently exists, or may hereinafter exist." Article 8.2 states, "the

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

Company reserves the absolute and unconditional right to terminate the Plan and any and all Benefit Programs, in whole or in part, with respect to some or all of the Employees."

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

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

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

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

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

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

A. Analysis

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

> We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of s 8(a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of s 8(a)(5) much as does a flat refusal.[FN11]
>
> * * *
>
> The respondents' third unilateral action related to merit increases, which are also a subject of mandatory bargaining. *National Labor Relations Board v. J. H. Allison & Co.,* 6 Cir., 165 F.2d 766. The matter of merit increases had been raised at three of the conferences during 1956 but no final understanding had been reached. In January 1957,

> the company, without notice to the union, granted merit increases to 20 employees out of the approximately 50 in the unit, the increases ranging between $2 and $10. [FN13] This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of s 8(a)(5), unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews-in effect, were a mere continuation of the status quo-differentiates them from the wage increases and the changes in the sick-leave plan. We do not think it does. Whatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.[FN14]

In *E.I. DuPont de Nemours,* 355 NLRB 1084 (2010), enf. denied 682 F.3d 65 (D.C. Cir. 2012),[4] the respondent's Beneflex Plan, under which it provided health care and a range of other benefits to many of its employees nationwide was incorporated into the parties 1994 and 1997 collective-bargaining agreements. The Beneflex Plan included a reservation of rights provision granting the Respondent authority to modify benefits under the plan on an annual basis. During the term of those collective-bargaining agreements, the respondent made unilateral changes to the Beneflex Plan annually under the reservation of rights provision without objection by the union. The issue in *DuPont* before the Board was when the union filed charges over DuPont's continuing to make such changes during a contractual hiatus period. The Board majority in finding *DuPont* violated the Act set forth following principles at 1084-1085:

> It is settled law that when parties are engaged in negotiations for a collective-bargaining agreement an employer is obliged to refrain from making unilateral changes, absent an impasse in bargaining for the agreement as a whole. See, e.g., *Register-Guard*, 339 NLRB 353, 354 (2003); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). As the Supreme Court has recognized, "[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).
>
> It is undisputed that, at the time that the Respondent unilaterally implemented changes in the Beneflex Plan, the parties were engaged in bargaining and were not at impasse. But relying on the Board's *Courier-Journal decisions*, the Respondent asserts that its unilateral actions were lawful because they were consistent with the parties' past practice. The Respondent bears the burden of establishing this affirmative defense. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), enfd. 317 F.3d 316 (D.C. Cir. 2003).
>
> We find that the Respondent has not carried that burden. In the *Courier-Journal* cases, a Board majority found that the employer's unilateral changes to employees' health care premiums during a hiatus period between contracts were lawful because the employer had established a past practice of making such changes both during periods when a contract was in effect and during hiatus periods. The Respondent's asserted past practice in this case, in contrast, was limited to changes that had been made when a contract, which included the reservation of rights language, was in effect. It is apparent that a union's acquiescence to unilateral changes made under the authority of a controlling management-rights clause has no bearing on whether the union would

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

acquiesce to additional changes made after that management-rights clause expired. The Respondent has simply not carried its burden of showing relevant past practice under the *Courier*-Journal cases—annual unilateral changes during hiatus periods. As a result, the Respondent's prior unilateral changes do not establish a past practice justifying the Respondent's unilateral actions during a hiatus between contracts. The *Courier-Journal* decisions are plainly distinguishable on this basis, as the judge explained in a decision we adopt today in *E.I. DuPont*, 355 NLRB No. 177 (2010), presenting a similar bargaining issue but at a different facility of the Respondent.

This factual distinction is key because it implicates important collective-bargaining principles. Extending the *Courier-Journal* decisions to the situation presented here would conflict with settled law that a management-rights clause does not survive the expiration of the contract embodying it, absent a clear and unmistakable expression of the parties' intent to the contrary,[FN1] and does not constitute a term and condition of employment that the employer must continue following contract expiration.[FN2] Those principles apply to a broad management-rights clause as well as to more narrow contractual reservations of managerial discretion addressing, as here, a specific subject of bargaining[FN3] and embodied in a plan document that has been incorporated in a collective-bargaining agreement.[FN4] Moreover, extending *Courier-Journal* to circumstances such as those presented here would render the expiration of the management-rights clause meaningless wherever the employer had acted under its authority to make changes during the contract period. This, in turn, "would vitiate an employer's bargaining obligation whenever a contract containing a broad management-rights clause expired." *Beverly Health & Rehabilitation Services*, 335 NLRB at 637. Such an outcome would discourage, rather than promote, collective bargaining, in particular, making unions wary of granting any discretion to management during the contract's term.[FN5]

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

FN1. See, e.g., *Beverly Health & Rehabilitation Services*, supra, 335 NLRB at 636 fn. 6 (collecting cases), enfd. 317 F.3d 316 (D.C. Cir. 2003). "The law is quite clear that, when a collective agreement expires, any management-rights … clause it contains expires with it." Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* § 20.16 at 638 (2d ed. 2004) (footnote omitted).

FN2. *Control Services*, 303 NLRB 481, 484 (1991) (management-rights clause "is not, in itself, a term or condition of employment that outlives the contract that contains it, absent some evidence of the parties' intention to the contrary"), enfd. mem. 975 F.2d 1551 (3d Cir. 1992); accord: *Furniture Renters of America*, 311 NLRB 749, 751 (1993) (quoting *Control Services*, supra), enfd. in rel. part 36 F.3d 1240, 1245 (3d Cir. 1994); *Holiday Inn of Victorville*, 284 NLRB 916 (1987).

Along these lines, in *WKYC-TV, Inc.,* 359 NLRB No. 30, slip op. at 3 (2012), the Board majority stated:

It is certainly true that a select group of contractually established terms and conditions of employment-- arbitration provisions, no-strike clauses, and management-rights clauses--do *not* survive contract expiration, even though they are mandatory subjects of bargaining. In agreeing to each of these arrangements, however, parties have waived rights that they otherwise would enjoy in the interest of concluding an agreement, and such waivers are presumed not to survive the contract. ….The Board has also held that a management-rights clause normally does not survive contract

expiration, because "the essence of [a] management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls." *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003).[FN9

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

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

FN5. We further observe that the *Courier-Journal* decisions are in tension with

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

Thus, we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.[FN12]

FN12. The Courts of Appeals have agreed that the waiver of a protected right must be expressed clearly and unmistakably. See, *e.g., Chesapeake & Potomac Telephone Co. v. NLRB,* 687 F.2d 633, 636 (2nd Cir. 1982); *NLRB v. Southern California Edison Co.,* 646 F.2d 1352, 1364 (9th Cir. 1981); *Communication Workers of America, Local 1051 v. NLRB,* 644 F.2d 923, 927 (1st Cir. 1981).

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

This case presents us with the opportunity to explain and reaffirm our adherence to one of the oldest and most familiar of Board doctrines, the clear and unmistakable waiver standard, in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of a collective-bargaining agreement. The clear and unmistakable waiver standard is firmly grounded in the policy of the National Labor Relations Act promoting collective bargaining. It has been applied consistently by the Board for more than 50 years, and it has been approved by the Supreme Court. *NLRB v. C & C Plywood*, 385 U.S. 421 (1967). By contrast, the contract coverage approach, urged by the Respondent and endorsed by the dissent, is a relatively recent judicial innovation, adopted by two appellate courts.[FN14] In the framework established by Congress, however, it is the function of the Board, not the courts, to develop Federal labor policy. See, e.g., *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 266 (1975).[FN15]

FN15. Our colleague states that the Board, in developing federal labor policy, should "pay close attention to what the courts are saying." We have done so. First, the Supreme Court and a majority of the appellate courts have approved the waiver standard. Second, our decision here thoroughly explains our reasons for adhering to the waiver standard and therefore fully responds to the minority of courts that have held otherwise.

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

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

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

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

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

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

In the instant case, Respondent, in its brief, cites *Courier-Journal,* 242 NLRB 1093 (2004). In *Courier-Journal,* the parties’ collective bargaining agreements expired on August 7,
30 2000. The most recent agreements for the engraving and pressroom departments contained language that bargaining unit health insurance plans were to be “on the same terms as are in effect for employees not represented by a labor organization. Any changes (benefits and Premiums) in such plans shall be on the same basis as for non-represented employees.” The pressroom contract also contained language that “the company reserves the right to modify or
35 terminate any (or all) benefits in this Article, at any time.” Earlier contracts contained those provisions. The respondent employer made changes in the costs or benefits of employee’s health insurance each year since July 1991 for represented and non-represented employees without bargaining with the union. The Board specifically noted some changes were made during the open period or hiatus between contracts. Until the fall of 2001, the Union never
40 objected that the unilateral changes were unlawful. As it had done in July 1992, and each year through 2000, on July 1, 2001, the respondent increased employee contributions towards healthcare insurance premiums for represented and non-represented employees. On September 24, 2001, the respondent issued a memo to employees announcing another increase in employees’ contributions to healthcare premiums and a number of more far reaching
45 changes in health care insurance benefits of unit employees that would go into effect on January 1, 2002. At a bargaining session on October 3, 2001, the respondent informed the union about these latter changes, to which the union objected and wanted to negotiate. The respondent responded that it had the right to make the changes without bargaining as long as it kept the benefits for unit employees the same as those for nonrepresented employees.

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In *Courier-Journal* at 1094, the Board majority stated, “a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo−not a violation

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

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

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

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

> not only directly impact on a key term and condition of employment and a primary basis for negotiations, [FN22] but it would simultaneously disparage the Guild by showing, despite its resistance to this proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment.

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

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

> Here, as in *Bonanno Linen,* the Board has denied the employer a particular economic
15 tactic for the sake of preserving the stability of the collective bargaining process.
> The post-impasse rule itself regulates process through power. The Board has told us that its rationale for permitting an employer to unilaterally implement its final offer after

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

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

impasse is that such an action breaks the impasse and therefore encourages future collective bargaining.[FN4] The theory might well be thought somewhat strained, for it does not explain why the Board decided to handle impasse with this rule instead of another. The Board could have adopted, for example, a rule requiring the status quo to remain in effect until either the union or the employer was willing to resume negotiations. Stagnancy might pressure both the employer and the union to bend. But the rule it did choose-allowing the employer to implement its final offer-moves the process forward by giving one party, the employer, economic leverage. And in this case, where the employer has advanced no substantive criteria for its merit pay proposal, the Board has decided that the economic power it has granted would go too far. Rather than merely pressuring the union, implementation might well irreparably undermine its ability to bargain. Since the union could not know what criteria, if any, petitioner was using to award individual salary increases, it could not bargain against those standards; instead, it faced a discretionary cloud. As the Board put it, "the present case represents a blueprint for how an employer might effectively undermine the bargaining process while at the same time claiming that it was not acting to circumvent its statutory bargaining obligation." *McClatchy II* at 6. We think that it is within the Board's authority to prevent this development:

* * *

[T]he Board, employing its expertise in the light of experience, has sought to balance the 'conflicting legitimate interests' in pursuit of the 'national policy of promoting labor peace through strengthened collective bargaining.' The Board might have struck a different *balance* from the one it has, and it may be that some or all of us would prefer that it had done so. *But assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment that Buffalo Linen ruled should be left to the Board.*

* * *

Not only does an employer's implementation of a proposal such as petitioner's deprive the union of "purchase" in pursuing future negotiations, the Board also concluded that by excluding the union from the process by which individual rates of pay are set petitioner "simultaneously disparag[ed] the Guild by showing ... its incapacity to act as the employees' representative in setting terms and conditions of employment." *McClatchy II* at 6. It knew no specifics about the merit raises, therefore it had no information to relay. In that regard, the Board echoed concerns expressed in Chief Judge Edwards' prior concurring opinion that petitioner's implementation of its proposal could be seen as seeking de-collectivization of bargaining.[FN5] The Board concluded that petitioner's action was "so *inherently* destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining." *McClatchy II* at 6 (citations omitted). Petitioner particularly objects to this passage, arguing that the phrase "inherently destructive"-which, as the Board acknowledges, comes from *NLRB v. Great Dane Trailers,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967)-applies only to employer behavior that is claimed to violate § 8(a)(3), the anti-discrimination provision of the Act. But the Board explained that it was using the term only to show that, as in *Great Dane,* the employer's action will have "foreseeable consequences" notwithstanding its motive. We do not see why that observation is independently objectionable.

* * *

We think the Board is free to draw on its expertise to determine that wages are typically of paramount importance in collective bargaining and to suggest that wages, unlike scheduling or a host of other decisions generally thought closely tied to management operations, are expected to be set bilaterally in a collective bargaining relationship.[FN8]

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

> We hold Du Pont, by making unilateral changes to Beneflex after the expiration of the CBAs, maintained the status quo expressed in the Company's past practice; those changes were therefore lawful under *Courier–Journal.* While the CBAs were in effect, Du Pont annually made unilateral changes to the package of benefits offered under Beneflex, including changes to the premiums the employees paid and to the benefits they received. Du Pont made the unilateral changes in dispute here after the CBAs had expired, but those changes were similar in scope to those it had made in prior years. Du Pont's discretion in making those changes was limited by the terms of the reservation of rights clause in the Beneflex plan documents, which permitted changes during—and only during—the annual enrollment period. Moreover, here as in *Courier–Journal,* the employer was obligated under its past practice to "treat the [union] employees exactly the same as [the non-union] employees," and so the employer's "discretion was limited" because it "did not have the freedom to grant [non-union] employees a benefit and deny same to [union] employees." 342 N.L.R.B. at 1094. Under the Board's precedent, therefore, Du Pont's making annual changes to Beneflex became a term and condition of employment the company could lawfully continue during the annual enrollment period, irrespective of whether negotiations for successor contracts were then on-going.
>
> The Board concluded Du Pont violated the Act because it failed to show "relevant past practice under the *Courier–Journal* cases-annual unilateral changes during hiatus periods." *E.I. Du Pont De Nemours, Louisville Works,* 355 N.L.R.B. No. 176, 2010 WL 3452312 at 2 (Aug. 27, 2010). The Board distinguished *Courier–Journal* on the ground that the employer there had "established a past practice of making [health care premium] changes both during periods when the contract was in effect and during hiatus periods" whereas Du Pont has made uncontested unilateral changes to Beneflex only while CBAs were in effect. *Id.* The Board emphasized the importance of this "factual distinction" as follows:
>
> > Extending the *Courier–Journal* decisions to the situation presented here would conflict with settled law that a management-rights clause does not survive the expiration of the contract ... and does not constitute a term and condition of employment that the employer must continue following contract expiration.*Id.*
>
> Be that as it may, whether a management-rights clause survives the expiration of the contract is beside the point Du Pont is making. The Board has previously recognized that the lawfulness of a change in working conditions made after the CBA has expired depends not upon "whether a contractual waiver of the right to bargain survives the expiration of the contract" but rather upon whether the change "is grounded in past practice, and the continuance thereof." *Courier–Journal,* 342 N.L.R.B. at 1095. The Sixth Circuit captured the point precisely in *Beverly Health and Rehabilitation Services, Inc. v. NLRB,* 297 F.3d 468, 481 (2002): "[I]t is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract." A subsequent Board decision unambiguously incorporates that teaching: "[T]he mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice." *Capitol Ford,* 343 N.L.R.B. 1058, 1058 n. 3 (2004). Therefore, although the employer "cannot rely upon the management rights clause of that contract to justify unilateral action," the "past practice is not dependent on the continued existence of the [expired] collective-bargaining agreement." *Id.*
>
> Because an employer may make unilateral changes insofar as doing so is but a continuation of its past practice, we see no reason it should matter whether that past

practice first arose under a CBA that has since expired. Nor did the Board in *Capitol Ford,* where it upheld as lawful the employer's unilateral changes to employee compensation and paid holidays on the basis of an established practice even though the employer (and its predecessor) had never before made such changes when a CBA was not in force. 343 N.L.R.B. at 1058. The Board has not offered any reason whatsoever for thinking a unilateral action being taken during a hiatus period, although expressly deemed immaterial in *Capitol Ford,* should be dispositive in this case. Indeed, the Board did not so much as cite *Capitol Ford* or *Beverly Health & Rehabilitation Services, Inc.,* 346 N.L.R.B. 1319 (2006), where the Board again said that "without regard to whether the management-rights clause survived, the [employer] would be privileged to have made the unilateral changes at issue if [its] conduct was consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract," *id.* at 1333 n. 5. Although the Board had in several earlier cases held unilateral changes made pursuant to a past practice developed under an expired management-rights clause were unlawful, *see Beverly Health & Rehab. Servs.,* 335 N.L.R.B. 635, 636–37 (2001); *Guard Publ'g Co.,* 339 N.L.R.B. 353, 355–56 (2003), the Board clearly took a different position in its more recent decisions.

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

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

In the instant case the Ft. Wayne bargaining unit consists of 35 employees. As of January 1, 1999, salaried and hourly non-union employees at the Ft. Wayne facility were covered by the new Raytheon Plan. Raytheon Medical is a self-insured medical care option encompassed within the Raytheon Plan. All Raytheon sites in the United States participate in the Raytheon Plan. The Raytheon Plan is available to approximately 65,000 domestic employees, including approximately 5,000 union employees across 19 bargaining units. The Union does not represent any Raytheon employees other than those in the Ft. Wayne bargaining unit.

On January 1, 2001, the Ft. Wayne bargaining unit employees, pursuant to their recent collective-bargaining agreement became covered by the Raytheon Plan. Plan documents provided that "the Company reserves the absolute right to amend the plan and any or all Benefit Programs incorporated herein from time to time, including, but not limited to, the right to reduce or eliminate benefits…". They also provided that, "the Company reserves the absolute and unconditional right to terminate the Plan and any and all Benefit Programs, in whole or in part, with respect to some or all of the Employees." In the parties 2000-2005 collective-bargaining

agreement the parties agreed that contributions for the Medical/Vision Plan would not exceed the rates paid by salaried employees at the Ft. Wayne facility. As reflected in the stipulated record, it was agreed upon implementation of the Raytheon Plan, Respondent would pay the majority of the projected annual plan cost for Raytheon Medical and employees were responsible for the balance of the projected annual plan cost. The premium payment was split 85% - 15% between Raytheon and participating employees. Prior to the 2000 collective-bargaining agreement, bargaining unit employees at the Ft. Wayne facility were provided with medical coverage, for which Respondent paid most, if not all, of the premiums. The language in the parties' 2005 to 2009 collective-bargaining agreement changed pertaining to medical benefits stating "The Raytheon United Benefit Plans will be available for all employees, offered on the same basis as is offered to salaried employees at the Ft. Wayne, Indiana, location from year-to-year." The language pertaining to medical benefits remained the same in the 2009 to 2012 collective bargaining agreement as it was in the 2005 to 2009 agreement.

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

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

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

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

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

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

2007 Changes
- Healthcare premiums increased

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

2008 Changes

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

2009 Changes

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

2010 Changes

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

2011 Changes

- Healthcare premiums increased
- Completed two-year plan to change cost share from 80% - 20% to 75% - 25%
- TRICARE Supplement returns but not as a Raytheon-sponsored program
- Medical insurance to cover dependents up to age 26 for medical, dental, and vision, pursuant to the Affordable Care Act
- Over-the-counter medications no longer considered eligible expenses for health care FSAs, HSAs or HRAs, pursuant to the Affordable Care Act
- Removal of lifetime maximums from medical plans, pursuant to the Affordable Care Act
- Change in-network outpatient copay to $20

- Delta Dental PPO Plus Premier administering the high/low dental care options (change from Metlife). Institution of a roll over maximum for the high option

2012 Changes

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

On February 24, 2012, the Union informed Respondent that it wanted to schedule bargaining sessions for a successor collective-bargaining agreement for the one set expire on April 29. The parties met for the first time to bargain on April 24. Over the course of the next five months, the parties met ten times in an attempt to reach a complete agreement. On April 24, in its proposals the Union sought to strike the “pass through” language contained in Article X, Article XVI and Exhibit C of the collective-bargaining agreement. The “pass through” language contained in the expiring agreement which the Union sought to strike were the same in provisions concerning disability/leave of absence, paid time off, and the Raytheon Plan offered to all of the approximately 65,000 domestic Raytheon employees, that these same benefits would be offered to the Ft. Wayne bargaining unit employees on a year to year basis. The Union’s proposals sought to designate that the disability/leave of absence, paid time off and Raytheon Plan benefits offered to the Ft. Wayne bargaining unit employees would remain the same for the life of the collective-bargaining agreement. On April 25, Respondent responded that the “pass through” language had been in place for at least the previous three contracts. Raytheon stated that all 19 bargaining units across the country, comprising 5,210 employees, were on the same benefit plan with the same year to year pass through language. The Union responded it was no longer willing to waive its right to bargain over a mandatory subject of bargaining such as health benefits. Raytheon rejected the Union’s proposals to modify the contract language and requested alternative proposals from the Union.

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

final offer. According to the Union, the two biggest issues for the membership were proposed changes in the PTO policy and in continuing to agree to the "pass through" language.

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

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

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

2013 Changes

- Healthcare premiums increased
- Conversion of the United Healthcare Gold plan to HSA 2
- Higher in-network deductible for employee and employee children ($2,500) than under the Gold plan
- Expanded list of women's health services covered at 100% with no deductible as preventative care, pursuant to the Affordable Care Act
- Generic use requirement for employees to receive 100% coverage for preventative care prescriptions, pursuant to the Affordable Care Act
- United Healthcare HSA covers various preventative drugs as outlined on the Treasury Guidance List without first meeting deductibles
- Expansion of Wellness Reward to $250

- Increase in out-of-pocket costs if employees purchase brand name prescription when a generic equivalent is available. Employee pays the cost difference, plus the copayment
- Flexible Spending Account lowered to $2,500 on medical, dental and vision, pursuant to the Affordable Care Act

I find Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally instituting changes to the bargaining unit health care coverage following the expiration of the collective-bargaining agreement. First, it is Board law, with which I agree, that the management rights clause, which includes language in the benefit plan, absent evidence of an agreement to the contrary, expires with the termination of the collective-bargaining agreement. See, *WKYC-TV, Inc,* 359 NLRB No. 30 (2012); *Omaha World-Herald,* 357 NLRB No. 156 (2011) (regarding the 401(k) plan discussed there.); *E.I. DuPont de Nemours,* 355 NLRB 1084 (2010), enf. denied, 682 F.3d 65 (D.C. Cir. 2012); *Guard Publishing,* 339 NLRB 353, 355 (2003); *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 fn. 6, enfd. 317 F.3d 316 (D.C. Cir. 2003); *Paul Mueller Co.,* 332 NLRB 312, 313 (2000); *Presbyterian University Hospital,* 325 NLRB 443, 443 fn. 2, enfd. 182 F.3d 904 (3d Cir. 1999); *Ironton Publications*, 321 NLRB 1048 (1996); *Blue Circle Cement Co.*, 319 NLRB 954 (1995), enf. granted in part, denied in part on other grounds 106 F.3d 413 (10th Cir. 1997); *Buck Creek Coal*, 310 NLRB 1240 fn 1 (1993); *Control Services*, 303 NLRB 481, 484 (1991), enfd. mem. 975 F.2d 1551 (3rd Cir. 1992); *Furniture Rentors of America*, 311 NLRB 749, 751 (1993) enfd. in rel. part 36 F.3d 1240, 1245 (3d Cir. 1994); *U.S. Can Co.*, 305 NLRB 1127 (1992), enfd. 984 F.2d 864 (7th Cir. 1993); and *Holiday Inn of Victorville*, 284 NLRB 916 (1987). Here, I view the Respondent's right to make changes during the term of the existing collective-bargaining agreements to be nothing more than a creature of those agreements. No evidence was presented that the parties ever discussed what would happen concerning Respondent's benefit plans when the collective-bargaining agreement expired, or that the Union ever agreed that it was ceding its right to bargain regarding health insurance when the agreement expired. Nor, in my view does it make sense to find that the Union acquiesced in Respondent's right to make unlimited changes in health insurance once the agreement expired because Respondent was allowed to do so during the agreement. In this regard, since the Union had agreed to Respondent's contractual right to make those changes during the term of the agreement, it had no basis to protest those changes during the agreement when they were made. This should not establish a practice to make unlimited unilateral changes beyond the four corners of the contract which survives the contract, particularly on such an important term and condition of employment such as health insurance. To hold otherwise, would clearly undermine the Union in front of bargaining unit members, and is inherently destructive of the right to collectively bargain.

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

entered the agreement that the language would go beyond the collective-bargaining agreement's expiration. In this regard, following the most recent contract's expiration the Union objected to any future unilateral changes by Respondent. Moreover, the fact that the Union abided by the terms of the management rights clause while the agreement was in effect merely confirms they were abiding by what they agreed to. It does not establish a past practice beyond the literal meaning of the management right's clause itself which was only in effect during the term of the contract.

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

[7] Noting that *McClatchy Newspapers* involved an established bargaining relationship, I do not find Respondent's argument that it should be able to engage in its conduct here because such conduct more adversely impacts a union in a new bargaining relationship than a longstanding one such as the one in the present case. First, to make such an argument is a tacit admission that the conduct serves to disparage the Union to the bargaining unit, but should nevertheless be tolerated. However, I do not find the conduct any less damaging to a union in an established relationship. Either way it sends a clear signal to employees that the union is powerless to negotiate about, or even explain changes in key terms of employment. Such conduct leads to instability and can only encourage the decertification of a union that is powerless to bargain in the hopes of finding a new one that can, or the conclusion that the employees are better off with

In *Eugene Lovine, Inc.,* 328 NLRB 294, 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001), the Board majority, in finding a respondent employer's unilateral change pertaining to work schedules violative of the Act, stated:

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

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

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

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7continued:
no union at all. See, *Litton Business Systems, Inc. v. NLRB,* 501 U.S. 190, 198, (1991), where the Court stated:

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

insurance program. *Garrett Flexible Products*, 276 NLRB 704, 706 fn. 4 (1985).

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

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

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

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

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

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

This lack of a definable criteria is evident by the history of benefit changes since the parties began using the Raytheon Plan for bargaining unit employees. On January 1, 2001, the Ft. Wayne bargaining unit employees, pursuant to their recent collective-bargaining agreement became covered by the Raytheon Plan. Plan documents which the parties rely on here in formulating their stipulation state that "the Company reserves the absolute right to amend the plan and any or all Benefit Programs incorporated herein from time to time, including, but not limited to, the right to reduce or eliminate benefits…". They also provided that, "the Company reserves the absolute and unconditional right to terminate the Plan and any and all Benefit Programs, in whole or in part, with respect to some or all of the Employees." Thus, while the history of changes following the implementation of the plan for bargaining unit employees show they have been theretofore limited to the annual fall enrollment period, the plan document itself provides no such limitation as to the timing of changes, nor did Respondent propose any limitation as to timing when it implemented the current plan changes in dispute. Moreover, when the plan was implemented for bargaining unit employees, the premium payment was an 85% to 15% split between Respondent and participating employees. Healthcare premiums increased annually in 2002, 2003, and 2004 based on that split. However, in 2005, Respondent introduced a three year plan to increase premium percentage paid by employees from 85% - 15% split to a 80% - 20% with final implementation in 2007. Thus, over the course of that period by 2007, the split in premiums changed on an annual basis until it was an 80% to 20%, with Respondent paying 80% and employees 20%. From 2007 to 2009, premiums remained at an 80 to 20% split. However, in 2010 Respondent introduced a two year plan to change the premium split to 75% - 25%, with a 2010 cost share at 77.5% - 22.5% in 2010 and a 75% to 25% in 2011. The 75% to 25% remained in effect for 2012 and 2013. Thus, while premiums increased annually, the divisions of premium percentages changed on a ad hoc basis, and the neither the bargaining unit employees nor the Union could predict those changes, and since there was no formula or criteria for the changes they could not be explained by the Union to the bargaining unit. Such changes in premium percentage allocations have been held to be too discretionary to establish a past practice status quo. See, *Dynatron/Bondo Corp.* 323 NLRB 1263, 1265 (1997), enfd. 176 F.3d 1310 (11th Cir. 1999), and *Garrett Flexible Products*, 276 NLRB 704, 706 fns 1and 4 (1985). Moreover, other changes to the plan over the years were completely random. For instance in 2008 specialist co-pays increased as did certain outpatient surgery copays. In 2010 emergency room copays increased, and in 2011 there was a change in-network outpatient copay to $20. In 2013, there was an increase in out-of-pocket costs if employees purchased brand name prescription when a generic equivalent is available. The employee pays the cost difference, plus the copayment. Thus, not only were premiums and premium percentages increasing on an ad hoc basis, co-pays were randomly changing some years and other years none. There was no basis for the Union to explain these increases to employees, and no way for either the Union or the employees to predict when they would take place. Locking the Union out from bargaining over these changes, over its protest, could only serve to disparage the Union to employees.

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

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

In the current case, Respondent raised premiums for 12 straight years for health insurance and also altered premium ratios to the disadvantage of employees on an adhoc basis during this period. It also increased certain co-pays and raised deductibles. This reached a point upon the expiration of the 2012 collective-bargaining agreement that, after meeting with bargaining unit employees, the Union would no longer agree with the "pass through" language, but wanted to bargain about health insurance, as well as certain other benefits that theretofore were covered by the contractual pass through language. I do not find, as set forth above, that the contractual limitation that the bargaining unit employees be offered health care and these other benefits "on the same basis as is offered to salaried employees at the Ft. Wayne, Indiana, location from year-to-year" constitutes a discernible status quo which survives the collective-bargaining agreement…". For it in essence allows Respondent to do anything it wants in terms of these benefits. Moreover, it is likely that salaried employees are earning more than bargaining unit employees and therefore can more easily absorb increases in healthcare costs. Even assuming that is not the case for some or all of them, the salaried employees interests are by definition are not in line with the employees of the bargaining unit, which in most instances are discrete groups of individuals whose jobs are sufficiently related to be included in a defined group of employees who are represented by the Union. Tying bargaining unit employees benefits to those of non-bargaining unit employees who are unrepresented, over the objections of the Union, in effect removes them from represented status and undermines the Union. Thus, as was urged by counsel for the General Counsel, I also recommend that the Board reconsider its holding in *Courier-Journal*. First, as set forth above, because there is a basic inconsistency, in finding that an employer can change benefits such as health insurance during the midst of negotiations for a new contract based on a proposal that the employer retain unlimited discretion in changing those benefits, but at the same time finding that the same employer would violate the Act by insisting to that proposal to impasse and then implementing it because it gives the employer unlimited discretion. Either way, the unilateral implementation of such a proposal pre or post impasse disparages the Union, undermines its status and is inherently destructive of its right to bargain and therefore the employees' right to union representation. Such a policy will inevitably lead to industrial instability by the necessity of unions being replaced by other labor organizations which had not been previously party to collective-

bargaining agreements containing such pass through language.

Moreover, the fact in the past that a union may not have objected to an employer's changes in benefit plans during a contract hiatus, to which the Board relied on as distinction in *Courier-Journal,* should not be used as a vehicle to have the union waive its bargaining right in those matters in perpetuity at a contracts end. In this regard, circumstances change, such as here when benefit costs rose to a point that they could no longer be tolerated by bargaining unit members without collectively bargained safeguards. Rather, a union's acquiescence to changes during a contractual hiatus period means nothing more than the fact that the union found those changes acceptable at the time. It does not mean that the union has ceded its right to object and want to bargain about changes in the future when circumstances change, nor does it signal that union agrees that an employer has total control over a term and condition of employment when the Union in representing bargaining unit employees finds it necessary in representing those employees to bargain about the matter. Thus, the Board majority in in *E. I DuPont,* supra at 1085 fn 5 stated, "We further observe that the *Courier-Journal* decisions are in tension with previously settled principles. First, it is well established that silence in the face of past unilateral changes does not constitute waiver of the right to bargain." See also *Owens-Corning Fiberglass*, 282 NLRB 609 (1987); *Exxon Research & Engineering Co.*, 317 NLRB 675, 685-686 (1995); *Rockwell International Corp.,* 260 NLRB 1346, 1347 (1982); *Ironton Publications,* 321 NLRB 1048 (1996); *Verizon New York, Inc. v. NLRB,* 360 F.3d 206, 209 (D.C. Cir. 2004); *Ciba-Geigy Pharmaceuticals Div. v. NLRB,* 722 F.2d 1120, 1127 (3d Cir.1983); *NLRB v. Miller Brewing Co.,* 408 F.2d 12, 15 (9th Cir.,1969); *Pacific Coast Ass'n of Pulp & Paper Mfrs. v. NLRB,* 304 F.2d 760 (9th Cir. 1962); and Cf. *Leeds & Northrup Co. v. NLRB,* 391 F.2d 874 (3d Cir. 1968); *General Tel. Co. v. NLRB,* 337 F.2d 452 (5th Cir. 1964). Thus, I join in the General Counsel's view that the Board's decisions in *Courier-Journal* and its progeny should be revisited.[8]

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

Concerning cases cited by Respondent, in *Beverly Health and Rehabilitation Systems v. NLRB,* 297 F.3d 468 (6th Cir. 2002), the court affirmed the Board's finding that a waiver of a bargaining right in a management's rights clause did not survive the term of the collective-bargaining agreement. The court also found, as I found here, that the respondent there had not established evidence of a past practice that independently survived the expiration of the collective-bargaining agreement and the court affirmed the Board's finding that the respondent's unilateral changes violated Section 8(a)(1) and (5) of the Act. In *Shell Oil Co.,* 149 NLRB 283, 289-290 (1964), cited by Respondent, the Board was careful to state, "we wish to make it clear that our present holding is limited to the particular circumstances of this case and that we do not pass upon whether or not Respondent may, in the future, lawfully expand its subcontracting practice without prior notice and consultation with the Union." I have found in the present case

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

that Respondent's changes it made to the employees medical benefits on January 1, 2013, were made on an ad hoc basis, and were therefore not the type of past practice that survived the extant collective-bargaining agreement. *Uforma/Shelby Business Forms v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) and *Litton Microwave Cooking Prods. Div. v. NLRB,* 868 F.2d 854 (6th Cir. 1989) cited by Respondent, are inapposite to the issues presented here because they involved waiver issues concerning management rights clause for events that took place when the collective-bargaining agreement was in effect.

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

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

Union failed to specifically request to bargain about the 2013 benefit changes to be persuasive. The Union asked to bargain about health insurance, the parties bargained about health insurance in general and proposals were made concerning health insurance provisions. The Union objected to Respondent's making a unilateral implementation of the 2013 changes, and it was incumbent upon Respondent to inform the Union of the specifics of those planned changes and offer to bargain about them with the Union prior to distributing them to employees as Respondent would be obligated with any other bargaining proposal.

In addition to my finding that Respondent gave the Union no opportunity to bargain about the specific changes announced to employees and then implemented on January 1, 2013, I find that the type of changes implemented here do not come within the *Stone Container Corp.,* 313 NLRB 336 (1993) exception to allow their implementation prior to an overall impasse. The changes announced here were ad hoc in nature and not part of a discrete repetitive event. Moreover, they involved changes to health benefits to 35 bargaining unit employees in a health plan covering 65,000 employees. The terms of the plan, were admittedly controlled by Respondent, and I do not find any business urgency allowing for implementation prior to an overall impasse in bargaining. In *Stone Container*, the employer notified the union in March during negotiations for a collective-bargaining agreement that it could not afford to give employees an annual April wage increase. The Board found the employer made its proposal in time to allow for bargaining over the matter, but the union made no counterproposal concerning the April wage increase and did not raise the issue again during negotiations. The Board concluded that the employer satisfied its bargaining obligation regarding the April wage increase and was not required to refrain from implementing the change until an overall impasse had been reached on bargaining for a collective-bargaining agreement as a whole. The Board reasoned that the annual April wage review was a discrete event that just simply happened to occur while contract negotiations were in progress. The annual wage increase ranged from 3 to 6 percent for hourly employees. However, in *E.I. DuPont De Nemours and Company,* 355 NLRB 1096, 1106-1107 (2010), the Board approved the judge's findings that the respondent's changes to its benefit plans in 2005 did not fall under the permissible exception under *Stone Container* of an annual adjustment to a discrete subject. It was stated in *DuPont* that the respondent's changes there were not confined to an adjustment to a single plan, but included the initiation of a new healthcare savings account plan, the creation of penalties for employees who do not use a designated mail-order pharmacy for certain prescriptions, and wide-ranging changes to employee costs and/or coverages for financial planning, medical care, dental care, and vision care. It was concluded that the collection of changes bore no meaningful resemblance to the "discrete" events that were at issue in *Stone Container* and the cases applying it. It was stated the respondent's changes included a number of ad hoc actions that were not annually occurring events, and about which the Respondent was not required to take some action such as the new healthcare savings plan, the new prescription drug penalty, and the change in financial planning premiums. It was stated, "Acceptance of the Respondent's argument that changes to a wide

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9continued:
employment. There was no objection by the union there to the continuation of the increase. Here, Respondent was seeking post contract total control of health care benefits, the Union objected, and Respondent unilaterally implemented multiple changes to the benefit plan despite the Union's objection. Finally, *Mt. Clemens General Hospital,* 344 NLRB 450 (2005), involved changes to a TSA plan during the term of collective-bargaining agreement in which the judge read the contractual language along with the bargaining history as the union there having consciously waived the right to bargain over those issues. That presents a different situation from that here, where the contract is expired, and Respondent seeks to continue its contractual ability to make unlimited changes to healthcare benefits in perpetuity and thereby eviscerating the Union's bargaining rights over a key term and condition of employment.

range of benefits, and even the addition wholly new benefit plans, should all be considered part of one discrete, recurring, event would deprive that limitation of much of its meaning and would transform the *Stone Container* standard into what the Board indicated it should not be—i.e., an exception of "broad application" and "disruptive potential." id. at 1107. In the instant case, Respondent's 2013 changes to health care included, increased premiums, the conversion of the United Healthcare Gold plan to HSA 2, higher in-network deductible for employee and employee children ($2,500) than under the Gold plan, expansion of wellness reward to $250, increase in out-of-pocket costs if employees purchase brand name prescription when a generic equivalent is available, all of which were not regularly occurring changes. Moreover, Respondent's conduct concerning health insurance must be viewed in the context that it was insisting on maintaining the "pass through" language on a multitude of benefits, such as paid time off, group insurance and pension plan, the vision plan, dental insurance, life insurance, short and long term disability, reimbursement accounts, and the Raytheon Savings and Investment Plan.

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

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

Respondent also cites cases relating to benefit plan distribution and/or coverage arguing ERISA promotes uniformity of rules pertaining to national benefit plans. See, *e.g., Kennedy v. Plan Adm'r for Raytheon Say. & Inv. Plan,* 129 S.Ct. 865 (209). I do not find Respondent's

argument to be persuasive here for the remedy sought is not to alter the plans benefits, but to determine if the plan changes were unlawfully implemented on January 1, 2013. The decisions Respondent cites do not relate to the remedial rights under the NLRA pertaining to ERISA based plans. See, *Décor Group, Inc.,* 356 NLRB No. 180, slip op. at 1 fn. 2 (2011); and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 552-553 (1988). Moreover, Respondent stipulated that the Raytheon plan was not monolithic in that it consisted of regional plans. In the initial collective-bargaining agreement entered into between Respondent and the Union it provided that, "that contributions for the Medical/Vision Plan would not exceed the rates paid by salaried employees at the Ft. Wayne facility." This language implies at the time, the plan administrators were allowed to charge the bargaining unit employees lesser rates than salaried employees. In 2003, Definity Health Care Options were added to the plan everywhere except California. In 2008, it was noted in the annual changes that Respondent "Discontinued M-Plan HMO in Ft. Wayne and moved employees to United Healthcare Choice EPO, absent election to different plan." Thus, Respondent has made changes to the plan based on area requirements. Moreover, I do not find the General Counsel seeks Respondent to modify the plan, for there are various options available to the parties through bargaining, including bargaining to a good faith impasse over Respondent's proposed annual changes to the plan which was not done here, and thereafter implementing them, or bargaining to provide employees with an alternate plan, or increased compensation to help defray the costs of the plan, to state a few. Respondent has acknowledged this concept in its January 2013 distribution to employees concerning amendments to plan benefits wherein in it stated, "Benefits for employees represented by a bargaining unit will be in accordance with their collective-bargaining agreement." In sum, I do not find Respondent has raised any valid defense to its statutory duty to bargain and for the reasons stated I find it has violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

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

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

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

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

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

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend it be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. With respect to the Respondents January 1, 2013, changes to bargaining unit employees health and medical insurance, I shall recommend that Respondent be required to make available to the unit employees the health insurance and medical coverage available prior to those changes at the pre-change rates and costs. In addition, the Respondent shall reimburse past, present, and future unit employees for any expenses and premium costs ensuing from the January 1, 2013, unilateral changes. See, *Larry Geweke Ford,* 344 NLRB 628 (2005) The reimbursement to employees shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, the decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), shall be applied by Respondent in compensating affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and the filing of a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee

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

ORDER

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

1. Cease and desist from:

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

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

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

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

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

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

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and/or other compensation due under the terms of this Order.

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

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

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

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Eric M. Fine
Administrative Law Judge

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[11] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

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

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

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

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

RAYTHEON NETWORK CENTRIC SYSTEMS
(Employer)

Dated ____________ By ______________________________
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577 (317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.