

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 25-CA-092145

Raytheon Network Centric Systems,

and

United Steel, Paper and Forestry,
Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers
International Union, AFL-CIO, CLC.

**RESPONDENT RAYTHEON NETWORK CENTRIC SYSTEM'S BRIEF IN
SUPPORT OF EXCEPTIONS TO ALJ'S DECISION**

Dated: December 17, 2013

Kenneth B. Siepman, Attorney No. 15561-49
Matthew J. Kelley, Attorney No. 27902-53
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
111 Monument Circle, Suite 4600
Indianapolis, Indiana 46204
Telephone: (317) 916-1300
Facsimile: (317) 916-9076
kenneth.siepman@ogletreedeakins.com
matthew.kelley@ogletreedeakins.com
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. STATEMENT OF THE CASE..... 1

III. ISSUES PRESENTED 2

IV. STATEMENT OF FACTS..... 4

 A. The Parties and Bargaining Unit..... 4

 B. The Raytheon Plan 4

 C. The Union Agrees to the Raytheon Plan in 2000 5

 D. Every Year Since 2000, Fort Wayne Bargaining Unit Employees Have Gone Through Open Enrollment, and Raytheon Has Made Unilateral Changes in the Employees’ Medical Benefits..... 9

 E. During Bargaining in 2012, the Union Unsuccessfully Tried to Eliminate “Pass Through” on Benefits. 10

 F. Raytheon Maintains the Status Quo—the Fort Wayne Bargaining Unit Employees Go Through Open Enrollment in October 2012 and Receive Raytheon’s Nationwide Benefits, Including All Annual, Recurring Changes Raytheon Made to the Raytheon Plan. 14

V. SUMMARY OF THE ARGUMENT 15

VI. ARGUMENT..... 17

 A. Well-Settled Board Law Authorized Raytheon to Make Changes to the Raytheon Plan Consistent With the Dynamic *Status Quo*..... 17

 1. *An employer’s right to unilateral action under a dynamic status quo need not be narrowly circumscribed.* 31

2.	<i>The Board should not analyze this case as if it were an initial contract situation, as the situations are markedly different.</i>	34
3.	<i>The ALJ erroneously found Raytheon's actions unlawful under Courier-Journal.</i>	35
4.	<i>McClatchy Newspapers is not relevant to the analysis of Raytheon's past practice.</i>	39
B.	Contrary To The ALJ's Determination, the Union Clearly and Unmistakably Waived its Right to Bargain Over the Changes to the Raytheon Plan.	40
C.	The ALJ Incorrectly Determined that Raytheon Violated the Act When it Notified Employees of the Benefit Changes.	44
D.	The ALJ Erroneously Rejected Raytheon's Public Policy Arguments Based on Speculation Inconsistent with the Facts of This Case.	46
VII.	CONCLUSION	49

TABLE OF AUTHORITIES

	Page(s)
BOARD DECISIONS	
<i>A-V Corp.</i> , 209 NLRB 451 (1974)	19, 32
<i>Allison Corp.</i> , 330 NLRB 1363 (2000)	42
<i>Beverly Health & Rehab. Servs.</i> , 335 NLRB 635 (2001).....	25
<i>Beverly Health & Rehabilitation Services, Inc.</i> 346 NLRB 1319 (2006)	20, 21, 24, 25
<i>Brannan Sand and Gravel</i> , 314 NLRB 282 (1994)	19, 31
<i>Broadway Volkswagen</i> , 342 NLRB 1244 (2004)	35
<i>Cal. Pac. Med. Ctr.</i> , 337 NLRB 910 (2002)	42
<i>Capitol Ford</i> , 343 NLRB 1058 (2004)	passim
<i>Courier-Journal Corp.</i> , 342 NLRB 1093 (2004)	passim
<i>Dynatron/Bondo Corp.</i> , 323 NLRB 1263 (1997)	32
<i>E.I. du Pont de Nemours and Company</i> , 355 NLRB 1084 and 355 NLRB 1096 (2010).....	passim
<i>Eugene Iovine, Inc.</i> , 328 NLRB 294 (1999)	32
<i>Finley Hospital</i> , 359 NLRB No. 9 (2012)	passim

<i>Garrett Flexible Products,</i> 276 NLRB 704 (1985)	32
<i>Goya Foods of Florida,</i> 347 NLRB 1118 (2006)	34
<i>Guard Publishing Co.,</i> 339 NLRB 353 (2003).....	25, 26
<i>Hardesty Co.,</i> 336 NLRB 258 (2001)	32
<i>Kir, Inc.,</i> 317 NLRB 1325 (1995)	41, 42
<i>Larry Geweke Ford,</i> 344 NLRB 628 (2005)	32
<i>Long Island Head Start Child Development Servs., Inc.,</i> 345 NLRB 973 (2005)	21, 32
<i>Matheson Fast Freight, Inc.,</i> 297 NLRB 63 (1989)	32
<i>McClatchy Newspapers,</i> 321 NLRB 1386 (1996)	39
<i>Mid-Continent Concrete,</i> 336 NLRB 258 (2001)	32
<i>Mt. Clemens General Hosp.,</i> 344 NLRB 450 (2005)	42, 43
<i>Nabors Alaska Drilling, Inc.,</i> 341 NLRB 610 (2004)	19, 31
<i>Omaha World-Herald,</i> 357 NLRB No. 156 (2011)	48
<i>Post-Tribune Co.,</i> 337 NLRB 1279 (2002)	21, 33
<i>Shell Oil Co.,</i> 149 NLRB 283 (1964)	18, 26
<i>Stone Container Corp.,</i> 313 NLRB 336 (1993)	3

COURT CASES

<i>Beverly Health & Rehab. Servs. v. NLRB</i> , 297 F.3d 468 (6th Cir. 2002)	19, 23, 33
<i>Conkright v. Frommert</i> , 130 S. Ct. 1640 (2010)	48
<i>Kennedy v. Plan Adm’r for Raytheon Sav. & Inv. Plan</i> , 129 S. Ct. 865 (2009)	48
<i>Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co</i> , 484 U.S. 539 (1988)	27
<i>Litton Financial Printing Division v. NLRB</i> , 501 U.S (1991)	27, 28
<i>Litton Microwave Cooking Prods. Div. v. NLRB</i> , 868 F.2d 854 (6th Cir. 1989)	19
<i>Martinsville Nylon Employees Council v. NLRB</i> , 969 F.2d 1263 (D.C. Cir. 1992).....	49
<i>NLRB v. E.I. du Pont de Nemours and Co.</i> , 682 F.3d 65 (D.C. Cir. 2012)	passim
<i>Metro. Life Ins. Co. v. Glenn</i> , 554 U.S. 105 (2008)	48
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983)	40
<i>May Dept. Stores Co. v. NLRB</i> , 326 U.S. 376 (1945)	34
<i>New NGC, Inc.</i> , JD-47-12, 2012 WL 3904672	27
<i>NLRB v. Eugene Iovine, Inc.</i> , 2001 WL 10366 (2d Cir. 2001)	32
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962)	passim

<i>O.C.A.W. v. NLRB</i> , 486 F.2d 1266 (D.C. Cir. 1973)	47
<i>Resorts Intl Hotel Casino v. NLRB</i> , 996 F.2d 1553 (3d Cir. 1993)	40
<i>Pacific Northwest Newspaper Guild v. NLRB</i> , 877 F.2d 998 (D.C. Cir. 1989)	33
<i>Uforma/Shelby Business Forms v. NLRB</i> , 111 F.3d 1284 (6th Cir. 1997)	19

STATUTES

29 U.S.C. § 158(a)(1) and (5)	passim
Affordable Care Act, Public Law 111-148, 124 Stat. 119 (2010).....	48
Section 1501(a)(2)(H), 42 U.S.C. § 18091(a)(2)(H).....	48

OTHER AUTHORITIES

National Labor Relations Board Rule 102.46.....	1
---	---

I. INTRODUCTION

Respondent, Raytheon Network Centric Systems, Inc. (“Raytheon” or “Respondent”), pursuant to Rule 102.46 of the National Labor Relations Board’s (“NLRB” or “Board”) rules, submits this brief in support of its contemporaneously-filed Exceptions to the decision of Administrative Law Judge Eric M. Fine dated November 19, 2013 (“ALJ Decision”).¹ The ALJ erred in finding that Respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the “Act”) when it had employees go through open enrollment and elect their health insurance benefits for 2013, just as the employees had done every year since 2000. The ALJ’s findings are unsupported by the record, contrary to law, and should be reversed.

II. STATEMENT OF THE CASE

On February 28, 2013, the Regional Director for Region 25, Rik Lineback, issued a complaint alleging Raytheon violated Sections 8(a)(1) and 8(a)(5) of the Act by (1) announcing in September 2012 that it would be making changes to health insurance plans of bargaining unit employees represented by the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy Allied-Industrial & Service Workers International Union, AFL-CIO-CLC, (“USW”) or “Union”), and (2) implementing those changes on January 1, 2013, without first bargaining with the Union to a good-faith impasse. Judge Fine conducted a telephonic hearing on

¹ Citations to the Administrative Law Judge’s decision will be referenced as “ALJD” followed by the appropriate page and line number(s).

May 2, 2013 and the parties submitted all evidence via stipulation during that telephonic hearing. No witnesses were presented.²

On November 19, 2013, the ALJ issued a decision (“ALJ’s Decision”) finding Respondent violated Sections 8(a)(1) and 8(a)(5) of the Act when it unilaterally implemented changes to bargaining unit employees’ health insurance benefits during bargaining for a successor contract. The ALJ erred, as Raytheon continued its customary open enrollment for yearly health benefits as part of a past practice, necessary to maintain the dynamic *status quo*. The ALJ’s decision should be overturned.

III. ISSUES PRESENTED

1. Did the ALJ err in finding that Respondent failed to establish a past practice under *NLRB v. Katz*, 369 U.S. 736 (1962) and *Courier-Journal Corp.*, 342 NLRB 1093 (2004)? (See Exceptions 1,2,4,5,7,8,9,10,13,16,42,47 and 49).

2. Did the ALJ improperly interpret and apply the Board’s decision and analysis in *Courier-Journal*, and other Board precedent, in finding Respondent’s actions were unlawful? (See Exceptions 2,4-9,12,13,16,19-26,28-33,35,36,42,47,48 and 50).

3. Did the ALJ err in failing to find that Respondent’s actions were mandatory under the Board’s “dynamic status quo” doctrine, as recently reviewed in *Finley Hospital*, 359 NLRB No. 9 (2012)? (See Exceptions 3,12,13,16,18,26,27,29,35,42,47 and 48).

² The Stipulated Facts will be referenced as “SF” followed by the paragraph number, and the exhibits will be referenced as “SF. Ex.” followed by the exhibit number(s).

4. Did the ALJ err in finding that Respondent's unilateral right to implement changes to the Raytheon Plan was limited by the expired management rights clause contained in the 2009-2012 collective bargaining agreement? (See Exceptions 11,14,15 and 42).

5. Did the ALJ err in finding that the Union had not clearly and unmistakably waived its right to bargain over the changes to the Raytheon Plan? (See Exceptions 17,39 and 42).

6. Did the ALJ err in finding that Respondent violated the Act when it notified employees of open enrollment and their opportunity to elect benefits for 2013? (See Exception 34).

7. Did the ALJ err in finding that Respondent's actions did not fall within the *Stone Container Corp.*, 313 NLRB 336 (1993) exception, allowing Respondent to implement changes prior to an overall impasse in bargaining? (See Exception 37).

8. Did the ALJ err in finding that Respondent would not be forced to improperly modify its benefit plan by requiring Respondent not to implement the changes implemented for all 65,000 Raytheon employees creating a new plan for the 35 bargaining unit members. (See Exception 40).

9. Did the ALJ err in dismissing Respondent's arguments concerning the effects of his decision on Raytheon's benefit plans and obligations under ERISA? (See Exceptions 41,43,45 and 46).

IV. STATEMENT OF FACTS

A. The Parties and Bargaining Unit

Prior to December 1997, the Fort Wayne facility was operated by Hughes Aircraft. (SF ¶ 2) Raytheon finalized its merger with Hughes Aircraft in December 1997. (*Id.*) Raytheon recognized the Fort Wayne bargaining unit and the CBA in place at the time of the purchase. (*Id.*)

PACE Local 6-0254 represented production and maintenance employees at the Fort Wayne facility for more than 20 years. (SF ¶ 1) In April 2005, PACE merged with the USW. (*Id.*) The Fort Wayne bargaining unit currently consists of 35 individuals across various job classifications. (*Id.*) The average age of Fort Wayne bargaining unit employees is 59—only one employee is under age 40. (SF ¶¶ 3, 52; Ex. 18, Attachment A)

Raytheon and the Union were parties to collective bargaining agreements (“CBAs”) covering the Fort 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. (SF ¶ 4) The parties’ most recent CBA covering the Fort Wayne bargaining unit employees ran from May 3, 2009 to April 29, 2012. (*Id.*)

B. The Raytheon Plan

On January 1, 1999, Respondent implemented the Raytheon Plan. (SF ¶ 5) The Raytheon Plan is a 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, life insurance, and short-term and long-term disability coverage. (SF ¶ 11; Ex. 3) Employees are provided with annual

enrollment periods each fall, at which point employees elect the level of health care coverage desired and other benefit options. (SF ¶ 11) Raytheon Medical is a self-insured medical care option encompassed within the Raytheon Plan. (*Id.*) All Raytheon sites in the United States participate in the Raytheon Plan. The Raytheon Plan is available to approximately 65,000 domestic employees, including over 5,000 union employees across 19 bargaining units.³ (*Id.*)

On January 1, 1999, salaried and hourly non-union employees at the Fort Wayne facility were covered by the Raytheon Plan. (SF ¶ 6) The terms of the Raytheon Plan allowed the Company to alter costs and/or levels of benefits for covered employees. (*Id.*)

C. The Union Agrees to the Raytheon Plan in 2000

During negotiations for the 2000 CBA in Fort Wayne, the parties agreed to a proposal to have employees covered by the Raytheon Plan, including Raytheon Medical, beginning on January 1, 2001. (SF ¶ 7; Ex. 2) In addition, the parties agreed that contributions for Raytheon Medical would not exceed the rates paid by salaried employees at the Fort Wayne facility. (SF ¶ 8) 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. (*Id.*)

Following the USW merger with PACE, the parties bargained on a new CBA for the Fort Wayne bargaining unit. The parties finalized the CBA on June 29,

³ The Steelworkers do not represent any Raytheon employees other than those in the Fort Wayne bargaining unit. (*Id.*)

2005. The CBA contained 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 Fort Wayne facility from year-to-year. (SF ¶ 1, 27; Ex. 8) The parties refer to the offering of benefits to bargaining unit employees on the same basis as non-represented employees as "pass through" language. (SF ¶ 54)

On February 26, 2009, Union bargaining representatives for the Fort Wayne bargaining unit provided notice to Raytheon to open negotiations on the CBA with the Company. (SF ¶ 40) No proposals to amend or eliminate the "pass through" language were made by either party during those negotiations. (*Id.*)

On May 28, 2009, the Union and Raytheon finalized a new CBA for the Fort Wayne bargaining unit. (SF ¶ 41) The agreed-to language concerning year-to-year changes to Raytheon Medical remained unchanged in the 2009 CBA from the 2005 CBA. (*Id.*) Article XXII of the CBA provided that, "The terms and conditions of agreement with respect to a Group Benefit Program are set forth as Exhibit C Addendum to this Agreement." (SF Ex. 13, p. 58) Exhibit C of the CBA provided, in pertinent part:

The Raytheon Unified 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 group insurance plans currently in effect are 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 dependents with group hospital, medical and surgical coverage, behavioral health care 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 Fort Wayne facilities.

Section 14. General Provisions (Formerly Section M of Exhibit G)

1. Employees may elect between different levels of benefit coverage for Medical/Vision, Dental and/or AD&D plans in accordance with the plans being offered to the non-represented employees at the location in Ft. Wayne, Indiana, location [sic] from year-to-year, as negotiated under this collective bargaining agreement.
2. The Company reserves the right to amend or terminate said Group Benefit Plans and from time to time to clarify plan provisions and to maintain compliance with applicable laws and requirements.
3. All benefits of employees, retired employees, laid off employees and insured dependents are subject in every respect to the terms of the applicable Plan documents under which payment is claimed.

Section 17. Annual Benefits Enrollment

For all contract years, beginning with 2001, the annual benefits enrollment will take place prior to the end of the preceding calendar year.

(SF Ex. 13, pp. 63-69)

The Raytheon Plan contains the following broad “reservation of rights”:

ARTICLE VIII

AMENDMENT AND TEMRINATION OF PLAN

8.1. **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 exist, or may hereafter exist. The Senior Vice President Human Resources and the Vice President, Deputy Director of Human Resources, of the Company may make amendments to the Plan or any Benefit Program or other implementing documents. All amendments to the Plan shall be in writing, and any oral statements or representations made by the Employer or an Administrative Services Provider, or any other individual or entity that alter, modify, amend, or are inconsistent with the written terms of the Plan shall be invalid and unenforceable and may not be relied upon by any Employee, beneficiary, Eligible Dependent, service provider, or other individual or entity.

8.2. **Right to Terminate.** The Company hopes and expects to continue this Plan indefinitely. However, notwithstanding any provision(s) 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 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. Termination shall be effected by a written resolution executed by the Senior Vice President, Human Resources, or other authorized officer of the Company.

(SF Ex. 1, pp. 16-17)

Similarly, the Your Benefits Handbook – the summary plan description – expressly provides, on the cover page:

The specific plan sections included in this handbook constitute the summary plan descriptions for the Raytheon benefit plans. If there is any difference between the information contained in this handbook and the actual plan documents, the plan documents will always govern.

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.

(SF Ex. 3, p. 1)

D. Every Year Since 2000, Fort Wayne Bargaining Unit Employees Have Gone Through Open Enrollment, and Raytheon Has Made Unilateral Changes in the Employees' Medical Benefits.

Every year since 2000, Fort Wayne bargaining unit employees have participated in open enrollment, as have all U.S.-based Raytheon employees. (SF ¶¶ 9, 11, 12) The Fort Wayne employees have selected from a variety of plan options, the medical and benefit plan most appropriate for themselves each year. (SF ¶ 12) In advance of open enrollment every year, Respondent mailed a document, entitled “Your Raytheon Benefits,” to all U.S. Region Raytheon employees, including Fort Wayne employees represented by the Union. (SF ¶¶ 14, 17, 20, 23, 28, 31, 34, 37, 42, 45, 48, 66; Exs. 4-7, 9-12, 14-16, 22) “Your Raytheon Benefits” communicated 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. (*Id.*) Each year prior to open enrollment, each employee also 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. (*Id.*) Each year open enrollment began in October and lasted between two and three weeks. (*Id.*)

Similarly, every year since 2001, and pursuant to the applicable CBA and Raytheon Plan documents referenced therein, the Company has retained and exercised discretion to modify and/or terminate aspects of the Raytheon Plan. (SF ¶¶ 13, 15, 18, 21, 24, 29, 32, 35, 38, 43, 46, 49, 67; Exs. 1-16, 22) The terms of the Raytheon Plan allowed the Company to alter costs incurred by bargaining unit

employees and/or levels of benefits received by bargaining unit employees under the Raytheon Plan. (*Id.*) The changes Raytheon made unilaterally to Raytheon Medical each year from 2000 through 2012 included increasing premiums, adding and deleting plans, adding and deleting benefit coverages, changing the percentage of the premiums shared as between Raytheon and employees, changing co-pays, changing administrators for programs, and changing benefits to comply with changes in the law, *e.g.*, the Affordable Care Act. (*Id.*)

Raytheon did not offer to negotiate over the benefit changes between 2000 and 2012, nor did the Union seek to bargain over these changes. (SF ¶¶ 15, 18, 21, 24, 29, 32, 35, 38, 43, 46, 49) Similarly, the Union did not file any grievances or unfair labor practice charges contesting any of the changes from 2000 through 2012. (SF ¶¶ 16, 19, 22, 25, 30, 33, 36, 39, 44, 47, 50)

E. During Bargaining in 2012, the Union Unsuccessfully Tried to Eliminate “Pass Through” on Benefits.

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. (SF ¶ 51) The Union also provided Raytheon with written information requests. (SF ¶ 51; Ex. 17) On March 30, 2012, Raytheon provided a memorandum to the Union regarding the information requests made by the Union, along with the requested information. (SF ¶ 52; Ex. 18)

The parties met for the first time to bargain over the terms of the next CBA on April 24, 2012. (SF ¶ 53) Over the course of the next five months, the parties met

10 times (4/24, 4/25, 4/26, 4/27, 4/28, 5/17, 6/7, 7/25, 7/26 and 9/26) in an attempt to reach a complete agreement. (*Id.*)

On April 24, 2012, the Union presented Raytheon with its non-economic contract proposals, including UNE 6, 7, and 9.⁴ (SF ¶ 54; Ex. 19) These proposals sought to strike the “pass through” language contained in Article X, Article XVI and Exhibit C of the CBA. (*Id.*) The “pass through” language contained in the expiring CBA highlighted that the same disability/leave of absence, paid time off and Raytheon Medical offered to all of the approximately 65,000 domestic Raytheon employees would be offered to the Fort Wayne bargaining unit employees on a year-to-year basis. (*Id.*) The Union’s proposals sought to designate that the disability/leave of absence, paid time off and Raytheon Medical benefits offered to the Fort Wayne bargaining unit employees would remain the same for the life of the CBA. (*Id.*)

On April 25, 2012, Raytheon responded to UNE 6, 7, and 9. (SF ¶ 55; Ex. 21) Raytheon explained to the Union negotiating team that the “pass through” language had been in place for at least the previous three contracts. (SF ¶ 55) 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. (*Id.*) The Union responded that it was no longer willing to waive its right

⁴ 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 (*e.g.*, UNE 6(a), etc.).

to bargain over a mandatory subject of bargaining such as health benefits. (*Id.*) Raytheon rejected the Union's proposals to modify the contract language and requested alternative proposals from the Union. (*Id.*)

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." (SF ¶ 56; Ex. 20) On April 26, 2012, Raytheon presented a counter-proposal. (SF ¶ 57) 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." (*Id.*; Ex. 21) The Union rejected this counter-proposal. (SF ¶ 57)

On April 27, 2012, the Union stated that its medical insurance proposal (UNE 9) had not changed. (SF ¶ 58) Raytheon presented the Union with its last, best and final offer on April 28, 2012. (SF ¶ 59) 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. (*Id.*) 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. (*Id.*) Bargaining continued on April 28, 2012 concerning the PTO policy, wages and the "pass through" language with no resolution. (*Id.*) The CBA expired on April 29, 2012 at 12:01 a.m. (*Id.*) The Fort Wayne bargaining unit employees continued to work under the *status quo*. (*Id.*)

Union and Raytheon representatives met on May 17, 2012 to discuss outstanding bargaining issues. (SF ¶ 60) Raytheon and the Union discussed options to the “pass through” language. (*Id.*) In the only negotiation session he attended, 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. (SF ¶¶ 53, 60) No formal proposals were exchanged by either side. (SF ¶ 60)

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

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

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. (SF ¶ 63) The parties were close to agreement on holidays, the attendance policy and right-to-work language. (*Id.*) Raytheon

maintained its position on the “pass through” issue, but said it would entertain any options the Union wanted to put on the table. (*Id.*) The Union again stated it would not waive its right to bargain over a mandatory subject of bargaining. (*Id.*) Raytheon explained that without a new proposal from the Union on the “pass through” issue, it believed the parties were at impasse. (*Id.*) The Union, for its part, stated its belief that the parties were not in fact at an impasse. (*Id.*) Neither party exchanged any proposals on “pass through.” (*Id.*) Raytheon and the Union have had no bargaining sessions since September 26, 2012. (SF ¶ 64)⁵

F. Raytheon Maintains the Status Quo—the Fort Wayne Bargaining Unit Employees Go Through Open Enrollment in October 2012 and Receive Raytheon’s Nationwide Benefits, Including All Annual, Recurring Changes Raytheon Made to the Raytheon Plan.

During the negotiations on September 26, 2012, the Union solicited Raytheon’s position on whether the Fort Wayne bargaining unit employees would participate in the upcoming open enrollment period for the Raytheon Plan. (SF ¶ 65) 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 and the Raytheon Plan. (*Id.*) The Union asked Raytheon to exclude the Fort Wayne bargaining unit employees from the upcoming open enrollment period. (*Id.*)

Raytheon instituted changes to its 2013 benefit package for all domestic employees and subsequently mailed a document, entitled “Your Raytheon Benefits,”

⁵ Following the close of the hearing on May 2, 2013, the parties have bargained.

to all U.S. Region Raytheon employees, including Fort Wayne employees represented by the Union. (SF ¶ 66; Ex. 22) In addition, in their personalized enrollment kit, each employee received, or was provided electronic access to, a “Your Benefits Handbook” outlining all of the benefits available to Raytheon employees. (SF ¶ 66) Open enrollment commenced on October 12, 2012 and closed on October 31, 2012. (*Id.*)

On January 1, 2013, Respondent implemented changes to the Raytheon Plan. (SF ¶ 67) 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. (*Id.*) The benefit changes Raytheon made in 2013 were consistent with and similar to the changes Raytheon historically had made. (SF ¶¶ 13, 15, 18, 21, 24, 29, 32, 35, 38, 43, 46, 49, 67; Exs. 4-7, 9-12, 14-16, 22)

V. SUMMARY OF THE ARGUMENT

The Board should reverse the ALJ’s decision and dismiss the Complaint because (1) decades of NLRB and court precedent hold that Raytheon was privileged to make the unilateral changes at issue here due to Raytheon’s obligation to maintain the “dynamic *status quo*” between the parties; and (2) the Union waived its right to bargain over the changes.

Raytheon’s actions were lawful because the annual Raytheon Medical changes were consistent with and preserved the *status quo* between the parties. Both the NLRB and courts have repeatedly held that an employer does not violate Section 8(a)(5) if it makes unilateral changes consistent with a clear past practice.

In fact, an employer violates Section 8(a)(5) if it fails to make changes to maintain the “dynamic *status quo*.” In this case, through the parties’ agreements and actions, the well-established *status quo* was that bargaining unit employees would continue to go through open enrollment and receive Raytheon’s nationwide benefits, including all annual, recurring changes Raytheon made to the Raytheon Plan. Raytheon’s changes to the Raytheon Plan in Fort Wayne in 2013 were consistent with past practice and, therefore, were not unlawful *changes* in terms and conditions of employment.

Even applying the Board’s “waiver” analysis, pursuant to which an employer may make unilateral changes only where a union has clearly and unmistakably waived its right to bargain, the Complaint should be dismissed because the evidence establishes that the Union did, in fact, waive its right to bargain over the changes to the Raytheon Plan. The Union did so both expressly, when it agreed to accept the Raytheon Plan for bargaining unit employees, and based on the parties’ conduct.

Moreover, contrary to the ALJ’s findings, the General Counsel’s position seeks to destroy the heretofore national uniformity of the Raytheon Plan, in effect dictating the creation of a new benefit plan for a small bargaining unit of 35 employees. This is inconsistent with federal labor policy, which seeks to promote stability and repose on matters agreed to in writing, and flies in the face of the Employee Retirement Income Security Act (“ERISA”), which authorizes the changes and requires Raytheon to maintain the Raytheon Plan pursuant to the written terms. Further, the cost to set up a free-standing plan for the 35 Fort Wayne bargaining unit employees, particularly considering their demographics (average

age 59), would be outrageous. They benefit from other Raytheon employees not using the benefits. This means, as a practical matter, if the Fort Wayne bargaining unit employees are not on the Raytheon Plan, their benefits will be reduced or they (and Raytheon) will pay much more for the benefits. The Board should reverse the ALJ's decision and dismiss the Complaint.

VI. ARGUMENT

A. Well-Settled Board Law Authorized Raytheon to Make Changes to the Raytheon Plan Consistent With the Dynamic Status Quo.

The Board should reverse the ALJ and dismiss the Complaint because the national changes to the Raytheon Plan in 2013 maintained the *status quo* in Fort Wayne. Indeed, had Raytheon not implemented the national changes to the Raytheon Plan in Fort Wayne, it would have unlawfully deviated from the existing practices of the parties, thereby failing to provide the bargaining unit with the nationwide benefits plan to which the parties agreed.

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer to fail or refuse to bargain in good faith with the representative of its employees. 29 U.S.C. § 158(a)(5). As a general rule, absent circumstances “justifying unilateral action,” an employer violates Section 8(a)(5) if it makes a unilateral *change* in wages, hours or terms and conditions of employment absent agreement between the parties or an overall bargaining impasse. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). But, *Katz* also noted that an employer’s obligation to maintain the *status quo* may, in fact, require unilateral action if that is part of the *status quo*. *Id.* at 745-46 (unilateral implementation of merit wage increases is a refusal to bargain “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* . . .”).

Under *Katz*, an employer unilaterally may implement changes “in line with [its] long-standing practice” because such changes amount to “a mere continuation of the status quo.” *Id.* at 746. “The purpose of prohibiting unilateral changes is not advanced by freezing in place the terms of employment when doing so disrupts the established practice for making changes. For this reason, an employer may lawfully change the terms of employment pursuant to such an established practice.” *NLRB v. E.I. du Pont de Nemours and Co.*, 682 F.3d 65, 67 (D.C. Cir. 2012)

The Board has consistently applied the *Katz* principle, maintaining that the *status quo* can include unilateral action if consistent with past practice. “[A] unilateral change made pursuant to a long-standing practice is essentially a continuation of the *status quo*—not a violation of Section (a)(5).” *Courier-Journal*, 342 NLRB 1093, 1094 (2004) (citing *Katz*, 369 U.S. at 743).

For example, nearly 50 years ago in *Shell Oil Co.*, 149 NLRB 283, 289 (1964), the Board found that the employer lawfully implemented a subcontracting decision after the expiration of the union contract because the unilateral exercise of that right was so well established that it became a term and condition of employment.⁶

⁶ The ALJ erroneously attempts to distinguish *Shell Oil* based on language the ALJ took out of context. (ALJD p. 33, lines 42-47) The ALJ notes the Board in *Shell Oil* did “not pass upon whether or not Respondent may, in the future, lawfully expand its subcontracting practice without prior notice and consultation with the Union.” Raytheon did not expand its practice, but did exactly what it had done the prior 12 years.

The Board subsequently followed the same principles in many decisions involving medical benefits.⁷

This approach to the preservation of the *status quo* has been consistently accepted by the courts. In *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468 (6th Cir. 2002), the Sixth Circuit held that the ability to act unilaterally may become part of the “past practice” of the parties, and that an employer does not alter the *status quo* by continuing that past practice following contract expiration:

We interpret *Shell Oil* and its progeny as standing for the proposition that if an employer has frequently engaged in a pattern of unilateral change under the management-rights clause during the term of the CBA, then such a pattern of unilateral change becomes a “term and condition of employment,” and that a similar unilateral change after the termination of the CBA is permissible to maintain the *status quo*. Thus, it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer’s past practice of unilateral change to survive the termination of the contract.

Id. at 481. See also *Uforma/Shelby Business Forms v. NLRB*, 111 F.3d 1284 (6th Cir. 1997); *Litton Microwave Cooking Prods. Div. v. NLRB*, 868 F.2d 854, 858 (6th Cir. 1989) (“an examination of the history and practices of [the employer] and the Union in this case reveals that the Union believed that the . . . agreement permitted [the employer] to act unilaterally”). As the Sixth Circuit noted in the cases cited above, the employer’s ongoing authority to make unilateral changes consistent with

⁷ See *Brannan Sand and Gravel*, 314 NLRB 282 (1994) (the employer’s unilateral changes to its health plan were permissible even though negotiations were ongoing); *Nabors Alaska Drilling, Inc.*, 341 NLRB 610 (2004) (employer lawfully made unilateral changes to its health plan given that health insurance review was an annually-occurring event); *A-V Corp.*, 209 NLRB 451 (1974) (employer did not violate the Act by allocating insurance premium increases to employees after expiration of a contract when consistent with past allocations of premium increases to which the union never objected).

past practice may become the *status quo*, regardless of whether the contract has expired.

Contrary to the ALJ, Board precedent is in accord, holding that a past practice developed under a management-rights clause can exist independent of that clause and survive expiration of that clause. In *Capitol Ford*, 343 NLRB 1058, 1058 n.3 (2004), the NLRB confirmed that a past practice arising under a collective bargaining agreement privileged an employer's unilateral action post-expiration. In that case, a successor employer implemented a productivity bonus, which it subsequently modified, without *any* bargaining with the union. The NLRB adopted the ALJ's finding that the changes were permissible, and rejected the argument that the practice was no longer valid simply because the contract provision that authorized the practice had expired:

Our colleague is correct in saying that a successor employer who does not adopt the predecessor's contract cannot rely upon the management rights clause of that contract to justify unilateral action. However, the instant case involves the predecessor's *practice* of acting unilaterally with respect to bonuses. The Respondent was privileged to continue that practice and did so in this case. Contrary to our colleague, the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice. *The Respondent's reliance on its predecessor's past practice is not dependent on the continued existence of the predecessor's collective bargaining agreement.*

Id. at 1058 n.3 (emphasis added).

Similarly, in *Beverly Health & Rehabilitation Services, Inc.* 346 NLRB 1319 (2006), the Board declared 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. *See also Long Island Head Start Child Development Servs., Inc.*, 345 NLRB 973, 973 n.5 (2005) (finding unilateral changes unlawful because, “[u]nlike the employer in [*Courier-Journal*], the Respondent has not demonstrated an established past practice of exercising its own discretion in changing its health insurance plan.”).

In fact, the Board has previously approved extensive unilateral changes to health care benefit programs during a hiatus between CBAs when doing so was the established practice. Thus, in *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002), the Board held it was not unlawful for an employer unilaterally to increase employees’ required contributions to health care premiums because the employer “had a consistent, established past practice of allocating health insurance premiums” between itself and its employees.

In *Courier-Journal*, 342 NLRB 1093 (2004), the Board again approved an increase in the health insurance premiums to be paid by employees together with “a number of more far-reaching changes in the health care insurance benefits.” *Id.* at 1093. There, the expired CBA contained a clause stating the employer “reserves the right to modify or terminate any (or all) benefits . . . at any time.” *Id.* at 1093. After the CBA expired, the employer:

changed the amount of the employee contributions to healthcare premiums; modified the framework for determining employee contribution levels; switched from an insurance ‘plan year’ starting on July 1 to a plan year starting on January 1; introduced separate vision and dental coverage plans; terminated the bonuses paid to employees who chose to waive the [employer’s] health care insurance; and

substituted two plans with [one insurer] for the plans [the employer] had previously offered with [other insurers].

Id. at 1099.

The Board explained that the correct analytical framework for these post-expiration changes to health benefits was the *status quo* rubric, given the employer's established past practice of unilateral action. The Board concluded the employer's changes did not violate the NLRA, because the ability to act unilaterally had become the *status quo* and the challenged benefit modifications were consistent with the *status quo*, rather than altering it. *Id.* at 1094 ("a unilateral change made pursuant to a long-standing practice is essentially a continuation of the status quo – not a violation of Section (a)(5).").

The one aberrant Board decision is *E.I. du Pont de Nemours and Company*, 355 NLRB 1084 and 355 NLRB 1096 (2010) (collectively, "*DuPont*"). There, the Board held that DuPont committed an unfair labor practice by unilaterally implementing changes to its nationwide employee benefits program while it was between CBAs with two local unions. The NLRB did not, however, reject the long line of authority discussed above, but instead attempted to distinguish and re-craft the holdings in *Courier-Journal*:

In the *Courier-Journal* cases, a Board majority found that the employer's unilateral changes to employees' healthcare 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 clause has no bearing on

whether the union would acquiesce to additional changes made after that management rights clause expired.

355 NLRB at 1084.

The D.C. Circuit reversed the Board's decision in *DuPont* and remanded the case to the Board because "the Board departed, without giving a reasoned justification, from its precedent allowing an employer unilaterally to change wages, hours, or working conditions when doing so is in keeping with the employer's past practice[.]" *E.I. du Pont*, 682 F.3d at 66. As the D.C. Circuit held in reversing the Board and as noted by the dissenting Board member in *DuPont*, there was nothing in the reasoning of the *Courier-Journal* decisions that suggested post-contract hiatus changes dictated the outcome in those cases.

[W]hether a management-rights clause survives the expiration of the contract is beside the point DuPont 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*, ... 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.

Id. at 69-70.⁸

Thus, the *Courier-Journal* decisions and other dynamic *status quo* cases do not turn on “when” the past practice existed. Rather, they properly turn on “if” a past practice exists. *Courier-Journal* confirmed that it is the actual past practice of unilateral changes that controls—a fact noted by the D.C. Circuit and Board Member Schaumber in *DuPont*.

From 1996 to 2002 the Respondent unilaterally implemented changes to the Beneflex Plan on an annual basis pursuant to the “reservation of rights” clause. In each instance, the Union did not oppose the Respondent’s changes.

Following the expiration of the parties’ contract in 2002, the Respondent was required to maintain the terms and conditions of employment under the expired collective bargaining agreement until the parties negotiated a new agreement or bargained in good faith to impasse [citations omitted]. That duty to maintain the *status quo* required the Respondent to continue to provide benefits under the Beneflex Plan and to implement the Beneflex Plan in *the same manner* that it had been implemented in the preceding years, including its annual changes to the Plan, which it implemented nationwide for unit and nonunit employees alike. Thus, the Respondent’s modifications to

⁸ Extensive research has uncovered no case except *DuPont* where the Board found regular changes as part of an entrenched past practice unlawful. This highlights the aberrational nature of *DuPont* and underscores the soundness of the reasoning of the D.C. Circuit.

the Beneflex Plan on January 2004 and 2005 did not constitute unilateral change, but rather, were consistent with the *status quo*.

355 NLRB at 1089 (emphasis in original).

The D.C. Circuit in *DuPont* questioned whether the Board may have returned to reasoning of its decisions in *Beverly Health & Rehab. Servs.*, 335 NLRB 635, 636-37 (2001) and *Guard Publishing Co.*, 339 NLRB 353, 355-56 (2003). *E.I. du Pont*, 682 F.3d at 70. But these Board decisions are readily distinguishable on their facts and not incompatible with *Courier Journal*, *Capitol Ford*, and *Beverly Health* (346 NLRB 1319). For instance, in *Beverly Health & Rehab. Servs.*, 339 NLRB 353, the employer made unilateral changes to a vast array of working conditions after the expiration of the parties' CBA (*e.g.*, work hours, disciplinary policy, absenteeism policy, job descriptions and duties, medical leave, required in-service meetings, vacation scheduling, conversion of full-time to part-time positions, work schedule posting requirements, unit work jurisdiction, overtime, dues deductions, union access, bulletin board notices, health care insurance and "other" areas). *Id.* at 636, 653. But, the record did not indicate "those changes were similar in scope to those that had been made in prior years." The employer contended that because it had made *some* changes to various terms and conditions of employment pursuant to the management-rights clause, it was privileged to make *all* of the other, very different changes implemented after the agreement expired. The Board majority found the "fluid" situation presented did not rise to the level of a binding and established dynamic *status quo*. *Id.* at 636-37.

Similarly, in *Guard Publishing Co.*, 339 NLRB 353, after expiration of a CBA, the employer unilaterally implemented two new types of sales commissions. As to the first (“Top Of Mind Awareness” or “TOMA”), the program never before had been changed during its few years of existence and was “re-launched” as a “new” TOMA with a different payment schedule. *Id.* at 353. The employer argued that it had a past practice of unilaterally implementing other types of advertising sales and incentive programs, but this was of no moment, because it did not support a past practice with respect to TOMA. The second program, dealing with Internet advertising commissions, “was unquestionably a new program.” *Id.* at 356.

Thus, in both cases, a past practice of similar in scope changes was plainly lacking, so the employers could not prove a dynamic *status quo*. As a result, the decisions are not inconsistent with the principal that “a well-established past practice” may be lawfully continued during a hiatus. *Courier-Journal*, 342 NLRB at 1094; *Capitol Ford*, 343 NLRB at 1058; *Shell Oil Co.*, 149 NLRB at 289.

That the outcome in this case is controlled by *Courier Journal* is confirmed by the NLRB’s recent opinion in *Finley Hospital*, 345 NLRB No. 9 (2012), which forcefully reaffirms the “familiar dynamic *status quo* doctrine.” *Id.* slip op. at 2. *Finley Hospital* involved a one-year collective bargaining agreement that provided for a three percent wage increase on each bargaining unit employee’s anniversary date. Upon expiration of the contract, the employer discontinued these increases while bargaining. Relying upon the dynamic *status quo*, the Board concluded that the NLRA required the employer to continue the program of raises, unless and until

the parties bargained otherwise or impasse was reached. *Finley Hospital, supra* at 4.

Important for this case, the Board in *Finley Hospital* made clear a number of analytical points that confirm the rationale advanced in *Courier-Journal* and entirely support Raytheon's positions:

First, Section 8(a)(5)'s duty to bargain in good faith requires that an employer maintain the *status quo* with respect to benefits and other material terms and conditions of employment during bargaining. *Id.* at 2 (citing *Katz*, 369 U.S. at 743).

Second, the duty to maintain the *status quo* during bargaining "applies with equal force regardless [of] whether the term or condition of employment at issue was established by the employer alone or jointly by the parties through a collective-bargaining agreement." *Id.* (citing *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988)). Thus, changes during a hiatus are not an element defining the *status quo*.

Third, this enforceable *status quo* may be "dynamic." *Id.* at 4. This means that, as here, the fact that the *status quo* is active and may change even at the discretion of a party does not dilute its force and effect.⁹

⁹ Directly to this point is *New NGC, Inc.*, JD-47-12, 2012 WL 3904672 (NLRB Div. of Judges) (Sept. 7, 2012), where the ALJ applied a dynamic *status quo* rubric in defining the company's post-contract obligation to remit health insurance premiums to a union-sponsored trust fund. The judge found that the *status quo* was defined by the language of the parties' expired collective bargaining agreement and various trust fund documents and that it was "dynamic (active)." Therefore, the company was obligated to pay increased premiums post-contract, above those that applied during the term of the expired contract, as set in the "unfettered discretion" of the trust fund's board.

Fourth, even where the *status quo* is established by reference to a CBA, while the contractual right to act ordinarily does not survive the expiration, “the statutory right typically does.” *Id.* at 2. Post-expiration, contractual terms that give rise to a *status quo* “are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them.” *Id.* (citing *Litton*, 501 U.S. at 206). This is the case here with respect to the benefit levels provided by the Raytheon Plan.

Fifth, the burden of proof is on the party opposing the change to the *status quo*, even where the *status quo* is dynamic. *Id.* at 4. In *Finley Hospital*, this burden was on the employer to prove that the annual wage increases did not rise to the level of the *status quo* itself. *Id.* at 2. In this case, the burden should lie with the General Counsel to prove that the parties did not intend for the annual changes to the Raytheon Plan to continue, rather than with Raytheon to prove that the Union had waived a right to block all modifications.

Sixth, the preservation of the dynamic *status quo* is necessary to protect the parties’ original bargain:

In the give-and-take of bargaining, a union presumably will make concessions in certain terms and conditions to achieve improvements in others, such as wages. Preserving the *status quo* facilitates bargaining by insuring that the tradeoffs made by the parties in earlier bargaining remain in place. Just as the employer continues to enjoy prior union concessions after the contract expires, as part of the “*status quo*” so too the union continues to enjoy its bargained-for improvements[.]

Id. at 2-3 (footnote omitted).

Seventh, the dynamic *status quo* can be based on a right exercised only during the existence of a collective-bargaining agreement. In *Finley Hospital*, a dynamic *status quo* requiring the post-expiration continuation of wage increases was established based upon conduct occurring during the term of a one-year contract. Thus, actions taken during a contractual hiatus period have nothing to do with the post-contract legitimacy of the practice.

Eighth, waiver analysis properly applies only insofar as a party may have waived the right in a CBA to have the *status quo* continue post-contract. *Id.* at 3-4. Waiver is a tool for contract interpretation; it does not define the statutorily-mandated baseline of the *status quo*—regardless of whether that *status quo* is dynamic or otherwise. *Id.* at 4-5.

Applying these legal principles to the undisputed, stipulated facts requires dismissal of the Complaint. The *status quo* at the Fort Wayne plant was dynamic, resting upon 12 years of annual open enrollment and unilateral changes to the Raytheon Plan. The burden is on the General Counsel to prove that this dynamic *status quo* was intended to cease upon expiration of the CBA. *Finley Hospital, supra* at 4. There is no such language anywhere in the parties' CBA or the Raytheon Plan documents. Indeed, the CBA expressly provides that the benefits will change “from year-to-year”—annually—and that Raytheon “reserves the right to amend or terminate” the Raytheon Plan and “to clarify plan provisions.” (SF Ex. 13, pp. 63, 68) The CBA also provides: “[a]ll benefits of employees . . . are subject in every respect to the terms of the applicable Plan documents . . .” (SF Ex. 13, p. 68), and the Raytheon Plan “reserves the absolute right to amend the

Plan and any or all Benefit Programs incorporated herein” and also “reserves the absolute and unconditional right to terminate the Plan and any and all Benefit Programs, in whole or in part,” (SF Ex. 1, pp. 16-17)

Further, the preservation of the dynamic *status quo* is necessary to protect the parties’ original bargain. *Finley Hospital, supra* at 2-3. In this case, Raytheon and the Union struck a deal under which unit employees received the benefits under the Raytheon Plan, subject to the Raytheon Plan’s terms and conditions, one of which is Raytheon’s reservation of the right to make changes to the Plan. Raytheon never agreed to provide benefits under the Plan uncoupled from a unilateral right to make changes therein. It agreed to provide those benefits conditionally, and those conditions are as much a part of the parties’ agreement concerning benefits as are the benefits themselves. “Fundamental fairness and the Board’s past practice doctrine govern the result here, because the Union cannot have it both ways. The Union cannot take the benefits of the plan while ignoring the provisions it finds distasteful.” *DuPont*, 355 NLRB at 1090-91.

In sum, controlling NLRB precedent and the D.C. Circuit’s decision in *DuPont* underscore that Raytheon’s past practice pursuant to the Raytheon Plan documents and the CBA “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.” *E.I. du Pont*, 682 F.3d at 68-69. The ALJ’s finding that Raytheon’s actions were unlawful should be reversed because it ignores both established law and the facts.

1. *An employer's right to unilateral action under a dynamic status quo need not be narrowly circumscribed.*

The ALJ agreed with the General Counsel that a dynamic *status quo* of unilateral action can exist only where management rights are narrowly circumscribed. But there is nothing to support the contention that the dynamic *status quo* applies only in cases involving mathematical formulae or limited objective criteria. Board case law puts these contentions to rest. In *Courier-Journal*, the past practice involved substantial, discretionary changes to the health insurance program, including: increases in employee premium contributions; new vision and dental plans; termination of a bonus program; and changes in coverages, carriers and the plan year. *Courier-Journal*, 342 NLRB at 1098-1110. The NLRB held that these “far-reaching” modifications did not alter the *status quo*, because they were consistent with past practice. *Id.* at 1054. The employer’s discretion was meaningfully limited by the commitment to provide identical benefits to both unit and non-unit employees. *Id.* But even without this limitation, the past practice privileged the employer’s comprehensive unilateral healthcare changes. *Id.* at 1095.

This is consistent with the mainstream of Board cases. In two opinions in particular, the changes in benefits were every bit as expansive as Raytheon’s in this case. In *Brannan Sand and Gravel*, 314 NLRB at 285-86, “the 1992 [health plan] changes here were hardly minor, as nearly every health plan benefit was affected and employee contributions increased substantially.” *Nabors Alaska Drilling, Inc.*, 341 NLRB at 611, involved “changes to the healthcare program” and increases to

employee co-pay contributions. *See also A-V Corp.*, 209 NLRB 451 (past practice of employer changing insurance cost allocations, coverages and carriers); *Matheson Fast Freight, Inc.*, 297 NLRB 63 (1989) (start times); *Capitol Ford*, 343 NLRB 1058 (bonus programs).

The ALJ and the General Counsel attempt to distinguish these controlling decisions, but their analysis using the authorities they cite is flawed. For instance, *Larry Geweke Ford*, 344 NLRB 628 (2005), and *Hardesty Co.*, 336 NLRB 258 (2001), involved newly-certified unions and first contract situations with no established past practice. Likewise, there was no past practice at all, much less a long-standing one, in *Long Island Head Start Child Devel. Servs.*, 345 NLRB 973, 973 n.5 (2005). Similarly, *Garrett Flexible Products*, 276 NLRB 704, 704 n.1 (1985), was an initial contract situation and “the Respondent did not have an established past practice regarding the payment of premium increases.” *Courier-Journal*, 342 NLRB at 1094-95, expressly determined that *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), which also involved an initial contract, was inapposite.¹⁰ *Mid-Continent Concrete*, 336 NLRB 258 (2001) and *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997), also involved initial contracts, so no past practice existed.

¹⁰ The Second Circuit’s decision enforcing the Board’s order in *Eugene Iovine* also shows the case is inapposite. The Second Circuit stated “[t]he Board has held that a company’s established past practices may constitute a defense . . . because the established practice has in effect become a condition that the company is entitled to continue . . .”, but agreed the evidence did not show there was a past practice:

Given the generality and the conclusory nature of the only evidence presented by Iovine, we see no basis for overturning the Board’s conclusion that the proof was insufficient to establish the defense that the challenged 1996 reduction was merely an instance of Iovine’s prior established practice.

NLRB v. Eugene Iovine, Inc., 2001 WL 10366, at 2, 3 (2d Cir. 2001).

Although *Post-Tribune Co.*, 337 NLRB 1279 (2002), involved a more mathematical computation of cost sharing (and, thus a limitation on the employer's discretion), the Board there also endorsed the employer's discretionary, unilateral change in insurance carriers. Thus,

if an employer has frequently engaged in a pattern of unilateral change under the management-rights clause during the term of the CBA, then such a pattern of unilateral change becomes a 'term and condition of employment,' and that a similar unilateral change after the termination of the CBA is permissible to maintain the *status quo*.

Beverly Health and Rehabilitation Services, 297 F.3d at 481.

Moreover, limiting a dynamic *status quo* analysis only to situations where management discretion is narrowly confined, as opposed to the existing requirement that the changes be within the *status quo* (*i.e.*, similar in scope to earlier changes), suggests an inherently subjective rule. This leaves parties and reviewing courts with no guidelines to follow; without the ability to predict whether a particular practice will be lawful, "we sanction impermissible 'ad hocery' on the part of the Board, which is the core concern underlying the prohibition of arbitrary or capricious agency action." *Pacific Northwest Newspaper Guild v. NLRB*, 877 F.2d 998, 1003 (D.C. Cir. 1989).

Here, the focus should be on the actual changes Raytheon made to the Raytheon Plan over the years. Because the 2013 modifications were within the scope of the parties' past practice, they do not violate the law. Just as the Court of Appeals in *DuPont* recognized in that case, here the Raytheon Plan changes were made only once per year, only at the start of a plan year, only with prior notice, and only if uniformly applied to all participants, union and non-union alike. These

limits are real, and Raytheon always acted in accordance with them, rendering its 2013 actions a lawful continuation of the *status quo*.

2. *The Board should not analyze this case as if it were an initial contract situation, as the situations are markedly different.*

As noted in the previous section, the ALJ and General Counsel rely almost exclusively on Board cases dealing with newly-certified unions in first contract situations. Those cases are, however, factually inapposite and the policies involved are markedly different. First and foremost, in an initial contract situation there can be no longstanding past practice establishing the *status quo* as between a company and a union. In other words, there is nothing in an initial contract situation against which to measure an employer's exercise of discretion and the union's acceptance of the employer's exercise of discretion. Where, on the other hand, the parties have a long bargaining history, including 12 consecutive years of employer changes in health insurance benefits (or other changes), there is a "way in such case for a union to know whether or not there has been a substantial departure from past practice." *Katz*, 369 U.S. at 746.

Moreover, the Board and courts have always zealously guarded initial contract situations because at that stage, a union is most susceptible to being undercut by an employer. *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945) (finding employer circumvention of union on pay increases during initial bargaining unlawful because "[s]uch unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."); *Goya Foods*

of Florida, 347 NLRB 1118, 1122 (2006) (“the Respondent’s unilateral changes involved the bread-and-butter issues of wage increases and promotions for which employees seek and gain union representation. Such changes, particularly where the Union is bargaining for its first contract, can have a lasting effect on employees. As the Board [has] found, ‘[w]here unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear.’”); *Broadway Volkswagen*, 342 NLRB 1244, 1247 (2004) (“Such [unilateral] changes, particularly where the Union is bargaining a first contract, can have a lasting effect on employees.”).

Here, the parties have a longstanding bargaining relationship and their CBA has specifically provided for annual changes in healthcare benefits for at least 12 years. Thus, Raytheon’s action consistent with the CBA and past practice cannot reasonably be perceived as freely circumventing the Union during negotiations. In sum, the distinction the Board and courts have drawn between longstanding bargaining relationships and newly certified unions is not artificial, but real, and the Board should reject the ALJ’s contrary finding.

3. *The ALJ erroneously found Raytheon’s actions unlawful under Courier-Journal.*

The ALJ recommends that the Board overrule *Courier Journal*, claiming it is inconsistent with *Katz* and Board law. (ALJD p. 19, n.6) The ALJ nevertheless concludes that “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. . . .” (ALJ Decision p. 33, lines 27-30) As previously discussed, *Courier-Journal* is consistent both with *Katz*¹¹ and Board law dating back 50 years. Accordingly, the Board should reject the ALJ’s recommendation to overrule *Courier-Journal*. Moreover, given the virtually identical facts of *Courier-Journal* to the instant case, the ALJ’s findings and reasoning conflict with Board law and his decision must be reversed.

The ALJ found that “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 the changes.” (ALJD p. 31, lines 21-25) But Raytheon’s right to change the benefits “at any time” is not relevant, or even related, to the past practice. Raytheon had to maintain the dynamic *status quo*, pursuant to its past practice, when all employees went through the normal October open enrollment period to elect their benefits for the following year. The timing of the changes was definite. The Union understood that these changes were coming when they asked Raytheon in advance about its decision on open enrollment during 2012 bargaining. Had Raytheon attempted to change benefits in July of

¹¹ Moreover, *Katz* was not decided in a vacuum, but in a first contract situation, with a new unit, where the company had attempted to undermine the union. In that case, the company issued unilateral wage increases significantly higher than those offered to the union during negotiations. In *Courier-Journal*, the past practice involved substantial, discretionary changes to the health insurance program in a mature bargaining relationship with 10 years of open enrollment between the parties, unlike in *Katz*, where the parties were new to each other, the wage increases were not part of a long-term practice, and the wage increases were not provided uniformly to all bargaining unit employees.

2012, under the plan language, it had that right, but in terms of defining a past practice, its previous practice of implementing changes to health care was limited to the open enrollment period for the following year. Deviation from that practice would have been the basis of a valid ULP. That is not the case here. (See ALJD, p. 3, lines 42-47)

Not only were Raytheon's changes definite as to timing, but they were, contrary to the ALJ's finding, definite as to criteria. The criteria for change was definite in two ways, first by its linkage of the benefits to non-bargaining unit employees and second, by its implementation of benefits that were similar in scope to those afforded the unit the previous year.

In *Courier-Journal*, the employer's discretion was meaningfully limited by the commitment to provide identical benefits to both unit and non-unit employees. 342 NLRB at 1094. But even without this limitation, the past practice privileged the employer's comprehensive unilateral healthcare changes. *Id.* at 1095. Here, the ALJ simply, and incorrectly, rejected *Courier-Journal's* holding 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 Fort Wayne, Indiana location from year-to-year constitutes a discernible status quo. . . ." (ALJD p. 32, lines 30-35).

The focus should be on the actual changes Raytheon made to the Raytheon Plan over the years. Because the 2013 modifications were within the scope of the parties' past practice, they do not violate the law. Just as the Court of Appeals in *DuPont* recognized in that case, here the Raytheon Plan changes were made only

once per year, only at the start of a plan year, only with prior notice, and only if uniformly applied to all participants, union and non-union alike. These limits are real, and Raytheon always acted in accordance with them, rendering its 2013 actions a lawful continuation of the *status quo*.

The ALJ also found the actual changes to the benefit plans were “ad hoc” in nature. “While premiums increased annually, the divisions of premium percentages changed on an ad hoc basis and neither the bargaining unit employees nor the Union could predict those changes, and since there was no formula or criteria for the changes that they could not be explained by the Union to the bargaining unit.” (ALJD, p. 31, lines 35-40). The ALJ erred in using this “ad hoc” standard. The correct standard, as outlined in *Courier-Journal*, was whether the changes were similar in scope to prior year changes. Moreover, the ALJ ignores that “Your Raytheon Benefits” precisely describes the benefit changes, and was provided to the Union at least two months prior to implementing any change in benefits.

The benefit changes the Board approved in *Courier-Journal* are exactly the kinds of changes the ALJ found to be “ad hoc” here. But the changes historically made by Raytheon were substantially similar to those made in 2013. As the ALJ noted, premiums increased every year between 2001 and 2012 (ALJD p.32, lines 23-25), and premiums increased for 2013. The record also shows Raytheon revised plans, dropped coverages, added new coverages, and had a history of modifying contribution percentages each year—2013 was no different. Thus, there is a “way in such case for [the] Union to know whether or not there has been a substantial departure from past practice.” *Katz*, 369 U.S. at 746. Raytheon’s continuation of the

parties' well-established practice complies with *Katz* and *Courier-Journal*; therefore, the Board should reverse the ALJ's decision and dismiss the Complaint.

4. *McClatchy Newspapers is not relevant to the analysis of Raytheon's past practice.*

The ALJ focuses much of his opinion on *McClatchy Newspapers*, 321 NLRB 1386 (1996), to confuse the issues of past practice and impasse. (See ALJD, p. 28, lines 24-29). Impasse signals to the parties and the union members that a fundamental breakdown in the collective bargaining process has occurred. The Board, as noted in *McClatchy Newspapers*, has found that unilateral implementation of the company's last, best and final offer can jumpstart negotiations. *McClatchy Newspapers* and its progeny stand for the proposition that in an impasse situation, where a company retains total control over the proposed change, implementation of the unfettered change is so inimical to the goals of bargaining that such changes cannot be implemented during impasse. The ALJ cites to dicta in *Courier-Journal* to support this concept.

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 that 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.

Courier-Journal, 342 NLRB at 1095 (citing *McClatchy Newspapers*).

This is not the case here. The parties have continued to bargain since these changes were implemented; in fact, they still are attempting to reach an agreement today. There was no impasse and no need to jumpstart the collective bargaining

process in this case. Raytheon did not unilaterally implement a discretionary change to a material term and condition of employment after giving the Union a take it or leave it ultimatum. Instead, Raytheon did what it has always done. Raytheon provided all employees with the opportunity to select revised health care benefits, in October, as consistently agreed to by the Union during the previous 12 years.

Raytheon modified its health benefits to provide comprehensive health care at the best prices for all its employees and at the same time it had done every year, with changes similar in scope to those passed on to employees in prior years. Nothing in Raytheon's maintenance of the *status quo* was inimical to the bargaining relationship or evidenced a Company decision to bypass bargaining on the issue of health care as the ALJ erroneously found (ALJD p. 36, lines 24-28).

B. Contrary To The ALJ's Determination, the Union Clearly and Unmistakably Waived its Right to Bargain Over the Changes to the Raytheon Plan.

Even utilizing the erroneous waiver analysis (*see* ALJD, p. 27-28, lines 39-7), Raytheon's conduct was proper because the Union abandoned its right to bargain over the Raytheon Plan changes, both expressly and by the parties' conduct.

The ALJ did not address the long held principle that there need not be an express waiver. A waiver may be express or it may be inferred from conduct. *See e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (a unilateral change by an employer may be permissible if the Union has "clearly and unmistakably" waived its statutory right to bargain over the particular subject matter); *Resorts Intl Hotel Casino v. NLRB*, 996 F.2d 1553, 1559 (3d Cir. 1993). *See*

also Kir, Inc., 317 NLRB 1325 (1995) (union’s waiver of its statutory right to bargain over a particular matter can occur by the express language in the collective bargaining agreement, or it may be implied from the parties’ bargaining history, past practice, or a combination of both).

With respect to an express waiver, the CBA provided in Article XXII and Exhibit C that the Raytheon Plan “will be available for all employees, offered on the same basis as is offered to salaried employees at the Fort Wayne, Indiana location from year to year”; “[t]he Company reserves the right to amend or terminate [the Raytheon Plan] and from time to time clarify plan provisions and to maintain compliance with applicable laws and requirements”; and “[a]ll benefits of employees . . . are subject in every respect to the terms of the applicable Plan documents” (SF Ex. 13, pp. 63, 68) Thus, the CBA specifically contemplated annual—“year to year”—changes in benefits.

In addition, the CBA specifically incorporated the Raytheon Plan and Raytheon Benefits Handbook. (*Id.*) And, both the Raytheon Plan and Benefits Handbook contained broad “reservation of rights” clauses. (SF Ex. 1, pp. 16-17; Ex. 3, p. 1) The parties thereby agreed that the benefits were subject to the broad “reservation of rights” clause set forth in the Raytheon Plan documents. Therefore, the Union’s clear and unmistakable waiver was not tied solely to the CBA as the ALJ held, because the Union’s express waiver also arose from the adoption of the plan documents, which survived contract expiration. Similarly, although the ALJ correctly notes the Your Raytheon Benefits guide specifies that “Benefits for employees represented by a bargaining unit will be in accordance with their

collective bargaining agreement” (ALJD p. 37, lines 23-24), he fails to address that the CBA specifically authorizes the annual changes—both the CBA and the Raytheon Plan authorize Raytheon’s actions. The ALJ’s determination is in direct tension with the tenets of *Courier-Journal*, as outlined by the D.C. Circuit in *DuPont*. The Union agreed to a plan that is uniform for all Raytheon domestic employees and changes annually. For either side to get the benefit of its bargain, the Union agreed to a clear and unmistakable waiver.

In addition, Board precedent provides that a waiver may be inferred based on the parties’ conduct. For example, in *Cal. Pac. Med. Ctr.*, 337 NLRB 910, 914 (2002), in dismissing a refusal to bargain charge, the Board held: “. . . as noted above, the past practice of the parties demonstrates that the Respondent has historically exercised, on numerous occasions, the right to lay off without prior bargaining about the decision to do so. A clear and unmistakable waiver may be inferred from past practice.” *Id.* See also *Kir, Inc.*, 317 NLRB at 1328 (“A waiver may also be inferred from extrinsic evidence of contract negotiations and/or past practice”); *Allison Corp.*, 330 NLRB 1363, 1366 (2000) (same).

The same principles apply to employee benefits. In *Mt. Clemens General Hosp.*, 344 NLRB 450 (2005), for nearly 20 years the hospital made annual changes to a pension plan without bargaining. The union first raised a challenge in 2003. The Board dismissed the unfair labor practice charge finding that the past practice amounted to a waiver of the union’s right to bargain over changes:

Moreover, the courts and the Board have held that a waiver also may be inferred from extrinsic evidence of the contract negotiations and/or practice (citations omitted). A waiver can be inferred here from the

undisputed evidence showing that the Union never bargained over any TSA [*i.e.* pension] changes, never requested to bargain over them, and never objected to any of the changes.

The circumstances here present a stronger case for finding no violation because here there is no contractual language which provides for a collectively-bargained TSA plan. Instead, there is a 20 year history of making unilateral changes to the TSA program, which was accepted without opposition by the Union.

Id. at 460.

As has been noted, both the parties' bargaining history, as well as their well-established past practice, demonstrate the Union was unmistakably aware it was giving up the right to bargain over changes to the Raytheon Plan. Every fall for 12 years, Raytheon announced and subsequently implemented its annual changes without objection from the Union. Thus, the parties' past practice confirms that the Union did, in fact, knowingly waive its rights in exchange for the participation of its members in Raytheon Medical. *See also Finley Hospital*, 359 NLRB No. 9, slip op. at 4 (the burden of proof is on the party opposing the change to the *status quo*, even where the *status quo* is, like here, dynamic).

The parties' last bargaining session was on September 26, 2012. Although the Union asked Raytheon not to have the employees go through open enrollment, there is no evidence the Union requested to bargain with Raytheon over the changes that were contemplated to occur in January 2013. Open enrollment did not start until October 12, 2012, and no actual change in benefits occurred until January 1, 2013. There is no evidence the Union even requested Raytheon to bargain over any

changes that would ultimately take effect on January 1, 2013.¹² Accordingly, even under the ALJ's and General Counsel's incorrect approach, Raytheon's actions in 2013 still do not violate Sections 8(a)(1) and (5).

C. The ALJ Incorrectly Determined that Raytheon Violated the Act When it Notified Employees of the Benefit Changes.

Over the course of five months, starting in April 2012, the parties met ten times to negotiate a new CBA. (ALJD, p. 10, lines 10-14). The parties bargained over the continued inclusion of the pass through language during that time. On several occasions, Raytheon officials informed Union negotiators that, without the pass through language, they could not agree to the company healthcare plan, and requested the Union to make counter-proposals for alternative health care for the unit employees. The Union never proposed an alternative health care arrangement.

During the course of negotiations, on September 26, 2012, the Union, knowing from past practice that open enrollment would begin soon, inquired as to whether Raytheon planned on including unit employees in the open enrollment for revised medical benefits. Raytheon informed the Union that it would do so, as required by the *status quo*. By September 26, 2012, the Union had wasted five months and failed to make a single alternative health care proposal. The Union was on notice of the changes to be implemented prior to the direct communication with

¹² Raytheon also notes the ALJ erroneously determined Raytheon changed benefits "without first providing . . . the ability to negotiate about them." (ALJD p. 31, lines 19-21). The undisputed record evidence shows the parties bargained in good faith throughout the Spring and Summer of 2012 regarding potential changes to the existing CBA, including over healthcare benefits, but the parties did not reach a new agreement. There is no evidence that Raytheon failed or refused to bargain with the Union regarding the changes that were implemented effective January 1, 2013.

employees, including Union representatives, through the “Your Raytheon Benefits” publication mailed to each employee. The practice of notifying employees directly of the change in their benefits has been part and parcel of the open enrollment process for 12 years and Raytheon notified the Union of its intentions regarding open enrollment, in advance of notifying the employees pursuant to customary procedures.

Thus, the Union had significant prior notice that Raytheon would implement changes to its benefit plan, as it had every year for the previous 12 years and that those changes would be similar in scope and offered to all the other unit employees. The Union failed to negotiate or put forth specific proposals related to health care, even though it had adequate notice that plan changes would occur during open enrollment.

The ALJ’s finding that Raytheon took the position the Union waived its right to bargain, “in essence in perpetuity,” is factually incorrect. (ALJD p. 36, lines 21-23). Raytheon bargained with the Union over future health care benefits. Its position was then, and remains now, that its offer of health care benefits under the Raytheon Plan was contingent upon agreement to the language in the plan concerning pass through. The Union could have proposed inclusion of the employees on another plan, such as the USW’s own health and welfare fund. It never provided such a proposal, and when maintenance of the *status quo* demanded that the unit employees go through open enrollment, Raytheon implemented that reality. The parties are still bargaining over a successor contract and are free to agree to any new health care arrangement. Raytheon has not asked the Union to agree to

anything in perpetuity, it merely implemented the new year's plan, as required to maintain the *status quo*, while bargaining continued.

D. The ALJ Erroneously Rejected Raytheon's Public Policy Arguments Based on Speculation Inconsistent with the Facts of This Case.

The ALJ dismissed the public policy arguments advanced by Raytheon, and stated:

While large national plans have their place, they may be more advantageous to certain participants than others in that 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. . . .

(ALJD, p. 36, lines 39-48). The ALJ's rationale ignores the facts in this case. The average age of the 35 bargaining unit employees covered by the Raytheon Plan is 59. (See SF Ex. 18, Attachment A) The cost of medical benefits for plan members, if their health care was divorced from the rest of Raytheon's 65,000 employees, is so high the Union has never attempted to negotiate separate rates or an alternative plan for these employees. This reality, rather than the ALJ's speculation, should inform the public policy argument.

As Member Schaumber recognized in *DuPont*:

[D]ismissal of the complaint here is consistent with sound policy, and the realities inherent in the way in which large company-wide health and benefit plans covering both represented and unrepresented employees, such as that at issue here, operate. In the face of continuously skyrocketing healthcare costs, and the questionable financial status of many multiemployer pension and health and welfare plans, parties seeking to provide decent coverage to employees frequently look to company-wide programs as the only economically viable option. Such large-scale plans achieve economies of scale and

thus reduce costs on a per capita basis, making it more feasible for the employer to offer attractive benefits. Employers and employees both benefit — employers by being able to attract and retain skilled employees by virtue of offering a strong benefits package; employees, by virtue of having access to the relatively low-price benefits afforded by the economies of scale involved in such plans.

DuPont, 355 NLRB at 1090.¹³

The record more than supports this reasoning. As is apparent from a review of the year-to-year changes, Raytheon acted within the same confines every year, and both parties benefitted from their bargain. For example, the 2013 benefit changes included a number of benefit enhancements, such as an expansion of a wellness reward and an expanded list of prescription drugs without first meeting deductibles, in addition to enhancements directed at future compliance with the Affordable Care Act, *e.g.*, expanded women’s health services covered at 100% with no deductible and 100% coverage for preventative care generic prescriptions. On the other hand, as Member Schaumber further observed:

Under the majority’s holding, however, employers would be deterred from offering participation in such plans to union-represented employees for companies like du Pont, with multiple contracts covering multiple bargaining units nationwide, will be compelled to freeze in place, unit-by-unit as contracts expire and successor agreements are not immediately concluded, ex-benefit-plan terms at the moment of expiration, creating a checkerboard of plans — despite the fact that the unions expressly agreed to be bound by the plan conditions. Costs will skyrocket, and the company, rather than absorb them and the administrative nightmares of post-hoc reconstruction of plan terms to comply with Board issues and Board orders, will simply stop offering the option to bargaining unit members. That, in turn, will drive up the

¹³ *Cf.*, *O.C.A.W. v. NLRB*, 486 F.2d 1266, 1269 (D.C. Cir. 1973) (stating, in a converse situation: “We are cognizant of the fact that the O.C.A.W. may not want local bargaining because it fears that Shell would respond by dropping the company-wide benefits program and whatever economic advantages the union derives from the uniform plan.”).

costs and diminish the availability of quality health insurance options for employees.

DuPont, 355 NLRB at 1090 (footnotes omitted). These important policies have been acknowledged by the Board itself. *Omaha World-Herald*, 357 NLRB No. 156 at *7 (2011) (noting the important policy goal of an employer “attempting to preserve its authority to make uniform changes in the plans as they applied to both represented and unrepresented employees”).

Indeed, this is the same commonsense policy that undergirds the Affordable Care Act, Public Law 111-148, 124 Stat. 119 (2010):

By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the [individual responsibility] requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to create an effective insurance market[.]

ACA § 1501(a)(2)(H), 42 U.S.C. § 18091(a)(2)(H).¹⁴

¹⁴ The ALJ’s finding and the General Counsel’s argument also conflicts with ERISA policies, because it results in the inconsistent application of a national ERISA plan. In essence, they would create a “New Raytheon Plan,” with different rules for Fort Wayne union workers than for all other Raytheon employees. In *Conkright v. Frommert*, 130 S. Ct. 1640, 1643 (2010), *Kennedy v. Plan Adm’r for Raytheon Sav. & Inv. Plan*, 129 S. Ct. 865 (2009), and *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 122 (2008), the Supreme Court emphasized that a key goal of ERISA is to promote uniformity and predictability in employee benefit plans. Courts have repeatedly emphasized that ERISA is designed to favor simple administration by creating a single set of rules for the employer to follow, which is exactly what Raytheon did here. See *Kennedy*, 129 S. Ct. at 875 (noting ERISA created a straightforward rule of hewing to the directives of plan documents that let employers establish a uniform administrative scheme). The General Counsel and ALJ (or NLRB) cannot simply proclaim that the expiration of the parties’ CBA suddenly “uncouples” the bargaining units from the rules and provisions that govern all Raytheon Plan participants (including the reservation of rights language).

Nor is the Union left helpless in the face of Raytheon's rights under the Raytheon Plan. The Union is and always was free to negotiate limitations on managerial authority. *E.g., Courier-Journal*, 342 NLRB at 1095. ("The union, in bargaining, can seek to take away [employer] discretion and seek definite terms.") Union negotiators are sophisticated, *Martinsville Nylon Employees Council v. NLRB*, 969 F.2d 1263, 1267 (D.C. Cir. 1992), and if unsatisfied with the course of negotiations, have statutory and economic weapons, such as strikes, picketing, handbilling, and corporate campaigns, to achieve their bargaining goals.

VII. CONCLUSION

For all of the foregoing reasons, the Board should reverse the ALJ and dismiss the Complaint against Respondent in its entirety.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: s/ Kenneth B. Siepman

Kenneth B. Siepman, Attorney No. 15561-49

Matthew J. Kelley, Attorney No. 27902-53

111 Monument Circle, Suite 4600

Indianapolis, Indiana 46204

Telephone: (317) 916-1300

Facsimile: (317) 916-9076

kenneth.siepman@ogletreedeakins.com

matthew.kelley@ogletreedeakins.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Respondent Raytheon Network Centric System's Brief in Support of Exceptions to ALJ's Decision* has been served by electronic mail, this 17th day of December, 2013, upon:

Anthony Alfano
United Steelworkers AFL-CIO
Organizing Counsel
1301 Texas Street, Room 200
Gary, Indiana 46402-2017

Fredric D. Roberson
Counsel for the General Counsel
National Labor Relations Board
Region 25
575 N. Pennsylvania Street
Indianapolis, IN 46204

Robert Hicks
MACEY LAW
445 N. Pennsylvania Street, Suite 401
Indianapolis, Indiana 46204

Daniel Kovalik
United Steelworkers, AFL-CIO
Five Gateway Center, Room 807
Pittsburgh, Pennsylvania 15222

s/ Kenneth B. Siepman