

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RAYTHEON COMPANY

and

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

Case 25-CA-092145

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Comes now Counsel for the General Counsel and respectfully submits this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's decision in the above-captioned matter. The Counsel for the General Counsel requests that Respondent's exceptions be denied and the Administrative Law Judge's November 19, 2013 decision in this case be affirmed. In support of this position, the Counsel for the General Counsel offers the following:

I. STATEMENT OF THE CASE

Pursuant to an unfair labor practice charge filed by the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers International Union, AFL-CIO-CLC (hereinafter "the Union"), a Complaint was issued by the Regional Director of Region 25 alleging the Raytheon Company (hereinafter "Respondent") engaged in conduct in violation of Section 8(a)(1), and (5) of the National Labor Relations Act (hereinafter "the Act").

Administrative Law Judge Eric M. Fine conducted a telephonic hearing on May 2, 2013.

General Counsel and Respondent submitted all evidence, including stipulations, during the telephonic hearing.

On November 19, 2013, Judge Fine issued his decision in the case, properly finding Respondent violated Sections 8(a)(1) and (5) of the Act by announcing changes to bargaining unit employees' health insurance and implementing those changes without affording the Union an opportunity to bargain with Respondent about those changes.

Respondent excepts to Judge Fine's finding that it engaged in any unlawful conduct. The Counsel for the General Counsel urges the Board to deny Respondent's exceptions and affirm the Judge's factual findings and conclusions of law.

## II. BACKGROUND

### A. Parties' Collective-Bargaining History and Agreements

Respondent is a corporation with an office and place of business in Fort Wayne, Indiana, where it is engaged in the design, manufacture, testing, integration, and installation of electronic systems, radars, missile systems, and other goods and services for the United States Government and other customers. (GC 1(c))<sup>1</sup> Respondent and the Union, including their predecessors, have been parties to various collective-bargaining agreements throughout its 30-year bargaining relationship. (JT 1) The parties' most recent collective-bargaining agreement went into effect on May 3, 2009 and expired on April 29, 2012. Pursuant to these collective-bargaining agreements, Respondent has recognized the Union as the exclusive collective-bargaining representative for the production and maintenance employees at Respondent's Fort Wayne facility.

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<sup>1</sup> Citations to the Judge Fine's decision and relevant exhibits of the underlying case will be as follows:  
Administrative Law Judge Decision . . . . . ALJD  
General Counsel's Exhibit . . . . . GC ( followed by exhibit #)  
Stipulated Facts. . . . . JT 1, ¶ (followed by paragraph #)  
Exhibits attached to JT 1, A. . . . . JT 1, A (followed by attachment # and page #)

In January 1999, Respondent implemented its Raytheon Unified Benefits Program (hereinafter “the Raytheon Plan”), a cafeteria style benefits program offering a variety of coverage, insurance, and investment plans to its salaried and non-union hourly employees. (JT 1; ¶5, 6, 11) Respondent’s union-represented employees, such as the bargaining unit represented by the Union, received their health coverage under separate plans contained in their collective-bargaining agreements.

Starting in January 2001, which was the first calendar year of a 5-year collective-bargaining agreement, the bargaining unit employees represented by the Union started receiving coverage under the Raytheon Plan with all of Respondent’s employees in the United States. (JT 1, A2; JT 1, ¶9) The health benefits provision in this agreement sets forth the terms and conditions of the benefit plan. Sections of the agreement states bargaining unit employee contributions will not exceed the rates paid by non-union salaried employees at Respondent’s Fort Wayne facility. (JT 1, A2) The agreement also contains a general provision that reads, in part, “[t]he 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 the applicable laws and requirements.” (JT 1, A2) This provision of health insurance under the Raytheon Plan has been included in subsequent collective-bargaining agreements, and each agreement contains language granting Respondent the right amend the plan.

In the fall of each year between 2000 and 2012, Respondent mailed out a benefits newsletter to participating employees that outlined their available medical and benefit options. This benefit newsletter also announced to employees the upcoming modifications to their benefit programs, premiums, deductibles, and copayments under the Raytheon Plan.<sup>2</sup> These annual announcements, which were made in various benefit newsletters, and the annual modifications to

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<sup>2</sup> See JT 1, ¶15, ¶18, ¶21, ¶24, ¶29, ¶32, ¶34, ¶33, ¶38, ¶43, ¶46, ¶49,

employees' medical options, benefit programs, premiums, deductibles, and copayments were authorized by the various collective-bargaining agreements. (JT 1)<sup>3</sup> In the January following these announcements, Respondent implemented the modifications.

The Union did not object to the changes made between 2000 and 2012 because Respondent was acting pursuant the negotiated collective-bargaining agreements. During this time period, Respondent exercised significant discretion in modifying and/or terminating aspects of the Raytheon plan. (JT 1, ¶13) On a yearly basis, from 2000 to 2012, Respondent introduced additional coverage options, new benefit programs, and expanded beneficiary coverage.<sup>4</sup> Respondent also increased employees' premiums, deductibles, and a number of copayments.

#### B. Union Proposes to Strike Yearly Modifications To Benefits

The 2009 -2012 collective-bargaining agreement expired on April 29, 2012. Respondent and the Union met on April 24, 2012 to begin negotiations for an agreement for a successor agreement. On this first day of negotiations, the Union submitted proposed changes to provisions that granted Respondent the right to make annual changes to bargaining unit employees' health insurance. (JT 1, ¶54; JT 1, A19)<sup>5</sup> Specifically, the Union proposed language stating each benefit under the various sections should be provided “. . . on the same basis as is offered to non-represented employees at the [Ft. Wayne, Indiana] **and shall not be changed during the life of the agreement.**” (JT 1, ¶54; JT 1, A19)(emphasis in original). It also proposed to eliminate the “reservation of rights” language. (JT 1, ¶54; JT 1, A19) The Union's proposed language reads:

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<sup>3</sup> Specifically, JT paragraphs 14, 17, 20, 23, 28, 31, 34, 37, 42, 45, and 48.

<sup>4</sup> See JT 1, ¶15, ¶18, ¶21, ¶24, ¶29, ¶32, ¶34, ¶33, ¶38, ¶43, ¶46, and ¶49.

<sup>5</sup> The official record identifies Exhibit 19 as the documents related to this evidence; not Exhibit 20 as noted in the Stipulated Facts.

the Company ~~shall reserves the right to amend or terminate said Group Benefit Plans and from time to time clarify plan provisions and to~~ maintain compliance with applicable laws and requirements. (emphasis and strike through in the original)

The following day, on April 25, 2012, Respondent advised the Union the “pass through” language had been in place for at least the previous three contracts,<sup>6</sup> and 19 bargaining units across the country were on the same benefit plan with the same year-to-year pass through language. (JT 1, ¶55) The Union informed Respondent it was no longer willing to waive its right to bargain over a mandatory subject of bargaining such as health benefits. Respondent rejected the Union’s proposals to modify the existing language and requested the Union submit alternative proposals. (JT 1, ¶55) The Union then proposed, instead of the current “year-to-year” language, that the provisions states the benefits could only be changed by mutual agreement. (JT 1, ¶56; JT 1, A20)<sup>7</sup>

A day later, Respondent presented a counter-proposal to the Union’s proposal to strike the “year-to-year” ability of Respondent to modify benefits. (JT 1, ¶57) Respondent’s proposal included language in each of the relevant provisions that “[i]n 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 the implementation.” (JT 1, ¶57; JT 1, A21)<sup>8</sup> The Union rejected Respondent’s proposal. (JT 1, ¶57)

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<sup>6</sup> Neither the “pass through” language nor the “year-to-year” language, in relation to the Union’s proposed changes in JT 1, A19, were in Article X, Sections 5 and 6 (Funeral Leave and Jury Duty Leave), Article XVI (Paid Time Off), Article XXII (Group Benefit Program), Sections 3, 6, 7, and 11 of the 2000 agreement.

<sup>7</sup> The official record identifies Exhibit 20 as the documents related to this evidence; not Exhibit 21 as noted in the Stipulated Facts.

<sup>8</sup> The official record identifies Exhibit 21 as the documents related to this evidence; not Exhibit 22 as noted in the Stipulated Facts.

On April 28, 2012, Respondent presented the Union with its purported last, best, and final offer. (JT 1, ¶59) According to the Union, the two biggest issues for its membership were the proposed changes to the PTO policy and in continuing to agree to the pass-through language. (JT 1, ¶59) The parties continued to discuss the PTO policy, wages, and the pass-through language, but with no resolution. The collective-bargaining agreement expired the following day on April 29, 2012.

The parties met again on May 17, 2012, to discuss outstanding bargaining issues. (JT 1, ¶60) Union Subdirector Mike O'Brien suggested several solutions to the pass-through language issue, including proposing bargaining unit employees seek coverage through the Union's health and welfare fund. (JT 1, ¶60) However, no formal proposals were exchanged. Nonetheless, the parties continued bargaining over wages, the union security clause, and proposed changes to the PTO policy. (JT 1, ¶60)

After making no progress on June 7, 2012, the parties requested the intervention of an FMCS mediator for their next bargaining sessions, which were scheduled for July 25 and 26. (JT 1, ¶61-62) The mediator identified four outstanding issues. The pass-through language, Right-to-Work law issues, the attendance policy/PTO language, and wages. During the second day of meeting with the mediator, Respondent presented the Union with another offer. (JT 1, ¶62) The bargaining unit employees did not vote on Respondent's offer. (JT 1, ¶62)

On September 26, 2012, during the parties' final meeting, Respondent and the Union continued to bargain over wages, the timing of implementation of wage increases, and the pass-through language. (JT 1, ¶63) The parties were close to reaching an agreement on holidays, the attendance policy, and the right-to-work language.

Respondent maintained its position on the pass-through language but said it would entertain any options the Union wanted to put on the table. (JT 1, ¶63) The Union repeated its position that it would not waive its right to bargain over a mandatory subject of bargaining. While Respondent believed the parties were at impasse, the Union did not believe this to be the case. (JT 1, ¶63) Both Respondent and the Union agree they did not reach impasse. (JT 1, ¶64)

### C. Announcement and Implementation of Changes To Benefits

During the parties' final meeting on September 26, the Union asked Respondent if bargaining unit employees would be asked to participate in the upcoming open enrollment period for the Raytheon Plan. (JT 1, ¶65) Respondent advised the open enrollment period for the 2013 benefits period was about to commence and it would proceed as planned for all Respondent employees, including the Fort Wayne bargaining unit employees. The Union requested that Respondent exclude the Fort Wayne bargaining unit employees from the upcoming enrollment period. (JT 1, ¶65) Respondent refused to do so. (JT 1, ¶67-68)

Respondent modified employees 2013 benefits and subsequently mailed out its benefit newsletter announcing the October 12 through October 31 open enrollment period and the changes to employees' benefits. (JT 1, ¶66; JT 1, A22)<sup>9</sup> In addition to the benefit newsletter, employees were provided electronic access to materials outlining available benefits. (JT 1, ¶66)

On January 1, 2013, Respondent implemented the changes to employees' benefits under the Raytheon Plan. (JT 1, ¶67; JT 1, A22) The modifications to employees' benefits included the expansion of the plan's Wellness Reward and the addition of a second health savings account. Respondent also increased deductibles and premiums. (JT 1, ¶67; JT 1, A22) The out-

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<sup>9</sup> The official record identifies Exhibit 22 as the documents related to this evidence; not Exhibit 23 as noted in the Stipulated Facts.

of-pocket costs for the purchase of prescription drugs increased when a generic equivalent is available, and the in-network deductible increased under the Gold plan. (JT 1, ¶67; JT 1, A22) Respondent announced and implemented these changes to bargaining unit employees' health benefits after the expiration of the 2009 collective-bargaining agreement and after the Union requested that Respondent exclude bargaining unit employees from its annual changes while the parties were negotiating for a successor agreement.

### III. ANALYSIS OF RESPONDENT'S EXCEPTIONS

The stipulated record overwhelmingly supports the Judge Fine's finding that Respondent announced changes to bargaining unit employees' health insurance, and on January 1, 2013, implemented those changes without affording the Union an opportunity to bargain with Respondent over those changes, and without bargaining in good faith in violation of Section 8(a)(1) and (5) of the Act. Judge Fine properly rejected Respondent's argument that its contractual right privileged it to make changes during hiatus periods between collective-bargaining agreements. Further, Judge Fine's analysis of core labor principles found in Board precedent properly notes the irreconcilable principles in *Courier-Journal*, 342 NLRB 1093 (2004) and *Capitol Ford*, 343 NLRB 1058 (2004). Accordingly, the Board should reject Respondent's exceptions and affirm the ruling of the Administrative Law Judge.

#### A. Post-Contract Exercise of Discretion Under Management-Rights Provision as a Past Practice is Irreconcilable with *Katz*

Respondent, in its brief supporting its exceptions, asserts that Judge Fine erred in finding it failed to establish a past practice under *NLRB v. Katz*, 369 U.S. 736 (1962) and *Courier-Journal*. To the contrary, Judge Fine's properly relied upon the principles set forth in *Katz* in finding Respondent failed to establish its contractual right to change bargaining unit employees'

health insurance amounted to a past practice that privileged it to continue to make changes during a hiatus period. Respondent's exceptions also asserts Judge Fine's analysis and ultimate conclusion that it unlawfully implemented its unilateral changes to bargaining unit employees' health insurance is based on a misinterpretation of *Courier-Journal* and *Capitol Ford*.<sup>10</sup>

Contrary to Respondent's exceptions, Judge Fine applied longstanding labor principles in reaching the conclusion that Respondent violated Section 8(a)(5) when it unilaterally changed employee's health insurance during a hiatus period. More so, the Judge's analysis and recommendation that the Board reconsider *Courier-Journal*, due to its basic inconsistency, are proper in view of the principles outlined by the Supreme Court in *Katz*. To the extent *Courier-Journal* and *Capital Ford* allow the exercise of discretion under management-rights provisions as a past practice, the cases are irreconcilable with *Katz*, and, as the Judge Fine recommends, must be reconsidered.

In *Courier-Journal*, the Board concluded the employer's health insurance changes were lawful because it regularly made changes in costs and benefits, pursuant to a management-rights clause, for 10 years under successive contracts and during hiatus periods without objection from the union. The contracts granted management the right to amend or terminate benefits as long as the changes were made on the same basis as non-represented employees. *Id.* at 1093. The Board concluded that even if the employer's discretion was "not limited," the purported "past practice privileged its post-collective-bargaining agreement actions. *Id.* at 1094.

The Board solidified this view in cases subsequent to *Courier-Journal*. In *Capitol Ford*, the Board found that an employer's discretionary use of bonus programs was part of the status quo where its predecessor had a practice, pursuant to an expired collective-bargaining agreement, of "act[ing] on bonuses at its discretion." *Id.* at 1058. Although it did not affect the outcome of

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<sup>10</sup> Exceptions 2, 4, 5, and 8.

the case in *Beverly Health and Rehabilitation Services*, 335 NLRB 634 (2001), the Board articulated the same principle it did in *Capitol Ford* and found the employer's unilateral actions unlawful. However, a majority noted the post-contract changes would have been privileged if they were "consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract." *Id.* at n. 5.

In line with Judge Fine's analysis and recommendation, the General Counsel urges that *Courier-Journal* and *Capitol Ford* be overruled because these decisions are irreconcilable with the meaning of past practice under *Katz*, they depart from longstanding Board law, and create unnecessary tension with settled waiver principles. In addition, they undermine the collective-bargaining process by allowing an employer to circumvent the union concerning discretionary changes while the parties are at the bargaining table, thereby giving employees the impression their bargaining agent is ineffectual.

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

*Courier-Journal* and *Capitol Ford* should be overruled because their view of past practice is fundamentally irreconcilable with *Katz*, which plainly holds that a union may insist on bargaining whenever an employer seeks to implement a change that is "in no sense automatic" but rather is "informed by a large measure of discretion." *Katz*, 369 U.S. at 746. In those situations, a union is entitled to negotiate over the "procedures and criteria" for such contemplated changes. *Id.* at 746-747. In essence, *Katz* teaches that changes informed by discretion are not the type of practice that can be unilaterally implemented. Instead, they must be bargained over so as to cabin management's discretion.

Judge Fine's reliance on *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1265 (1997), *enfd.* 176 F.3d 1310 (11<sup>th</sup> Cir. 1999) and *Garrett Flexible Products*, 276 NLRB 704, 704 fn 1, (1985)

is appropriate, as these cases adopt *Katz*'s prohibition on the unilateral exercise of discretion concerning unilateral changes to employees' health benefits. Judge Fine also properly relied on *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999), *enfd.* 1 Fed Appx. 8 (2<sup>nd</sup> Cir. 2001), and *Adair Standish Corp.*, 292 NLRB 890 fn 1 (1989), which also recognized the *Katz* prohibition on the unilateral exercise of discretion has been applied in a broad range of circumstances.

Not only has the prohibition on unilateral changes been applied to first-contract bargaining situations, it has also been applied when an employer and union are bargaining for a successor contract. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). The bargaining duties are the same in each situation. Thus, an employer has an equivalent duty to refrain from changing the status quo in each circumstance. *Id.* at 198, 206-207. There is no reason to distinguish between the level of discretion an employer should be allowed to unilaterally wield after a union's arrival versus after the expiration of the collective-bargaining agreement. Because *Courier-Journal* and *Capitol Ford* allow employers to continue making discretionary adjustments to terms and conditions of employment after a management-rights clause expires and without any bargaining, they are contrary to *Katz* and must be overruled.<sup>11</sup>

This conflict is essentially acknowledged in *E.I. DuPont de Nemours, Louisville Works*, 355 NLRB No. 176 (2010). The Board noted *Courier-Journal* is "in tension" with the principle that an employer is prohibited from adjusting terms and conditions of employment "if they amount to the exercise of unbounded managerial discretion" during first contract bargaining. *Id.* at fn 5 (citing *Eugene Iovine*). In *Eugene Iovine*, the Board found the employer's unilateral reduction in hours of work, a decision that "admittedly involved management discretion," was an

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<sup>11</sup> Although *Katz* allows the Board the latitude to carve out situations where a unilateral change might be excused, *Courier-Journal* and *Capitol Ford* do not purport to create such a carve-out. *Katz*, 369 U.S. at 747-48. Rather, they simply alter the meaning of past practice as envisioned by *Katz*.

unlawful unilateral change. 328 NLRB at 94. Citing *Katz*, along with other cases, the Board noted that it “and the courts have consistently held that such discretionary acts are . . . ‘precisely the type of action over which an employer must bargain with a newly-certified [u]nion.’” *Id.* Because the Board originally distinguished *Courier-Journal* in its *E.I. DuPont de Nemours, Louisville* decision, it did not find it necessary to reconsider *Courier-Journal*’s holdings at that time. It is clear that *Eugene Iovine* properly interprets *Katz*, and that *Courier-Journal* and *Capitol Ford* are inconsistent with *Eugene Iovine* and are contrary to Supreme Court law and therefore cannot stand.

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

Contrary to Respondent’s exceptions and assertions that its conduct was based on an established past practice, Judge Fine properly recognized that allowing the mere exercise of discretion to constitute a past practice allowing employers to continue exercising their discretion as part of the status quo after a collective-bargaining agreement expires, which is the effect of *Courier-Journal* and *Capitol Ford*, is inconsistent with longstanding precedent. Once the Board decided, in *Holiday Inn of Victorville*, 284 NLRB 916, 917 (1987), that a management-rights clause does not outlive the expiration of the contract, it routinely determined that subsequent changes that might have been authorized by the expired waiver were unlawful until *Courier-Journal*.<sup>12</sup> The Board, in many cases, determined the post-collective-bargaining agreement action was unlawful simply because the management-rights clause had expired. There was no consideration of whether the employer had exercised that right and thereby created a “practice.” See *Kentucky Fried Chicken*, 341 NLRB 69, 70, 84 (2004), *Paul Mueller Company.*, 332 NLRB

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<sup>12</sup> The one exception may be *EIS Brake Parts*, 331 NLRB No. 195, slip op. at 3-4 (Aug. 2000), where the Board sanctioned the combination of jobs because such changes were contemplated by the expired contract’s provision for altering production methods and consistent with its prior practice. This case, however, has not been relied on by the Board since.

312, 313, fn 4 (2000)(with Member Hurtgen noting the changes were not consistent with past practice), *Ryder/Ate, Inc.*, 331 NLRB 889, n. 1, 893 (2000), *enforced per curiam sub nom, First Transit, Inc. v. NLRB*, 22 Fed. Appx. 3 (D.C. Cir. 2001), *Ironton Publications, Inc.*, 321 NLRB 1048 (1996), *Furniture Renters of America, Inc.*, 311 NLRB 749, 751, n. 14 (1993), *enforcement denied on other grounds*, 36 F.3d 1240 (3<sup>rd</sup> Cir. 1994), *Kendall College of Art & Design*, 288 NLRB 1205, 1212 (1988). Even where the Board considered arguments that a post-collective-bargaining agreement action was consistent with past practice, it nonetheless found that the changes were not privileged. See *University of Pittsburg Medical Center*, 325 NLRB 443, 443, n.2 (1998), *enforced mem.*, 182 F.3d 904 (3<sup>rd</sup> Cir. 1999)(past practice does not entitle employer to continue practice “as much . . . as it chooses”), *Blue Circle Cement Co.*, 319 NLRB 954 (1995), *enforced in part on other grounds mem.*, 106 F.3d 413 (10th Cir. 1997)(no “consistently applied seasonal fluctuation” to justify schedule changes). Thus, the pre-*Courier-Journal* cases did not support the broad proposition that the mere exercise of discretion during the life of the collective-bargaining agreement constitutes a past practice that would thereafter authorize discretionary changes after expiration of the agreement.

Indeed, the Board explicitly declined to adopt such an expansive view of past practice in decisions issued shortly before *Courier-Journal*. In a 2001 *Beverly Health & Rehabilitation Services* decision, the Board majority rejected the dissent’s suggestion that the “practice of taking unilateral action” under a management-rights clause and the “discretion exercised by the [employer] . . . was as much a part of the status quo as were the employees’ wages and benefits.” *Id.* at 636-637, 646. The majority noted the status quo “after contract expiration cannot include the right to make unilateral changes since such changes cannot be made in the absence of a waiver.” *Id.* at 637 n.7. And the majority explained that under the dissent’s view, “such a fluid

status quo would vitiate an employer's bargaining obligation whenever a collective-bargaining agreement containing a broad management-rights clause expired. In that event, the expiration of the management-rights clause would be meaningless wherever the employer had taken advantage of the waiver to make changes." *Id.* at 37. Likewise, in *Register-Guard Publishing Co.*, 339 NLRB 355, 356 (2005), the Board explicitly rejected the employer's contention that the prior institution of sales incentive programs pursuant to a contractual reservation of managerial discretion created a past practice privileging the creation of new bonuses during a contract hiatus. Thus, prior to *Courier-Journal*, the Board squarely rejected the proposition that the exercise of discretion under a management-rights clause constituted a past practice that would justify discretionary changes after the expiration of a collective-bargaining agreement. This view is consistent with established Board principles and intervening cases contradicting this view should be disregarded.

In the present case, as detailed in the stipulated record and pointed out by Judge Fine, Respondent's changes to bargaining unit employees' health insurance plan since 2001 have been completely random. (ALJD 31) The stipulated record states Respondent retained and exercised significant discretion to amend and/or terminate aspects of the Raytheon Plan. (ALJD 3) Since 2001, as detailed in the stipulated record, and pursuant to and during the terms of the collective-bargaining agreements, Respondent modified bargaining unit employees' coverage options, eliminated coverage options, increased premiums, increased copayments for specialist visits, increased copayments for outpatient surgery, expanded plan options, introduced a high deductible plan with a health savings account, and host of other changes. As Judge Fine notes, the Board, in cases with very similar facts, have found this exercise of managerial discretion

during the term of a collective-bargaining agreement does not justify discretionary changes after the expiration of the agreement.

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

The Board, in *E.I. DuPont de Nemours, Louisville*, notes the holding in *Courier-Journal's* is also in tension with settled waiver principles. 355 NLRB No. 176, slip op. at 2 n.5. Ordinarily, a union's relinquishment of its statutory right to bargain must be "clear and unmistakable" for an employer to take unilateral action pursuant to a waiver. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708-09 (1983); *Provena St. Joseph Med. Ctr.*, 350 NLRB at 810-811. Thus, a union's silence or acquiescence in the face of previous unilateral changes does not normally constitute a waiver. *See, e.g., Verizon N.Y., Inc.*, 360 F.3d 206, 209 (D.C. Cir. 2004), *Owens-Corning Fiberglass Corp.*, 282 NLRB 609, 609 (1987). And, as previously discussed, it is well-settled that a union's waiver, as expressed in a management-right clause, normally expires along with the rest of the agreement. *Holiday Inn of Victorville*, *supra*. Extrapolating from these principles, one would expect that an employer could only take unilateral action during a hiatus period if the union clearly surrenders its bargaining right. Yet the view of past practice espoused in *Courier-Journal* and *Capitol Ford* effectively allows an employer to make unilateral changes in the absence of a continuing waiver.

Although *Courier-Journal* and *Capitol Ford* purport to apply past practice, not waiver principles, in actuality these decisions so distort the concept of past practice that they undermine well-settled waiver principles. Past practice and waiver principles should work in a complementary manner. Automatic changes that merely continue the status quo should be permissible without a union's waiver. But practices that are discretionary, in whole or in part, should only be implemented if there is a meaningful opportunity to bargain as to the

discretionary elements, or if the union has waived its right to bargain. *Courier-Journal* and *Capitol Ford* upset this doctrinal relationship by essentially allowing an employer to make discretionary changes after the expiration of a management-rights clause without bargaining, regardless of whether a union has waived its statutory rights. Because these cases create unnecessary tension with these settled waiver principles and distort the view of past practice, reliance on these cases must be revisited.

B. Respondent Must Prove Discretionary Practice Is Certain as to Time and Criteria

1. *Practice must be reasonably certain and predictable.*

When an employer alters wage rates, benefit levels, working hours or other terms of employment in the midst of bargaining with a newly-certified representative, the Board scrutinizes whether the purported past practice justifying that change is reasonably certain as to time and criteria. *Eugene Iovine*, 328 NLRB at 294. See *Mission Foods*, 350 NLRB 336, 337 (2007). When an employer defends its actions based on past practice, it bears the burden of demonstrating that such a practice existed. *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. at 3 (Aug. 17, 2010); *Eugene Iovine*, 328 NLRB at 294 n.2. To the extent that a change is consistent with a reasonably certain practice but involves some discretion, such as the amount of a wage increase, a bargaining duty still attaches as to that discretionary component. *Mission Foods*, 350 NLRB at 337; *Oneita Knitting Mills, Inc.*, 205 NLRB 500, 500 n.1 (1973). These standards properly ensure that any modifications are reasonably predictable to employees and that the bargaining representative is not circumvented as to any discretionary elements of a change.

The same standard should be applied in the context of an asserted past practice arising under a management-rights clause. Under the proposed approach, which is noted in Judge Fine's decision, an employer may not make unilateral adjustments after a contract expires unless it

followed fixed criteria when it made regular changes, by virtue of a management-rights clause, during the life of the contract and the new adjustment is consistent with that practice. To the extent that post-contract adjustments involve discretion, such as with regard to the amount of a wage or benefit change, the employer must bargain with the union over those discretionary elements.<sup>13</sup> This approach is consistent with prior Board cases, which did not reject out-of-hand the possibility that a past practice could arise under a management-rights clause. *See Register-Guard*, 339 NLRB at 355-56; *Blue Circle Cement Co.*, 319 NLRB at 954; *Univ. of Pittsburgh Med. Ctr.*, 325 NLRB at 443, n. 2. Just as in the context of a new bargaining relationship, this approach recognizes that some practices designed solely by an employer represent the status quo and may continue to be implemented in limited circumstances.<sup>14</sup>

The proposed framework for regulating post-contract unilateral changes is advisable for several reasons. First, by harmonizing the rules governing the past practice defense in the post-contract context with those that apply during first-contract negotiations, it streamlines the legal standard and removes artificial distinctions. Second, it alleviates the Board's concern that recognizing a past practice arising under a management-rights clause might render the expiration

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<sup>13</sup> As a practical matter, an employer may satisfy its bargaining obligation without waiting until impasse on an agreement as a whole when a change concerns a discrete event that happens to occur while negotiations are in progress. *See Stone Container Corp.*, 313 NLRB 336, 336 (1993) (an employer need not bargain to overall impasse over issues that "could not await an impasse in overall negotiations" where a proposal concerns a "discrete event" that "simply happens to occur while contract negotiations are in progress"). However, it still must timely notify the union and provide a meaningful opportunity to bargain over that matter. *Id.* at 336-37.

<sup>14</sup> This approach differs from the one taken in *Shell Oil Co.*, 149 NLRB 283, 288 (1964). In that case, the Board found that the employer was authorized to subcontract certain work during a hiatus period because that action did not "materially var[y] in kind or degree from what had been customary in the past." *Id.* *Shell Oil* is best understood as a subcontracting case, in the vein of *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965). Thus, its "kind or degree" standard should be confined to that narrow factual circumstance. This clarification is important because, although the Board has already overruled *Shell Oil* with respect to the survival of the management-rights clause, *Beverly Health & Rehab. Svcs., Inc.*, 335 NLRB 635, 636 n.6, (2001), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003), the case still has continuing vitality on the past practice issue in a few Board cases and in the courts of appeals. *See, e.g., Winn-Dixie Stores, Inc.*, 224 NLRB 1418, 1434 (1976), *enforced in part*, 567 F.2d 1343 (5th Cir. 1978) (authorizing shift changes that did not vary "in degree or kind from those historically made" under a management-rights clause); *Beverly Health & Rehab. Svcs., Inc. v. NLRB*, 297 F.3d 468, 480-81 (6th Cir. 2002).

of that clause meaningless. *E.I. DuPont*, 355 NLRB No. 176, slip op. at 2. Under the proposed approach, the expiration of the management-rights clause would mean the revocation of management's authority to act according to its discretion, which represents a significant shift in managerial prerogative when a contract expires. Third, this model would promote bargaining because unions will be more willing to grant management some discretion during the contract's term, knowing that the discretion would be limited to that period and any post-contract adjustments would consequently be predictable or could be bargained over. *Id.* Finally, by allowing changes that are consistent with employee expectations and prohibiting changes that are discretionary, the proposed framework promotes the objectives of the Act by ensuring that employers are not perceived as freely circumventing the bargaining representative during negotiations. *See May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945).

2. *Finley Hospital demonstrates a reasonably certain time and criteria.*

Respondent, in support of its exceptions, cites *Finley Hospital*, 345 NLRB No. 9 (2012) to support its argument that its contractual right to change bargaining unit employees' health insurance was an established past practice that could lawfully continue during a hiatus between collective-bargaining agreements. Respondent's reliance on *Finley Hospital* is misplaced, as the facts of the case clearly demonstrate the adjustments made by the hospital were certain as to time and criteria.

In *Finley Hospital*, the Board found the hospital unlawfully discontinued a wage increase after the collective-bargaining agreement expired. The parties' collective-bargaining agreement states, in relevant part:

For the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date. Such pay increases for Nurses not on probation, during the term of this Agreement[,] will be three (3) percent. If a Nurse's base rate is at the top of the range for his/her position, and the Nurse is not on

probation, such Nurse will receive a lump sum payment of three (3) percent of his/her current base rate. . .

Upon expiration of the collective-bargaining agreement, the hospital discontinued the wage increase for nurses whose anniversary date fell after the expiration of the agreement. The Board, in agreement with the judge, found the hospital violated the Act by unilaterally discontinuing the wage increase.

Respondent's reliance on *Finley Hospital* is misplaced for two obvious reasons, as the facts of the case and the Board's conclusion bolster Judge Fine's analysis of *Katz*. First, the wage increase involves no discretion on the part of the hospital. The agreement allows for all nurses (not on probation) to receive an increase. The contractual language eliminates the use of discretionary criteria to determine which nurses receive a wage increase or the discretionary setting of a standard for being awarded the wage increase. Second, and more significantly, the wage increase is certain as to time and criteria. The agreement calls for hospital to adjust a nurse's pay on *anniversary dates* and the adjustment of the nurse's pay is to be *three percent*.

In light of the finding that the hospital unlawfully discontinued the wage increase, the Board's decision cannot be separated from the facts of the case, and the facts unequivocally demonstrate that granting the wage increase, after the expiration of the parties' agreement, remained reasonably predictable to the nurses. Also, their bargaining representative is not circumvented as to any discretionary elements. The Board's decision in *Finley Hospital* is not inconsistent with the *Katz* prohibition against the exercise of unilateral exercise of discretion after the expiration of a collective-bargaining agreement. Accordingly, Judge Fine correctly recognized the discrete and clearly defined elements of the wage increase in *Finley Hospital* and he properly rejected Respondent's waiver argument.<sup>15</sup>

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<sup>15</sup> See ALJD 34, fn. 9.

### C. Changes to Health Insurance Were Not A Privileged Past Practice

#### 1. *Past annual modifications were not based on fixed criteria or guidelines.*

In applying the above standards, Respondent plainly failed to demonstrate its post-contract modifications to employees' health insurance were reasonably certain as to both timing and criteria. Although the prior annual modifications went into effect at the same time each year, the modifications were informed by a large measure of discretion, and thus, its failure to bargain over the continued implementation of such modifications after the collective-bargaining agreements expired was unlawful.<sup>16</sup>

In *E.I. DuPont de Nemours, Edge Moor*, 355 NLRB No. 176 (2010), the judge observed the employer's modifications from 1995 to 2004 included increases and decreases in premiums, modifications in insurance co-payment and deductible levels, alterations of coverage rules, and the creation of new benefits. 355 NLRB No. 177, slip op. at 5. While some types of changes, such as adjustments to medical premium and coverage levels, were made almost every year, other changes were "nonroutine" and occurred "intermittently" or "only once" during this period. *Id.* Applying pre-*Courier-Journal* case law, the judge determined the 2005 changes in question, which included changes to employee contributions, benefit rules, coverage levels and options, and the creation of a new health savings account plan, were "too discretionary, variable, and ad hoc to be considered part of an established past practice." *Id.* at 4-5, 11.

In the present case, as found by the judge, Respondent exercised significant discretion in the modification of and termination of bargaining unit employees' health insurance benefits. The

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<sup>16</sup> The Board already determined that the Respondent did not satisfy its bargaining obligation, even taking into account the *Stone Container* exception. In the Louisville case, the Respondent "flatly refused" the Union's request to bargain. 355 NLRB No. 176, slip op. at 3. And in the Edge Moor case, the Board affirmed the judge, who concluded that the *Stone Container* exception did not apply because the changes were not a discrete, recurring event and because the Respondent did not satisfy even a diminished bargaining duty. 355 NLRB No. 177, slip op. at 11.

modifications made to bargaining unit employees' health insurance was orchestrated by its in-house benefit professionals, who, as the judge states, exercised "free rein to come up with whatever benefits they think is best. . ." (ALJD 30; JT 1, 13) Respondent, since 2001, has implemented a number of increases to employees' copayments, premiums, deductibles, and other out-of-pocket expenses under various plans. While Respondent added plan options available to those in the plan, it also eliminated plans in which bargaining unit employees were enrolled. Respondent not only eliminated plans and merged plans as it deemed necessary, it increased the costs to bargaining unit employees. It is undisputed that Respondent, in making many of the modifications to employees' health insurance, did so exercising a great deal of discretion. Moreover, even as to the modifications that occurred on multiple occasions, there was no way for the Union or bargaining unit employees to predict which deductibles, copayments, and plans Respondent would modify and what those modifications would be.

Even as to those benefit features under the Raytheon Plan that Respondent did change nearly annually, such as medical premiums, the Respondent has not identified any fixed rule or formula governing the change in bargaining unit employees' contributions. The Board has previously explained that an employer may lawfully pass part of an externally-imposed premium increase on to employees without bargaining if it had a practice of splitting the costs with employees *at a fixed ratio*, paying a set amount itself, or having employees contribute a set amount. *Maple Grove Health Care Ctr.*, 330 NLRB 775, 780 (2000)(emphasis added). *See also Post-Tribune Co.*, 337 NLRB 1279, 1280-81 (2002); *Dynatron/Bondo Corp.*, 323 NLRB at 1265; *Intermountain Rural Elec. Ass'n*, 305 NLRB 783, 785-86 (1991), *enforced*, 984 F.2d 1562 (10th Cir. 1993); *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), *enforced*, 772 F.2d 421 (8th Cir. 1985); *A-V Corp.*, 209 NLRB 451, 452 (1974). Respondent's modifications to

bargaining unit employees' health insurance were not made pursuant to any set formula that the Union would be able to anticipate.

This practice, as appropriately found by Judge Fine, was purely discretionary and unpredictable. Judge Fine properly found Respondent failed to show a proven past practice that establishes certainty as to timing or criteria concerning the changing of bargaining unit employees' health insurance. (ALJD 30) The evidence clearly demonstrates and supports the Judge's finding that Respondent's modifications to the Raytheon Plan were discretionary and subject to a duty to bargain, which is a duty Respondent failed to meet. Judge Fine's finding that the lack of definable criteria is evident based on the history of Respondent's benefit changes since the bargaining unit employees first started receiving coverage under the Raytheon Plan should be affirmed.

2. *Similar treatment of union and non-union employees is not a limitation.*

Contrary to Respondent's exceptions, Judge Fine properly found the contractual limitation that bargaining unit employees be offered health insurance benefits on the same basis as is offered to Respondent's salaried employees at Respondent's Fort Wayne, Indiana facility does not constitute a discernible status quo that survives the collective-bargaining agreement. Respondent's policy of treating bargaining unit employees the same as unrepresented employees does not provide a sufficient limitation on its discretion to convert the Respondent's past modifications to the Raytheon Plan into a legally-cognizable past practice. Because *Courier-Journal* erroneously treats a similar practice as sufficiently cabinining managerial discretion, it should also be revised as well. 342 NLRB at 1094.

As noted by Judge Fine, in his review of the relevant case law, an employer is not exempt from bargaining simply because it commits itself to treating unionized and nonunionized

employees identically. *E.I. DuPont*, 355 NLRB No. 176, slip op. at 3. Thus, it would be inconsistent to allow an employer to circumvent its bargaining duty merely by labeling such treatment a “past practice.” Aside from *Courier-Journal*, the Board has consistently held that past equal treatment does not justify subsequent unilateral changes. In *Larry Geweke Ford*, the judge rejected such a claim, and the Board affirmed that decision. 344 NLRB 628, 632 (2005). Likewise, in *Mid-Continent Concrete*, 336 NLRB 258, 259, 268 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002), the Board found it “immaterial” that the employer’s changes to the health plan were companywide and covered union and non-union employees, ultimately concluding that these changes violated Section 8(a)(5). *Cf. J. P. Stevens & Co., Inc.*, 268 NLRB 89, 96-97 (1983) (personnel policy changes and grant of general wage increase unlawful despite asserted practice of making wage and benefit changes system-wide at the same time); *United Hosp. Med. Ctr.*, 317 NLRB 1279, 1282 (1995) (employer obligated to bargain over changes to health benefits, even though it continued to offer the same benefits as rest of workforce, where union did not waive bargaining).

The Raytheon Plan document, in Article 8.2, states Respondent “reserves the absolute and unconditional right to terminate the Plan and any or all Benefit Programs, in whole or in part, *with respect to some or all of the Employees.*”<sup>17</sup> (emphasis added) Thus, Respondent cannot credibly argue its discretion was limited by treating bargaining unit employees and non-bargaining unit employees the same. Treating both groups the same is no real limitation. If Respondent was free to make whatever modifications it pleased with regard to unrepresented employees, and by extension, it could do the same with respect to its unionized workforce. *See Courier-Journal*, 342 NLRB at 1096-97 (Member Liebman, dissenting). While tying union employees’ fate to that of non-union employees might arguably make an employer less likely to

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<sup>17</sup> See JT 1, A1

radically curtail benefits, or at least less likely to curtail them for discriminatory reasons, this by no means limits its authority to modify benefits in any direction and to any degree, at its sole discretion, should it choose to exercise that authority. Ultimately, Respondent's tradition of implementing modifications for union and non-union employees alike does not guarantee that any particular modification is reasonably predictable from the perspective of employees. Thus, this custom does not sufficiently limit or restrain Respondent's discretion to constitute a practice that warrants unilateral action.

*Courier-Journal's* finding that the employer's discretion was "limited," merely because it had committed to provide benefits on the "same basis" for its represented and unrepresented employees, 342 NLRB at 1094, conflicts with other Board decisions and is logically unsound. Thus, *Courier-Journal* should be revised on this basis as well.

#### D. Respondent Has Not Established A Past Practice Under *DuPont*

The facts of the present case equally demonstrate that Respondent has not established a past practice under *E.I. DuPont de Nemours, Louisville Works* and *E.I. DuPont de Nemours and Company*. The Board, in reviewing the *E.I. DuPont* cases, which contain almost identical facts as the present case, found the employer's unilateral modification to health benefits allowed under the collective-bargaining agreement did not create a past practice for such action outside the contract period. *Id.* The parties in *E.I. DuPont*, similar to the Respondent and the Union here, executed a collective-bargaining agreement where bargaining unit employees were covered by a health plan the employer offered to its nationwide workforce. The health plan's "reservation of rights" clause, which granted the employer authority to modify benefits under the health plan on an annual basis, was incorporated into 2 consecutive collective-bargaining agreements. During the effective period of the collective-bargaining agreement the employer in *E.I. DuPont*, like

Respondent, made unilateral changes to employees' health plan pursuant to the agreement without protest from the union. Following the expiration of the collective-bargaining agreement, and prior to finalizing a successor agreement, the employer unilaterally modified employees' health plan over the union's objection.

The employer, in *E.I. DuPont*, maintained it was privileged to continue its unilateral modifications under the collective-bargaining agreement's "reservation of rights" clause. The Board, however, held the employer's unilateral modifications to employees' health insurance during the effective periods of its collective-bargaining agreement, which was granted to the employer pursuant to the agreement's terms, did not establish a past practice validating the same unilateral action during a hiatus period between agreements.

The employer in *E.I. DuPont* argued its unilateral actions were sanctioned by the Board's decision in *Courier-Journal*, 342 NLRB 1093 (2004) where the employer modified its employees' health insurance plan for almost 10 years pursuant to a "reservation of rights" provision contained in successive collective-bargaining agreements. However, the employer in *Courier-Journal*, unlike the employer in *E.I. DuPont* and Respondent, not only modified the health insurance plan during the life of its collective-bargaining agreements, it also made modifications to the health insurance plan *during hiatus periods* between agreements without objection from its employees' bargaining representative. The employer in *E.I. DuPont* argued the distinction between modifications during the life of the agreement and modifications outside the life of the agreement was of no special significance and did not meaningfully distinguish the cases. *E.I. DuPont*, 355 NLRB No. 177, *supra* at slip op. 14. The Board, however, found the employer's reliance on *Courier-Journal* unpersuasive because all of its past modifications were implemented under the authority of a contractual management-rights clause (where *Courier-*

*Journal* employer's modifications were not made under a contractual grant of authority). The Board, in *E.I. DuPont*, found that the employer's contractually authorized past practice did not support its unilateral modifications made during a hiatus between contracts when the contractual authorization ceased to be effective. *E.I. DuPont*, 355 NLRB No. 176, supra at slip op. 1.

As the Board explained in *E.I. DuPont*, extending contractual rights, such as those under Exhibit C of the Respondent' and Union's agreement in the present case, which have only been exercised during the life of a collective-bargaining agreement, would conflict with settled law that a management-rights clause does not survive the expiration of the collective-bargaining agreement, absent a clear and unmistakable expression of the parties' intent to do so. *Id.* at slip op. 3 (citing *Beverly Health & Rehabilitation Services*, supra, 335 NLRB at 636 n. 6)(“the law is quite clear that, when a collective-bargaining agreement expires, any management-rights . . . clause it contains expires with it.”) The Board went on to explain these clauses are not transformed into terms and conditions of employment an employer must continue following the expiration of the collective-bargaining agreement. *Id.* (citing *Control Services*, 303 NLRB 481, 484 (1991))(“a management rights clause is not, in itself, a term or condition of employment that outlives the contract that contains it, absent evidence of the parties intentions to the contrary.”) The Board concluded allowing the clause to continue would make the expiration of a management-right clause meaningless in situations where the employer acted under the authority of the clause during the collective-bargaining agreement. *E.I. DuPont*, 355 NLRB No. 177 at slip op. 3.

The essence of the grant of authority contained in Exhibit C of the collective-bargaining agreement is the Union's waiver of its right to bargain over the subjects covered in Exhibit C. As the Board makes clear in *E.I. DuPont*, allowing such a waiver to continue past expiration of

the agreement would effectively abrogate an employer's obligation to bargain whenever a collective-bargaining agreement containing a broad management-rights clause expired. *Id.* There is no evidence in the expired collective-bargaining agreement or elsewhere that Respondent and the Union intended provisions in Exhibit C, specifically Section 14(2), to survive the April 29, 2012 expiration date. Accordingly, Respondent erred in relying on those provisions in the expired agreement to justify its unilateral modification of employees' health insurance.

#### E. The Union Did Not Waive It's Right To Bargain

Long standing Board doctrine supports the finding that the Union did not waive its right to bargain over bargaining unit employees' health insurance, and Respondent's exceptions asserting Judge Fine failed to find such a waiver are without merit. The Supreme Court's "clear and unmistakable" standard for the waiver of a statutory right, in *Metropolitan Edison Co.*, 460 U.S. at 708, has been long recognized and applied by the Board. *See Provena St. Joseph Med. Ctr.*, 350 NLRB at 810-811; *Amoco Chemical Co.*, 328 NLRB 1220, 1221-22 (1999); *American Diamond Tool*, 306 NLRB 570, 570 (1992). The evidence does not support a finding that the Union waived its right to bargain over bargaining unit employees' health insurance.

Respondent's points to the language of the collective-bargaining agreement, which expired on April 29, 2012, as evidence of the Union's explicit waiver of its right to bargain over employees' health insurance at times subsequent to expiration of that agreement. In fact, the Union, upon expiration of the agreement, submitted proposals to Respondent for language changes to the Raytheon Plan. Specifically, on April 24, 2012, which was the first day of negotiations to replace the expiring agreement, the Union proposed to strike the "pass through" language from the plan and substitute it with ". . . Raytheon Plan benefits offered to Ft. Wayne

bargaining unit employees would remain the same for the life of the CBA.”<sup>18</sup> On April 26, 2012, Respondent submitted a counter-proposal to the Union with language stating “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.”<sup>19</sup> Respondent, during negotiations for a successor agreement, acknowledged the Union advised that one of its major issues was the “pass through” language in the Raytheon Plan.<sup>20</sup> On July 25 – 26, 2012, Respondent and the Union met with an FMCS mediator to address the parties remaining unresolved issues. Four outstanding issues were identified by the mediator. One of those issues was the “pass through” language in the Raytheon Plan.<sup>21</sup>

On September 26, 2012, Respondent, without reaching an agreement on either its proposal or the Union’s proposal, informed the Union that its open enrollment period would proceed as planned. The Union requested that Respondent exclude the bargaining unit employees from the open enrollment period, but Respondent refused.<sup>22</sup> Respondent instituted changes to its 2013 benefit package under the Raytheon Plan. Prior the opening of the open enrollment period on October 12, 2012, Respondent mailed the information to its U.S. Region employees, including the bargaining unit employees in Fort Wayne represented by the Union.<sup>23</sup> On January 1, 2013, Respondent implemented the changes to the Raytheon Plan.<sup>24</sup>

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<sup>18</sup> See JT 1, ¶54; JT 1, A19.

<sup>19</sup> See JT 1, ¶57.

<sup>20</sup> JT 1, ¶59.

<sup>21</sup> JT 1, ¶62.

<sup>22</sup> JT 1, ¶65, ¶66.

<sup>23</sup> JT 1, ¶66.

<sup>24</sup> JT 1, ¶67.

The preceding paragraphs clearly demonstrate the Union, in fact, did not waive its right to bargain over the bargaining unit employees' health care insurance. Yet—after receiving, reviewing, rejecting the Union's proposal during negotiations, and discussing the Union's proposal during mediation—Respondent now urges a finding that the Union waived its right to bargain over this same subject. It is evident from the stipulated record that the Union in no way waived its right to bargain over bargaining unit employees' health insurance. Instead, the stipulated record supports Judge Fine's determination that there was no waiver.

There is no merit to Respondent's exception that the Union clearly and unmistakably waived its right to bargain over bargaining unit employees' health insurance. Respondent's changes to the health insurance, during the term of the collective-bargaining agreement, and the Union's silence on the matter during the term of the agreement is no grounds for waiver. A union's silence or acquiescence in the face of previous unilateral changes does not normally constitute a waiver. *See, e.g., Verizon N.Y., Inc.*, 360 F.3d at 209, *Owens-Corning Fiberglass Corp.*, 282 NLRB at 609. Judge Fine properly applied Board doctrine in rejecting Respondent's claim to the contrary, and this finding should be affirmed.

#### F. Unilateral Announcement and Modification Were Not Privileged.

Judge Fine properly found that Respondent's announcement to bargaining unit employees that their health insurance benefits would change, and the implementation of those changes were unlawful. Respondent's public policy arguments in support of its unilateral changes lack merit and were properly rejected.

1. *The unilateral authority to modify the Raytheon Plan expired with the collective-bargaining agreement.*

The Board has held an announced unilateral change in employee benefits damages the bargaining relationship and violates Section 8(a)(5) of the Act even in the absence of

implementation. In *ABC Automotive Products Corp.*, 307 NLRB 248 (1992), the employer and the union were engaged in negotiations for a successor collective-bargaining agreement. During a strike, the employer sent a letter to the union advising, among other things, that its contribution to the union's health fund would terminate and the employer would provide employees its own health package. The judge determined the employer violated Section 8(a)(5) of the Act by announcing and implementing its decision to replace employees' health plan. The employer, in excepting to the judge's findings, argued no violation occurred because it never took the steps to institute a new plan. The Board, in affirming the judge's decision, found the employer's conduct unlawful regardless of whether steps were taken to implement the plan and regardless of whether the employer intended to take steps to implement the plan. *Id.* at 250.

The Board reached a similar finding in *Kurdziel Iron of Wauseon*, 327 NLRB 155 (1998). In *Kurdziel Iron*, the employer announced to employees that their 15-minute morning break and 30-minute lunch break was being reduced. The Board, in agreement with the judge, found the employer's threat of a unilateral reduction in the employees break times violated Section 8(a)(5) of the Act. The Board, citing *ABC Automotive Products Corp.*, stated even if the announced reduction did not result in a reduced benefit to employees, the damage to the bargaining relationship was accomplished "simply by the message to employees that the [employer] was taking it on itself" to set an important term and condition of employment, thereby suggesting the irrelevance of the employees' collective-bargaining representative. 307 NLRB at 250.

The facts in the present case involve a unilateral announcement of changes to employees' benefits and the subsequent implementation of those changed benefits in the face of objections from employees' bargaining representative. As described above, the Union made it perfectly clear to Respondent during negotiations that it no longer desired to grant Respondent the

authority to unilaterally change bargaining unit employees' health insurance without bargaining. On April 24, 2012, the first day of negotiations for a successor agreement, the Union submitted a proposal to modify the language in the Raytheon Plan.

Respondent did not find the Union's proposal acceptable and requested alternative language. The Union obliged and proposed health insurance "can only be changed by mutual agreement." This language preserved the Union's right to bargain over modifications to bargaining unit employees' health insurance. Respondent, in response to the Union's last proposal, counter-proposed language to the Union's suggested language. Respondent offered language requiring it to provide notice, to the extent possible, and clarify any questions regarding changes prior to implementation. Respondent's proposal would still allow it to unilateral modify bargaining unit employees' health insurance, subject only to providing notice (when feasible) and with no obligation to bargain over such modifications. The Union did not find this acceptable and rejected Respondent's counter-proposal. Three months later, on September 26, 2012, and without any agreement from the Union, Respondent notified bargaining unit employees of the changes to their health insurance benefits under the Raytheon Plan would become effective in January 2013.

Respondent, as did the employers in *ABC Automotive Products Corp.* and *Kurdziel Iron*, took it upon itself to set important terms and conditions of bargaining unit employees' employment, and, thus, suggesting the irrelevance of their collective-bargaining representative. Judge Fine correctly found that Respondent notified bargaining unit employees that their health insurance benefit would change in violation of Section 8(a)(5) of the Act.

2. *Public policy does not support Respondent's selective uniformity.*

Respondent excepts to Judge Fine's failure to adopt the argument that its benefit distribution framework is supported by ERISA's promotion of uniform rules in national benefit plans. Judge Fine properly rejected Respondent's argument as unrelated to the remedial rights under the Act pertaining to ERISA based plans.

It is noteworthy, as pointed out by the Judge's decision, that ERISA's promotion of uniformity did not prevent Respondent from excluding its California employees from certain plans. Respondent also piloted a new medical benefit plan only in the Texas and Arizona in 2002, which is reflected in its Benefit Newsletter.<sup>25</sup>

Judge Fine properly rejected this argument and found that Respondent has not raised any valid defense to its statutory duty to bargain with the Union for the changes to bargaining unit employees' health insurance coverage under the Raytheon Plan. Accordingly, the findings and recommendations in the Judge's November 19, 2013 decision should be affirmed.

IV. CONCLUSION

For the reasons stated above and based on the record as a whole, the General Counsel respectfully requests that Respondent's Exceptions to the November 19, 2013 Decision of the Administrative Law Judge be denied in their entirety.

Dated at Indianapolis, Indiana this 14<sup>th</sup> day of January 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Fredric D. Roberson", with a long horizontal flourish extending to the right.

Fredric D. Roberson  
Counsel for the General Counsel

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<sup>25</sup> JT 4, pg. 1

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of General Counsel's Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge has been e-filed with the Administrative Law Judge and served electronically on January 14, 2014 upon the following persons, addressed to them at the following addresses:

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