UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RAYTHEON NETWORK CENTRIC SYSTEMS, Respondent, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Charging Party.	Case 25-CA-092145

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND REQUEST FOR ORAL ARGUMENT

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

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Pursuant to Section 102.46(d)(2) of the Board's Rules and Regulations, Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("USW" or "Union") files this answering brief in response to the Exceptions to the Decision and Recommended Order of the Administrative Law Judge ("ALJ") and Brief in Support of Exceptions to ALJ's Decision filed by Respondent Raytheon Network Centric Systems ("Raytheon," "Company," or "Respondent").

I. INTRODUCTION

In its Supporting Brief,[1] Respondent Raytheon presents nine issues: (1) whether the ALJ erred in finding that the Company failed to establish a past practice under *NLRB v. Katz*, 369 U.S. 736 (1962), and *Courier-Journal Corp.*, 342 NLRB 1093 (2004);[2] (2) whether the ALJ misinterpreted and misapplied the Board's *Courier-Journal* decision;[3] (3) whether the ALJ erred in finding that the Company was not privileged to make the unilateral changes to health care benefits because the "dynamic status quo" doctrine did not apply;[4] (4) whether the ALJ erred in finding that the reservation-of-rights clauses in the collective-bargaining agreement ("CBA") and benefits plan expired with the CBA;[5] (5) whether the ALJ erred in finding the Union had not waived the right to bargain over changes to the health care benefits;[6] (6) whether the ALJ erred in finding the Company violated the Act by notifying bargaining-unit employees of open enrollment and changes to the health care benefits;[7] (7) whether the ALJ erred in finding that the

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1 All references to Respondent's Supporting Brief are noted as "Supporting Brief ___." Respondent's Exceptions are noted as "Exceptions ___." The Stipulated Facts are noted as "SF ¶ ___." The Administrative Law Judge's Decision is noted as "ALJD ___."

2 *See* Exceptions ¶¶ 1, 2, 3-5, 7-10, 13, 16, 42, 47, and 49.

3 *See* Exceptions ¶¶ 2, 4-9, 13, 16, 19-26, 28-33, 35-36, 42, 47, 48, and 50.

4 *See* Exceptions ¶¶ 2, 12-13, 16, 18, 26-27, 29, 35, 42, 47, and 48.

5 *See* Exceptions ¶¶ 11, 14, 15, and 42.

6 *See* Exceptions ¶¶ 17, 39, and 42.

7 *See* Exceptions ¶ 34.

Company's unilateral changes did not fall within the exception set out in *Stone Container Corp.*, 313 NLRB 336 (1993);[8] (8) whether the ALJ erred in finding that the Company violated the Act by implementing the benefit plan used by the rest of its employees on the Ft. Wayne bargaining-unit employees;[9] and, (9) whether the ALJ erred in dismissing the Company's ERISA-based arguments.[10]

The Union respectfully requests that the Board affirm the ALJ's decision and adopt the Recommended Order.[11] First, and quite simply, the ALJ's decision is entirely in keeping with *Courier-Journal* because no past practice exists of unilateral changes being made during the interim between contracts in the parties' collective-bargaining relationship.

Second, *Courier-Journal* sets up a tension between the statutory right to bargain and the waiver of the right to bargain. Not only that, *Courier-Journal* effectively privileges the waiver over the right. While the ALJ's decision here is fully in keeping with *Courier-Journal*, the Board should take the opportunity to overrule *Courier-Journal* because (1) management-rights clauses—which are waivers to bargain during the life of a collective-bargaining agreement—expire with the CBA and (2) prioritizing the statutory right to bargain over the waiver of that right furthers the purposes of the Act. After all, if parties bargain a waiver and it unexpectedly expires with the contract, they can easily bargain a new waiver. The right to bargain is not so easily reincarnated.

Third, the Union did not waive the right to bargain. The Company's Exceptions neglect the fact that the waiver shall not be "lightly inferred." *Georgia Power Co.*, 325 NLRB 420, 420

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8 *See* Exceptions ¶ 37.

9 *See* Exceptions ¶ 40.

10 *See* Exceptions ¶¶ 41, 43, 45, and 46.

11 In its Exceptions, the Company requested oral argument. (Exceptions at 12-13). The Union believes that oral argument is not necessary to decide the issues presented here, but would happily participate should the Board find oral argument appropriate.

(1988), *enf'd.* 176 F.3d 494 (11th Cir. 1999). If the Board were to find a waiver in a reservation-of-rights clause that was expected to expire with the CBA, it would deter unions from ever agreeing to such a clause for fear of forever waiving the right to bargain. Because here the Union promptly informed the Company that it would not acquiesce to the changes to health care benefits made during the hiatus between contracts and also discussed health care benefits during negotiations, the ALJ was correct in deciding that the Union had not waived the right to bargain.

Finally, the Company's public policy arguments were correctly rejected by the ALJ. Indeed, if the Board were to reverse the ALJ's decision, it would go against the Act's very purposes and policies.

II. ARGUMENT

The Stipulated Facts are incorporated by reference herein. (*See* ALJD 2-12). In its Supporting Brief, however, the Company glosses over several key stipulated facts upon which the ALJ's decision turns. First, the changes to bargaining-unit health care benefits were made when no collective-bargaining agreement was in effect between the parties. (SF ¶ 67). The parties were in the midst of bargaining a new contract. (SF ¶¶ 51-65). These facts are of the utmost significance because the Company alleges the changes to health care benefits were made pursuant to a reservation-of-rights clause—but the clause expired with the contract.

Second, the Company continually reiterates that the changes it made to health care benefits over the years were consistent, predictable, and that its discretion to make those changes was limited. The record, however, shows that the Company made varying annual changes to the health care plan since the Ft. Wayne bargaining-unit employees began coverage under the Raytheon Plan:

- 2002: five changes, including an increase in premiums and the introduction of a preferred provider organization ("PPO") option. (SF ¶ 15).

- 2003: four changes, including an increase in premiums and the addition of three levels of coverage under the "Definity Health Care Options." (SF ¶ 18).

- 2004: two changes, including an increase in premiums. The POS and HMO provider was changed. (SF ¶ 21).

- 2005: two changes, including an increase in premiums. Furthermore, this year saw the introduction of a three-year plan to increase the premium split between employer and employee from 85/15 to 80/20. (SF ¶ 24).

- 2006: five changes, including further implementation of the plan to increase employees' share of premiums from 15% to 20%. Additional changes to prescription medication copays and the discontinuation of the Definity Health Bronze Plan. (SF ¶ 29).

- 2007: three changes, including realization of the 20% employee-share of health care premiums. (SF ¶ 32).

- 2008: ten changes, including an increase in premiums. Several options were discontinued, including the "M-Plan HMO" that was available to Ft. Wayne employees. Increases in special copays. (SF ¶ 35).

- 2009: four changes, including an increase in premiums. (SF ¶ 38).

- 2010: eight changes, including implementation of a two-year plan to increase employees' share of premiums from 20% to 25%. In 2010, the employee share increased from 20% to 22.5%. Additionally, some copays were increased and out-of-pocket maximums for those covered under the HMO plan. (SF ¶ 43).

- 2011: eight changes, including finalization of the employee-premium-share increase from 20% to 25%. (SF ¶ 46).

- 2012: nine changes, including an increase in premiums. (SF ¶ 49).

While health care premiums were always increased, the amount of the increases varied. Furthermore, the type of changes implemented each year since 2002 have not been consistent in the least—indeed, over the years, the *only* constant established by the changes is that the benefits and costs are always changing. (*See* ALJD 23-25). The ALJ was correct when he determined that "the divisions of premium percentages changes on an ad hoc basis" and that "other changes to the plan over the years were completely random." (*Id.* 31 at 35-36, 42-43).

Additionally, the Company's characterization of the limits on its discretion in changing health care benefits is distorted, misrepresentative, and disingenuous. The Company asserts, and the Union agrees, that, under the reservation-of-rights language in the CBA, the *only* limitation on the Company's discretion was its "commitment to provide identical benefits to both unit and non-unit employees." (Supporting Brief at 31). Given that non-unit employees do not have a collective-bargaining representative to bargain benefits for them, this is no limitation at all: the Company can make whatever changes it pleases to not only the medical benefits, but to almost all terms and conditions of employment (where not restricted by other laws). Moreover, the Company itself admitted that it "retained and exercised *significant discretion* to modify and/or terminate aspects of the Raytheon Plan." (SF at ¶ 13) (emphasis added). The limitation the Company claims is a farce.

Finally, the Company explains that its right to unilaterally change health care benefits must be preserved in order to protect the parties' original bargain. (Supporting Brief at 28). This portrayal of the health care benefits provided under the 2009-2012 CBA is decidedly one-sided. Of course, the Union gained the benefit of having health care benefits provided to bargaining-unit employees. At the same time, the Company reaped the benefit of not having to provide a separate health care benefits plan to the Fort Wayne bargaining unit. At the time the 2009-2012 CBA was bargained, enough was put on the table for both sides to be happy with the bargain. While bargaining the new contract, however, the Union no longer felt that the bargain was worth the waiver because the Company so drastically exercised its discretion under the reservation-of-rights clause of the CBA and benefits plan.

A. The ALJ Correctly Determined That The Company Violated Section 8(a)(1) And (5) When It Unilaterally Changed Health Care Benefits.

The ALJ found that the Company violated Section 8(a)(1) and (5) of the Act when, in September 2012, it notified bargaining-unit employees of changes to their health care benefits and then unilaterally implemented those changes on January 1, 2013, over the objections of the Union. (ALJD 33 at 27-30). The ALJ's decision was based on the finding that "the contractual provisions authorizing such changes during the duration of the collective-bargaining agreement did not survive the expiration of the agreement, and that changes during the term of the collective-bargaining agreement and its predecessor agreements were made on an ad hoc and unpredictable basis, and therefore did not create a status quo or past practice separate and apart from the agreement." (*Id.* at 31-35).

1. The ALJ's decision follows *Courier-Journal* because no past practice of changes made during a hiatus between collective-bargaining agreements had been established.

The Company asserts the ALJ erred in failing to find that the Company had established a past practice of making unilateral changes to health care benefits during hiatus periods between contracts.[12] Rather than misinterpreting *Katz* and *Courier-Journal*, as the Company claims, the ALJ correctly applies these cases to the facts of this case. The Company is simply not putting enough weight on the facts that the contract, including the reservation-of-rights clause, had expired and that changes to the Ft. Wayne bargaining-unit employees' health care plan had been

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[12] The ALJ correctly found that the burden of proving the establishment of a past practice rests with the Company. *Eugene Iovine, Inc.*, 328 NLRB 294 fn. 2 (1999), *enf'd.* 1 Fed. Appx. 8 (2d Cir. 2001)(unpublished)("The Respondent raised its alleged past practice as an affirmative defense, and the burden is therefore on the Respondent to establish such defense.")(citing *Aaron Bros. Co. v. NLRB*, 661 F.2d 750, 753 (9th Cir. 1981)); see also *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB No. 176 slip op. at 1 (2010)(citing *Beverly Health & Rehab. Svcs.*, 335 NLRB 635, 636 (2001), *enf'd.* 317 F.3d 316 (D.C. Cir. 2003)).

made without a contract in effect. However, as discussed below, these facts are of the utmost importance.

One of the tenets of federal labor law is that an employer violates Section 8(a)(5) when it makes a unilateral change to a mandatory subject of bargaining without bargaining to impasse. *NLRB v. Katz*, 369 U.S. 736.[13] But, even once impasse has been reached, an employer is still prohibited from making unilateral changes that vests unfettered discretion with the employer, discussed *infra* at § II.A.2. *See McClatchy Newspapers*, 321 NLRB 1386, 1390 (1996) (*McClatchy II*).

The Board has also carved out an exception related to past practices and the "dynamic status quo."[14] This theory revolves around *Courier-Journal* and its progeny. The situation in *Courier-Journal* was similar to that presented here: the parties had agreed on a reservation-of-rights clause that allowed the employer to make unilateral changes to medical benefits and the employer made changes to medical benefits while the contract was in effect. *Courier-Journal*, 342 NLRB at 1093. However, in *Courier-Journal*, and unlike the instant case, the employer also

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[13] Although *Katz* involved a first-contract situation, its holding has been extended to established collective-bargaining relationships. See *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991)("The *Katz* doctrine has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed.")(citing *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988)).

[14] Interestingly, the dynamic status quo line of cases was developed and applied in first-contract cases. *See Finley Hosp.*, 359 NLRB No. 9 slip op. at 12 (2012) (Hayes, dissenting in part)(citing *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enf'd.* 73 F.3d 406 (D.C. Cir. 1996)). Yet, the Company makes vigorous arguments that first-contract cases are entirely different than cases dealing with established bargaining relationships. (*See* Supporting Brief at 32, 34-35). Part of this argument is based on the contention that unilateral changes made when bargaining a first contract have a "lasting" and allegedly greater effect on employees than those made when the parties have an established collective-bargaining agreement. However, a union without a contract and past the three-year contract bar is at risk for decertification and can still be made to look weak and ineffective in the eyes of its bargaining unit. Thus, the ALJ was correct when he determined that implementation "might well irreparably undermine [the Union's] ability to bargain." (ALJD 20 at 11-12; *see also* ALJD 32 at 48-50).

made changes to medical benefits without the union's objection ***during the hiatus between contracts***. *Id.* The Board found the changes were made pursuant to a "well-established past practice" and, therefore, the changes to the medical benefits were themselves the status quo—the very thing that could not be unilaterally changed under *Katz*. *Id.* at 1094.

The Board based its analysis on the idea that "a unilateral change made pursuant to a longstanding practice is essentially a violation of the status quo." *Id.* at 1094. The cases cited by the Board, however, were limited to those where "employers passed on portions of employee health care premium increases pursuant to established past practices of sharing premium costs with employees according to *fixed* percentages." *Id.* (citing *Post-Tribune Co.*, 337 NLRB 1279, 1280-1281 (2002))(emphasis added); *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), *aff'd.* 772 F.2d 421 (8th Cir. 1985); *A-V Corp.*, 209 NLRB 451, 452 (1974)). Finding that the *Courier-Journal* employer had made changes to both benefits and costs when a contract was in effect *and* when there was a hiatus between contracts, the Board found that a past practice had been established. The Board's analysis, however, does not hinge more heavily on the nature of the changes made than whether the past changes were made when a contract was in effect and when it was not.[15]

Significantly, the *Courier-Journal* Board's analysis of the establishment of a past practice allowing an employer to change medical benefits as it pleases both during the term of a CBA and

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[15] Indeed, if *Courier-Journal* had weighted the *types* of changes to benefits and costs made more heavily than *when* past changes had been made, it would have risked conflicting with existing Board law. As Member Liebman pointed out in her dissent, unilateral changes made pursuant to an established past practice are lawful only if they "are not made in the exercise of managerial discretion" and there is "'reasonable certainty' as to both their timing and criteria." *Id.* at 1096 (Liebman, dissenting in part)(citing *Eugene Iovine, Inc.*, 328 NLRB 294); see also *Katz*, 369 U.S. at 746 (violation where unilateral change is "informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice.").

during the hiatus between contracts is *only* grounded on the idea of past practice. The Board specifically did "not pass on the legal issue of whether a contractual waiver of the right to bargain survives the expiration of the contact." *Courier-Journal*, 342 NLRB at 1095. This question was left for another day.

That other day arose in 2010 when the Board was presented with the situation it explicitly ignored in *Courier-Journal*, *i.e.*, whether an employer could make unilateral changes to medical benefits pursuant to a reservation-of-rights clause in an expired collective-bargaining agreement. *E.I. DuPont de Nemours, Louisville Works*, 355 NLRB No. 176 (2010) (*Louisville Works*); *E.I. DuPont de Nemours*, 355 NLRB No. 177 (2010) (collectively, *DuPont*).[16] In the *DuPont* cases, the Board found the fact that the unilateral changes were made during a period between contracts to be dispositive and a clear distinction from the fact pattern presented in *Courier-Journal. See Louisville Works*, 355 NLRB slip op. at 1 ("Respondent's reliance on the *Courier-Journal* cases is unavailing because the past changes it relies on were implemented under the authority of a contractual management-rights provision."). The Board explained its reasoning at length:

> **Extending the *Courier-Journal* decisions to the situation presented here would conflict with settled law that a management-rights clause does not survive the expiration of the contract embodying it, absent a clear and unmistakable expression of the parties' intent to the contrary, and does not constitute a term and condition of employment that the employer must continue follow contract expiration**. Those principles apply to a broad management-rights clause as well as to more narrow contractual reservations of managerial discretion addressing, as here, a specific subject of bargaining and

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[16] The Company also generally excepted to reliance on any cases decided between April 5, 2010, and August 3, 2013, because the Board allegedly did not have the quorum required by statute. (Exceptions at 11). Where Board decisions relied upon by the ALJ have not been challenged under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), and *New Vista Nursing & Rehab. v. NLRB*, 719 F.3d 203 (3d Cir. 2013), they should not be called into question here. Furthermore, *DuPont* has already been appealed the D.C. Circuit, *E.I. Du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012), without any of these arguments being raised. The ALJ's duty is "to apply established Board precedent which the Supreme Court has not reversed." *Insurance Agents*, 119 NLRB 768, 773 (1957). Here, the ALJ fulfilled his duty.

> embodied in a plan document that has been incorporated in a collective-bargaining agreement. **Moreover, extending *Courier-Journal* to circumstances such as those presented here would render the expiration of the management-rights clause meaningless wherever the employer had acted under its authority to make changes during the contract period.** This, in turn, "would vitiate an employer's bargaining obligation whenever a contract containing a broad management-rights clause expired." *Beverly Health & Rehabilitation Services*, 335 NLRB at 637. Such an outcome would discourage, rather than promote, collective bargaining, in particular, making unions wary of granting any discretion to management during the contract's term.

Id. slip op. at 2 (internal citations omitted; emphasis added).[17]

Furthermore, the *DuPont* Board observed that *Courier-Journal* and its progeny "are in tension with previously settled principles" that govern the statutory right to bargain. *Louisville Works*, 355 NLRB No. 176 slip op. at fn. 5. First, *Courier-Journal*'s holding flies in the face of the well-established principle "that silence in the face of past unilateral changes does not constitute waiver of the right to bargain." *Id.* (citing *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987); *Exxon Research & Engineering Co.*, 317 NLRB 675, 685-686 (1995)). Second, when bargaining a first contract, "the employer may not make unilateral changes if they amount to the exercise of unbounded managerial discretion." *Id.* (citing *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), *enf'd.* 1 Fed. Appx. 8 (2d. Cir. 2001)).[18] Yet, even though *Courier-Journal* seemingly disregards these two principles of labor law, the *DuPont* Board found that it was unnecessary to revisit the holdings of the cases cited in footnote 3 because "the *Courier-Journal*

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[17] See also *Silgan Plastics Corp.*, JD-50-12 at 32-33, 2012 WL 4321038 (NLRB Div. of Judges) (Sept. 20, 2012)("I share the [*DuPont*] Board's concern that unions would be discouraged from ever granting special discretion to employers during a contract's term, if doing so meant that employers who exercised that contractual discretion would thereby acquire the discretion in perpetuity—even if the contractual grant of discretion expired and the parties did not agree to renew it in subsequent contracts. Since contractual grants of discretion are an important tool in reaching collective-bargaining agreements, a policy that made their use unworkable would significantly interfere with collective bargaining.")

[18] This principle has been extended beyond first-contract situations and equally applies to established bargaining relationships. See *Litton Financial Printing Division*, 501 U.S. at 198.

cases are not applicable to the factual situation presented here"—"here" being a situation in which a union objects the *first* time an employer attempts to make unilateral changes pursuant to a reservation-of-rights clause in an expired CBA. *Id.*

In this case, the ALJ was presented with the same fact pattern as that of *DuPont* and came to the same conclusion as the Board: the situation presented here is distinguished from *Courier-Journal* because the Company, for the first time in the parties' bargaining relationship, made changes to health care benefits during the hiatus period between contracts. (See ALJD 33 at 27-30). The ALJ's decision, therefore, is in keeping with extant Board law presented in *Courier-Journal* and *DuPont*[19], and the ALJ did not err in his analysis of these cases.

The Company attempts to use the *Courier-Journal* line of cases to show a robust and vibrant history of the Board allowing an employer to make whatever changes it would like pursuant to expired reservation-of-rights clauses without having to go through the trouble of bargaining with a union or reaching impasse. (Supporting Brief at 17-30). However, the cases do not stand for such a proposition.

The Company cites to *Shell Oil Co.*, 149 NLRB 283 (1964), but that situation can be distinguished from the instant case. As the ALJ correctly noted, in *Shell Oil*, the employer's exercise of the right to subcontract when the CBA was expired was not an expansion of the subcontracting language. (ALJD 33 at 42-47). Indeed, the Board itself noted that the subcontracting carried out during the hiatus period did not materially vary "in kind or degree"

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[19] The *DuPont* decisions are on remand from the D.C. Circuit Court. The court has asked the Board to reconsider the facts and apply *Courier-Journal* or "explain its return to the rule it followed in its earlier decisions." *Du Pont*, 682 F.3d at 70. Section II.A.2, *infra*, discusses why the Board should take this opportunity to overrule *Courier-Journal* and its progeny.

from what had been done in the past. *Shell Oil*, 149 NLRB at 288.[20] Additionally, in *Shell Oil*, the employer's right to subcontract was materially limited by "the conditions of the protective wage requirement" of the contract. *Id.* at 286. That is unlike the situation here where the Company's alleged ability to change health care benefits is limited only by the fact that it must treat bargaining-unit employees the same as employees who are not represented by a union. As explained above, this is no limitation at all. Nothing in *Shell Oil* stands for the proposition that an employer which has never exercised its authority under a reservation-of-rights clause of an expired contract is privileged to bypass its obligation to bargain with the union about mandatory subjects of bargaining.

The Company then relies on the Sixth Circuit's interpretation of the *Shell Oil* line of cases to stand for the proposition that "it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination." *Beverly Health & Rehab. Services v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002). First, the Board is not required to follow precedent set by individual circuit courts. *Int'l. Bhd. of Teamsters, Local No. 507*, 306 NLRB 118, 144 (1992); see also *Insurance Agents*, 119 NLRB at 773 (ALJ must apply Board precedent that has not been reversed by Supreme Court because "[o]nly by such recognition of the legal authority of Board precedent will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved."). Second, after finding that no past practice existed which allowed for unilateral changes to be made based on the

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[20] The Company excepts to the ALJ's finding that *Shell Oil* can be distinguished from this case because it did not expand its subcontracting notice. (Supporting Brief at fn. 6). The Company asserts that it did not "expand its practice, but did exactly what it had done for the prior 12 years." (*Id.*). This assertion, however, assumes that the changes it had made previously were consistent year-to-year—they were not.

management-rights clause of an expired agreement, the court went on to affirm the Board's ruling that the management-rights clause did not survive the termination of the underlying contract. *Id.* at 481-482 (citing *Buck Creek Coal*, 310 NLRB 1240 (1993); *Holiday Inn of Victorville*, 284 NLRB 916 (1987)). The simultaneous expiration of management-rights clauses with collective-bargaining agreements is further discussed *infra* at § II.A.2.

Other cases cited by the Company also have a more circumscribed exercise of the past practice than the situation here where the Company changed the benefits available, the costs, and even the premium splits. (See SF ¶¶ 15-46). *See A-V Corp.*, 209 NLRB 451 (employer unilaterally changed insurance premiums, not benefits provided); *Post-Tribune Co.*, 337 NLRB 1279 (employer increased premiums, but the employer/employee premium split remained the same).

Also, the Company relies on two cases based on *Stone Container*. In *Stone Container*, the Board determined that a "fluid" status quo could exist when an employer had a past practice of granting annual wage increases, but did not do so during the hiatus between contracts. The Board determined the decision to alter the status quo of granting the wage increase was not a violation of the Act because the parties were engaged in contract negotiations, the employer expressed a willingness to discuss the subject and did not propose to permanently abandon the wage increases, and the union made no counterproposal about the April wage increases and did not raise the issue again during bargaining. *Stone Container*, 313 NLRB at 336.

One *Stone Container* the Company relies on is *Nabors Alaska Drilling*, 341 NLRB 610 (2004). In *Nabors Alaska Drilling*, the parties were bargaining a first contract over a period of years. Every year, the employer made adjustments to the health care benefits. Since bargaining for the first contract began, the employer and union successfully bargained for changed benefits.

Nabors Alaska Drilling, 341 NLRB at 611. In one year, however, the employer proposed changes, told the union when it was going to send out notices of the new proposed copayment rates to bargaining-unit employees, and the union did not respond until after the deadline. *Id.* The Board found this fell into the *Stone Container* exception because "bargaining over the changes in health insurance could not await an impasse in overall negotiations" *Id.* at 613. Furthermore, there was "no evidence that bargaining or further bargaining with Respondent would have been fruitless." *Id.*

Stone Container and *Nabors Alaska Drilling* can be distinguished from the case at hand.[21] First, in *Nabors Alaska Drilling*, the employer's changes were not based on the survival of a reservation-of-rights clause past the contract—there was no contract and the argument was based solely on the "dynamic status quo." Second, in this case, the Company failed to display the same willingness as those employers because, when the parties met on September 26, 2012, to continue bargaining over outstanding issues, the Company stated that "it would not entertain any options the Union wanted to put on the table" in regards to the reservation-of-rights language in the contract. (SF ¶ 63). And, in that case, the union did not timely demand to bargain; here, of course, the Union did precisely that. (SF at ¶ 51). In fact, the situation here is more like another case based on *Stone Container*: *Brannan Sand and Gravel Co.*, 314 NLRB 282 (1994). In *Brannan Sand & Gravel*, even though the Board determined that annual changes to the costs and benefits of the health plans was indicative of a "fluid" status quo, the employer violated the Act because—just as the Company did here—the changes were presented to the union as a *fait accompli*, discussed, *infra*, at § II.B. 314 NLRB at 314. (*See* ALJD 34 at 24-25).

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[21] Furthermore, it has been suggested that the *Stone Container* exception applies only to first-contract negotiations, and not to negotiations for successor contracts. See *Oak Hill*, JD-08-13, 2013 WL 664197 (NLRB Div. of Judges)(Feb. 22, 2013).

Finally, the Company holds out *Finley Hospital* as a great champion of its cause. In *Finley Hospital*, an employer unilaterally discontinued three-percent wage increases when the CBA expired. The Board found that the employer was required to continue these raises as part of the "dynamic status quo." 359 NLRB slip op. at 2. What distinguishes *Finley Hospital* from the case at hand is that, in *Finley Hospital*, there was absolutely no employer discretion involved in the "dynamic status quo" that the parties were required to maintain. Rather, the amount of the wage increase was set out in the collective-bargaining agreement. Likewise, the cases cited to by the Board for support involved no employer discretion. See *AlliedSignal Aerospace*, 330 NLRB 1216 (2000) (employer discontinued paying severance benefits for laid-off employees); *General Tire & Rubber Co.*, 274 NLRB 591 (1985), *enf'd.* 795 F.2d 585 (6th Cir. 1986)(employer discontinued supplemental benefits plan).[22] Nothing in *Finley Hospital* responds to the question left by *Courier-Journal* and answered by *DuPont*—namely, can unilateral changes be made pursuant to the management-rights clause of an expired contract?

Thus, the ALJ did not ignore case law or err when he determined that the same reasoning applied in *DuPont* can easily be applied to the case presented here. (See ALJD 21 at 34-49). The Company did not establish a past practice of making unilateral changes to bargaining-unit employees' health care benefits during the hiatus between contracts. The decision, therefore, is in keeping with both *Courier-Journal* and *DuPont*, and should be affirmed.

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[22] See also *New NGC, Inc.*, JD-47-12, 2012 WL 3904672 (NLRB Div. of Judges) (Sept. 7, 2012) (employer failed to follow dynamic status quo by refusing to remit health insurance premiums to a union-sponsored trust fund where no employer discretion was exercised).

2. *Courier-Journal* should be overruled because management-rights clauses expire with collective-bargaining agreements and proposals that vest unlimited discretion with management cannot be implemented even when impasse is reached.

While the *DuPont* Board postponed resolution of the tensions left by *Courier-Journal* for another day, those tensions have the potential to wreak havoc on longstanding Board law that (1) management-rights clauses expire with a contract, see *Beverly Health & Rehab. Svcs.*, 297 F.3d at 479; *Beverly Health & Rehab. Svcs., Inc.*, 335 NLRB at 636-637 (2001); *Holiday Inn of Victorville*, 284 NLRB at 916; *Irontron Publications, Inc.*, 321 NLRB 1048, 1048 (1996); *Buck Creek Coal*, 310 NLRB at fn. 1; *Control Services*, 303 NLRB 481, 484 (1991), *enf'd.* 961 F.2d 1568 (3d Cir. 1992); *Long Island Head Start Child Dev. Servs. v. NLRB*, 460 F.3d 254 (2d Cir. 2006); (2) an employer may not unilaterally implement changes to mandatory subjects of bargaining in the absence of impasse (except for certain, narrowly-defined exceptions[23]), see *Katz*, 369 U.S. at 746; *FKW, Inc.*, 321 NLRB 93, 94 (1996); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enf'd.* 15 F.3d 1087 (9th Cir. 1994); and (3) an employer may not make unilateral changes—even where impasse exists—when the change amounts to unbounded managerial discretion, *see McClatchy II*, 321 NLRB 1386 (1996).

Indeed, in *Du Pont*, the D.C. Circuit took note of the tension created by *Courier-Journal* and *Capitol Ford*, 343 NLRB 1058 (2004), and instructed the Board to "either conform to its precedent in *Capitol Ford* and in the 2006 iteration of *Beverly Health Services*, 346 NLRB 1319 (2006), or explain its return to the rule it followed in its earlier decisions." *Du Pont*, 682 F.3d at

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[23] In *FWK, Inc.*, the Board clarified that the affirmative defense of waiver is not available to an employer during negotiations for a contract to replace an expired one unless (1) a union continually avoids or delays bargaining or (2) "when economic exigencies compel prompt action." 321 NLRB at 94; citing *Bottom Line Enterprises*, 302 NLRB at 374. Neither of the exceptions contemplated by *FWK, Inc.* and *Bottom Line Enterprises* are present here and the Company relies on its dynamic status quo/past practice theory rather than the two exceptions cited above.

70; citing *Manhattan Ctr. Studios, Inc. v. NLRB*, 452 F.3d 813, 816 (D.C. Cir. 2006). As the ALJ indicated in his decision, the Board should take this opportunity to overrule *Courier-Journal* and relieve the tension between contract-based waiver and the statutory right to bargain.

Years before *Courier-Journal* was decided, the Board distinguished management-rights clauses from the terms and conditions of employment that must be maintained to preserve the status quo under *Katz*. A management-rights clause is different than other terms and conditions of employment that do not expire with the contract because

> [t]o the extent that it authorizes unilateral action to change matters that are not mandatory subjects of bargaining, it is, in effect, **a union's waiver of its statutory right to bargain over those matters**. Given the established rule that such waivers must be clear and unmistakable (*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983)), we would not presume that the granting of management rights to one employer was intended, without more, to apply to a successor employer who does not adopt the contract. Rather, the waiver would be limited to the time during which the contract that contains it is in effect.

Holiday Inn of Victorville, 284 NLBR at 916. This holding has been extended to situations beyond successor employers, including the one presented here. *Irontron Publications, Inc.*, 321 NLRB at 1048 ("It is well settled that the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intentions to the contrary."); (citing *Buck Creek Coal*, 310 NLRB at fn. 1); *Control Services*, 303 NLRB at 484. And, it is equally well-established that reservation-of-rights clauses are the equivalent of single-issue management-rights clauses that also expire with the collective-bargaining agreement. *Beverly Health & Rehab. Services*, 335 NLRB at 636-637.

But, as Member Liebman points out in her partial dissent, *Courier-Journal* calls this well-established law on waiver into question. If the waiver of the right to bargain can extend beyond the life of the contract that creates it, then the statutory right to bargain over the waived issues is potentially lost forever. *Courier-Journal*, 342 NLRB at 1096 (Liebman, dissenting in

part). Indeed, the extension of reservation-of-rights clauses beyond expiration of the contract changes a mandatory subject of bargaining into

> one over which the Respondent may never again have a duty to bargain . . . unless and until the Union is able to persuade the Respondent to give up, the Union will never again have a voice in setting the substantive terms of the health benefits received by the employees it represents. **This result is *wholly at odds* with the Act's notion of collective bargaining.**

Id. at 1097 (emphasis added). The possibility of a mandatory subject never again being bargained until the union is able to persuade the employer to give it up is exactly the situation that is present here.

The problem presented by *Courier-Journal* is that it prioritizes the statutory maintenance of the status quo over the statutory right to bargain. But this is not in keeping with the Act's purposes for several reasons. First, the Board assumes that "[p]reserving the status quo facilitates bargaining by ensuring that the tradeoffs made by the parties in earlier bargaining remain in place." *Finley Hospital*, 359 NLRB slip op. at 2. However, when parties bargain a waiver, such as a management-rights clause, they do so with the understanding, pursuant to well-established Board law, that the waiver will expire with the contract.[24] Only where there is evidence of the parties' intentions for the waiver to outlive the contract will the waiver be deemed to extend beyond the contract as part of the status quo. Thus, the Board itself has implied that, in situations such as the one presented here, the statutory right to bargain should take precedence over the maintenance of the status quo. Indeed, this leaves the party to waive anew the right to bargain,

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[24] Cf. *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 813 (2007) (changing from the waiver to "contract-coverage" standard would "create a significant and unbargained-for shift of rights to employers and away from employees and unions, who previously thought they were assured of the right to bargain collectively over matters that were not explicitly waived).

whereas the maintenance of the "status quo management rights" prevents the union from exercising its right to bargain.[25]

Second, *Courier-Journal* allows for the possibility that an employer may make unilateral changes in the absence of impasse even where, as here, the parties agree they were not at impasse. (SF ¶ 63 ("During the 2012 bargaining, Raytheon and the Union did not reach impasse.")). This, too, is wholly at odds with the Act and, by implication, with the *Courier-Journal* decision itself. Indeed, in *Courier-Journal*, the Board specifically observed that, "[i]f impasse is reached, . . . the employer cannot implement its proposal, because it vests complete discretion in the Employer." *Courier-Journal*, 342 NLRB at 1095 (citing *McClatchy II*, 321 NLRB 1986).

And, third, *Courier-Journal* makes it possible for an employer to unilaterally implement a change in the terms and conditions of employment that normally it would not be entitled to make even when impasse *does* exist. *McClatchy II*, 321 NLRB 1386.

The ways that *Courier-Journal* fails to square with existing Board law leads to confusing and distorted decisions. In *Capitol Ford*, for example, the Board allowed a successor employer to make unilateral changes to its predecessor's bonus programs, even when the contract creating that ability was no longer in effect. Member Walsh's dissent in that case focuses on the well-established principle that "any union waiver of the statutory right to bargain did not outlive the contract that contained it." 343 NLRB at 1060 fn. 1 (Walsh, dissenting in part).

More telling of *Courier-Journal*'s ability to aid in the misapplication of Board precedent, however, is the D.C. Circuit's opinion in *E.I. DuPont de Nemours & Company*. The *DuPont*

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[25] Indeed, the possibility of forever waiving the right to bargain over a mandatory subject of bargaining presented in *Courier-Journal* is directly at odds with Board law that a union's acquiescence in the past does not forever waive the right to bargain. *See Owens-Corning Fiberglas Corp.*, 282 NLRB at 609.

Board decisions had been appealed to the D.C. Circuit Court for review. Even though *DuPont* was in keeping with *Courier-Journal*, the court decided to remand the decision back to the Board. In order to follow the Board's *Courier-Journal, Capitol Ford*, and the 2006 *Beverly Health & Rehabilitation Services* decisions, the court had to find that the obligation to "treat the [union] employees exactly the same as [the non-union employees]" was a *limitation* of the employer's discretion. *Du Pont*, 682 F.3d at 68. This tortured logic was predicted by Member Liebman in her dissent to *Courier-Journal*, where the "limitation" on the employer was the same:

> The only limitation on the changes the Respondent could make in the costs and benefits of health care coverage for unit employees was that they be the same as for unrepresented employees. As the judge pointed out, **that was no limitation at all**: the Respondent could do exactly as it pleased with regard to the latter group's coverage, and therefore, by extension, it could do the same for unit employees.

Courier-Journal, 342 NLRB at 1096 (Liebman, dissenting in part). And, this same non-existent "limitation" is what the Company here claims is a rein on its discretion.

For these reasons, the ALJ was correct when he stated that the *Courier-Journal* line of cases

> has brought about the unusual circumstance in the instant case in which no party is claiming impasse has been reached despite the Respondent's implementation of its health care changes. In short, there is an underlying inconsistency, at least to the undersigned, in allowing an employer to unilaterally implement changes to terms and conditions of employment during negotiations, but at the same time state that the employer cannot lawfully insist to bargaining to impasse and implement that same proposal.

(ALJD 19 at fn. 6).

The significance of the ALJ's observation that, under *Courier-Journal*, an employer could implement a proposal to which it could not lawfully insist to impasse and implement is immense. The ALJ refers to the Board's decision in *McClatchy II*; the Company argues that

McClatchy II "is not relevant to the analysis of Raytheon's past practice." (Supporting Brief at 39). Not only is *McClatchy II*'s holding relevant, but so is the reasoning the Board applied in reaching its decision.

In the *McClatchy* cases, the parties were bargaining and reached impasse; upon reaching impasse, the employer unilaterally implemented wage increases based entirely on merit and at the employer's discretion. The D.C. Circuit Court remanded *McClatchy Newspapers*, 299 NLRB 1045 (1990) (*McClatchy I*), to the Board because it found that the Board's determination that the employer violated the Act by implementing the merit-wage-increase proposal did not "constitute reasoned decision making under past Board and court interpretations of the Act." *NLRB v. McClatchy Newspapers, Inc., Publisher of the Sacramento Bee*, 964 F.2d 1153, 1153 (D.C. Cir. 1992) (*Sacramento Bee*).

In making this decision, the *Sacramento Bee* Court relied heavily on *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). In *American National Insurance*, the Supreme Court held that an employer may lawfully insist on "the retention of discretion under a management rights clause over certain mandatory subjects of bargaining." *McClatchy II*, 321 NLRB at 1388. The D.C. Circuit found that the *McClatchy I* Board had failed to justify its reasoning of why an employer was able to bargain for retaining unlimited discretion under a management-rights clause but not legally implement that same language when impasse was reached (and an employer could generally implement unilateral changes without violating the Act). *Sacramento Bee*, 964 F.2d at 1157-1158. The *Sacramento Bee* Court did not understand the Board's reliance on *Katz*'s holding that an employer could not unilaterally implement mandatory subjects of bargaining, rather than *American National Insurance*'s approval of bargaining waivers on mandatory subjects of bargaining. *Id.* at 1030.

On remand, the Board's answer in *McClatchy II* was based on *Katz*, rather than *American National Insurance*, because the latter case did not concern implementation or impasse:

> Although *Katz* does not hold that employer bargaining proposals for merit increases must themselves include procedures and criteria, the Court's introductory invocation of "the statutory objective of *establishing* working conditions through bargaining" ([*Katz*, 369 U.S.] at 744, emphasis added), stands at odds with any assertion that an employer should be able, by means of a unilateral implementation following impasse of its discretionary merit wage proposal, to institute a practice of periodically granting such wage increases without any known procedures or criteria for reaching these determinations. ***When a union has withheld its agreement to such a wage increase system, the employer's subsequent unilateral determinations making changes in the wages of individual unit employees amount to changes in terms and conditions of employment that are made totally outside the collective-bargaining process.*** Accordingly, the Respondent's contention that this conduct is permissible, gains little support from the Court's opinions in *American National Insurance* and *Katz*, which converge on the principle that the collective-bargaining process is the primary vehicle for establishing working conditions.

McClatchy II, 321 NLRB at 1389 (emphasis in original and added). Thus, *McClatchy II* resolved the tension presented by *American National Insurance* (parties can agree to management-rights clauses that vest discretion with the employer and waives the union's right to bargain for the life of the contract) and *Katz* (an employer cannot make unilateral changes to mandatory subjects of bargaining). *Katz*, and the statutory right to bargain, prevailed.

Thus, *McClatchy II* is more than relevant here because it demonstrates that, when given a choice, the Board properly privileges the statutory right to bargain in order to further the purposes of the Act. Additionally, the Board observed that

> were we to allow the Respondent to implement [these proposals] without agreement . . . , such that the Employer could thereafter unilaterally exert unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria, ***the fundamental concern is whether such application of economic force could reasonably be viewed "as a device to [destroy], rather than [further], the bargaining process.***"

Id. at 1389 (emphasis added)(quoting *Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982)). The employer's

> open-ended, intermittent disruption of collective bargaining by means of the implementation of a proposal for repeatedly shifting wage rates with no objective basis and without the Guild's participation ***fully bypasses*** the Guild in its role as employee bargaining representative. ***Such a result would be*** **antithetical** ***to our statutory system of collective bargaining meant to promote industrial stability.***

Id. (emphasis added)(citing *Katz*, 369 U.S. at 747). The problem of the implementation of the fully-discretionary proposal was its effect on the *process* of collective bargaining, not the proposal itself, because it—just as the survival of a waiver of the right to bargain past a contract's expiration—effectively eviscerated the right to bargain.

Indeed, the D.C. Circuit enforced in relevant part the Board's second *McClatchy* decision. *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026 (D.C. Cir. 1997) (*McClatchy*). In that case, the court found that it was within the Board's authority to prevent an employer from implementing a change that vests full discretion with itself because it "represents a blueprint for how an employer might effectively undermine the bargaining process while at the same time claiming that it was not acting to circumvent its statutory bargaining obligation." *Id.* at 1032 (quoting *McClatchy II*, 321 NLRB at 1391).[26]

The Board faces the same situation here with the conflict between waiver and the statutory right to bargain: allowing a reservation-of-rights clause to survive the contract that creates it is exactly the same sort of blueprint that would undermine the collective-bargaining process while allowing employers to claim that they are not violating the Act at all. The aberration in Board law, however, is not, *DuPont*, as the Company asserts: it's *Courier-Journal.*

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[26] See also *Courier-Journal*, 342 NLRB at 1096-1097 (Liebman, dissenting in part) ("If dealing with union-represented employees exactly as it would if they were not represented is a 'limitation' on [an employer's] discretion, it is one that most employers would be happy to accept.").

The Company's arguments to the contrary are merely an attempt to lawfully undermine collective bargaining and reserve for management the right to make changes as if its employees were unrepresented.

B. The Union Exercised, Rather Than Waived, Its Right To Bargain Over Changes To The Health Care Plan.

The Company argues that the Union, having agreed to a reservation-of-rights clause in the benefit plan, has forever waived the right to bargain over the right to make changes to the plan. This argument centers around the reservation-of-rights clause in the CBA. But, as explained above, this language expired with the CBA on April 29, 2012. (SF ¶ 59).

Moreover, the Company's argument ignores the fact that the Board has consistently and emphatically adhered to the principle that the waiver of the right to bargain over a mandatory subject is not "lightly inferred." *Georgia Power Co.*, 325 NLRB at 420. Waiver can be established three ways. See *American Diamond Tool, Inc.*, 306 NLRB 570, 570 (1992). First, when the language is "clear and unmistakable," waiver can be established by express agreement of the parties. *Metropolitan Edison Co.*, 460 U.S. at 708. In order to meet this standard, the party asserting waiver must be able to show that the contract language unequivocally and specifically expresses waiver of the right to bargain over a particular subject. *Allison Corp.*, 330 NLRB 1363, 1365 (2000) (citing *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995)).

Thus, even when the parties have agreed that a supplemental benefits plan providing life insurance, accidental death and dismemberment, survivor income benefits, hospital and medical benefits, major medical coverage, prescription drugs, pension benefits, and supplemental workers' compensation expires 90 days after the contract, the Board found no waiver of the right to bargain over the existence of the supplemental benefits after the specific 90-day period. *General Tire & Rubber Co.*, 274 NLRB 591. Although the Board noted that the parties had

specifically agreed upon a time period to extend the supplemental benefits, the party asserting waiver lacked evidence that this limitation unequivocally and specifically waived the right to bargain over what happened to the benefits after the 90-day period. Here, as in *General Tire & Rubber*, the Company has not provided any evidence that the Union waived the right to bargain changes to the medical benefits after the expiration of the contract and the express waiver provision.[27]

Second, waiver can be established by bargaining history—but only when the party asserting waiver can show that the waived matter was "fully discussed" by both parties and the waiving party "consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB at 1365 (citing *Trojan Yacht*, 319 NLRB 741, 742 (1995)). The Company cites to *Mt. Clemens General Hosp.* for support on this issue. 344 NLRB 450 (2005). In *Mt. Clemens*, the employer unilaterally made changes to a "tax shelter annuity" program ("TSA"). This program was not covered by the CBA. *Mt. Clemens*, 344 NLRB at 459. Additionally, the CBA included other relevant language that the ALJ and Board found to be evidence that the waiver of the right to bargain over the TSA was fully discussed and the union consciously yielded. Finally, the ALJ and Board also found that the right had been exercised before with the union's acquiescence. Here, there is no evidence that the parties fully discussed the issue of the reservation-of-rights clauses surviving the CBA, that the Union consciously yielded its interest in this matter, or that the Union acquiesced to changes when no contract was in effect.

Finally, waiver can be established by acquiescence. Significantly, "a union's past acquiescence in an employer's unilateral action on a particular subject does not, without more,

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[27] Waiver is an affirmative defense used to "avoid an otherwise binding bargaining obligation" and must be proven by the party asserting it. *R.P.C., Inc.*, 311 NLRB 232, 234 (1993) (citing *Insulfab Plastics*, 274 NLRB 817, 821 (1985), *enf'd.* 789 F.2d 961 (1st Cir. 1986)).

constitute a waiver by the union of any right it may have to bargain about future action by the employer in that matter." *Johnson-Bateman Co.*, 295 NLRB 180, 188 (1989). In other words, a right once waived is not waived forever. See *Owens-Corning Fiberglas Corp.*, 282 NLRB at 609 ("union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time."); *Verizon New York, Inc. v. NLRB*, 360 F.3d 206, 209 (D.C. Cir. 2004).

In this case, the Union acquiesced to the changes when the CBA was in effect. This was not a waiver of the right to bargain forever—indeed, even if the Union had never before opposed the unilateral changes to medical benefits without the reservation-of-rights clause, the right to bargain over that issue would not be lost for all time. But, under the Company's proposed application of *Courier-Journal*, a reservation-of-rights clause would effectively waive the right to bargain forever, even when an employer could not unilaterally implement the same proposal at impasse. The situation the Board faces here is precisely what Member Liebman described, and warned against, in her *Courier-Journal* dissent.

Furthermore, the ALJ was correct when he found that the specific changes made over the health care benefits were presented to the Union as a *fait accompli*. (ALJD 34 at 24-25). "The Board does not find a waiver when the change has essentially been made irrevocable prior to the notice ***or has otherwise been announced as a matter on which the employer will not bargain***." *Mercy Hosp. of Buffalo*, 311 NLRB 869, 873 (1993) (emphasis added)(citing *Michigan Ladder Co.*, 286 NLRB 21 (1987)); *Glass & Pottery Workers (Owens-Corning)*, 282 NLRB 609 fn. 1 (1987)). To determine whether an employer unlawfully presented a union with a *fait accompli*, the Board "looks for objective evidence." *Id.*; see also *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013, 1017 (1982) ("if . . . the employer has no intention of changing its mind, then the

notice is nothing more than informing the union of a *fait accompli*." (citing *Int'l Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972)).

The objective evidence here shows no evidence of waiver or of the Company's willingness to bargain over specific changes to health care benefits. When the Company informed the Union of its intention to change medical benefits during the hiatus between contracts, the Union asked for the Ft. Wayne bargaining-unit employees to be excluded. (SF at ¶ 65). Medical benefits and the "pass through" language were discussed at several bargaining sessions. (SF ¶¶ 54-62). Therefore, the Union actively exercised its right to bargain over the allegedly-waived subject of bargaining the very first time the Company tried to make unilateral changes when a contract was expired.

The ALJ was correct in finding that the Union did not waive the right to bargain over changes to the benefits plan, and that the Company violated the Act by notifying bargaining-unit employees of those changes.

C. The ALJ Did Not Err In Rejecting The Company's Public Policy Argument.

The Company alleges that the ALJ erred by rejecting its public policy argument that an employer's ability to provide just one benefits plan to all its employees—those represented by a union and not alike—over the bargaining-unit employees' right to bargain. The Company's argument, however, fails in several respects. First, while the Union derived the benefit of the bargain reached in 2009 by ensuring that bargaining-unit employees would be able to have medical benefits, the Company also derived a benefit: it did not have to provide the Ft. Wayne, USW-represented employees a benefits plan different from those of other employees across the country. In the 2009 contract, the Company even won the benefit of the right to make unilateral changes to benefits as it pleased. The Company exercised this right a bit too liberally which, in

turn, caused the Union to withdraw its consent to the "pass through" language. Nonetheless, both parties derived some benefit from the 2009 CBA.

Second, the Company's reasoning would privilege an employer's unfettered right to make changes pursuant to expired reservation-of-rights clauses over one of the most fundamental rights bestowed upon bargaining-unit employees' by the Act: the right to bargain and, in effect, have a voice in the terms and conditions of their employment. The importance of this right cannot be understated. If the Board were to extend *Courier-Journal*'s reasoning to the situations presented here and in *DuPont*, it would effectively give away the right to bargain over any mandatory subject of bargaining waived by a reservation-of-rights clause. The implications of this state of affairs would be disastrous for collective bargaining across the country. In order to further the purposes of the Act, the Board must privilege the right to bargain—otherwise what is the point of having a union?

Third, the Company puts the onus of making proposals for a new medical benefits plan on the Union alone. (Supporting Brief at 49). This overlooks the fact that the Company, too, was free to make more creative proposals. If the "pass through" language was so important to the Company—and, presumably, it is of the utmost importance—it could have made a variety of proposals to "sweeten the pot" in other areas of the CBA, such as wages, the pension multiplier—perhaps even reimbursement of part of the increased premiums that were levied on non-unit employees. Just as Union negotiators are sophisticated, so too are those of the Company.

Finally, the Company asserts that upholding *DuPont* would deter employers from offering participation in these company-wide plans for union-represented employees.

(Supporting Brief at 47). There is, however, no evidence presented to back up this assertion.[28] In support of its contention, the Company cites to Member Schaumber's dissent in *DuPont*. First, Member Schaumber's dissent relies upon a disagreement with extant Board law that reservation-of-rights clauses, like management-rights clauses, expire with the contract. *DuPont*, 355 NLRB No. 177 slip op. at 3 (Schaumber, dissenting)(citing *Mary Thompson Hosp.*, 296 NLRB 1245 (1989), *enf'd.* 943 F.2d 741 (7th Cir. 1991)). Second, Member Schaumber's dissent in *Louisville Works* revolves around the idea that reservation-of-rights clauses in benefits plans are "discrete, specific and integral components of the benefits plans" and that the employer never would have agreed to provide benefits under the plan without the reservation-of-rights clause. *Louisville Works*, 355 NLRB slip op. at 6 (Schaumber, dissenting).

Respectfully, the Company's arguments based on Member Schaumber's dissents must fail. Here, there is no evidence presented that the reservation-of-rights clauses were thought of as inseparable from the benefits plan in a way that would constitute any of the three methods for achieving waiver explained above. (*See also* ALJD 36 at 19). And, the reasoning in Member Schaumber's dissent is a departure from the Board's reasoning in *Courier-Journal* which was specifically *not* a case about reservation-of-rights clauses.

For these reasons, the ALJ did not err when he rejected the Company's public policy arguments.

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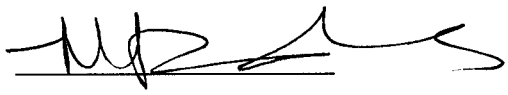
[28] The Company's public policy argument implies that the ALJ should have taken the Company's potential liabilities under ERISA into account when deciding whether it was privileged to make the unilateral changes to healthcare benefits. (Supporting Brief at fn. 14). But, the Company's obligation to comply with ERISA is its alone. Indeed, if the Company were concerned about its ERISA obligations *and* its own obligation to bargain, it may have had a greater incentive to reach an agreement with the Union. Since the Company only concerned itself with its ERISA obligations, it ran afoul of the Act. Furthermore, the Board lacks jurisdiction to consider ERISA claims. *Martin v. Garman Constr. Co.*, 945 F.2d 1000, 1003 (7th Cir. 1991).

III. CONCLUSION

For the reasons stated above, the Union respectfully requests that the ALJ's Decision and Recommended Order be adopted.

Respectfully submitted,



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UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION

January 14, 2014

CERTIFICATE OF SERVICE

This is to certify that a true copy of the CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND REQUEST FOR ORAL ARGUMENT was served via electronic mail this 14th day of January 2014 upon:

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