UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E. I. DUPONT DE NEMOURS AND COMPANY	)	
AND	)	Case No. 5-CA-90984
AMPTHILL RAYON WORKERS, INC., LOCAL 992, INTERNATIONAL BROTHERHOOD OF DU PONT WORKERS	)	Case No. 9-CA-91793
FREON CRAFTSMAN UNION, LOCAL 788, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS	)	Case No. 26-CA-92629
INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (IBDW), LOCAL 593, OLD HICKORY EMPLOYEES COUNCIL	)	

BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENT E. I. DU PONT DE NEMOURS AND COMPANY TO THE DECISION OF ADMINISTRATIVE LAW JUDGE MICHAEL A. ROSAS

Kris D. Meade
Glenn D. Grant

Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595

Counsel for Respondent
E. I. DuPont de Nemours and Company

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INTRODUCTION

Ignoring the parties' agreements and more than 30 years of consistent past practice, Administrative Law Judge ("ALJ") Michael A. Rosas ruled that Respondent E. I. du Pont de Nemours and Company ("DuPont" or "the Company") violated Sections 8(a)(5) and (1) of the Act at three unionized locations (the Richmond Plant, Louisville Plant, and the Nashville Plant) by implementing, unilaterally, changes to two of its comprehensive, corporate-wide benefit plans: the Dental Assistance Plan ("DAP") and Medical Care Assistance Plan ("MEDCAP").[1]

All three Unions agreed to have their members participate in the DAP in 1976. Similarly, all three Unions agreed to have their members participate in MEDCAP starting in the mid-1980s. The Unions each accepted the DAP and MEDCAP, and agreed to participate in those benefit plans subject to the terms of the plans themselves, which include "reservation of rights" language that gives DuPont the right to modify the plans unilaterally at its discretion. Simply put, the parties struck a deal that allowed Union workers to participate in the DAP and MEDCAP, and receive the same benefits as all other plan participants nationwide (both union and nonunion), in exchange for the Unions' agreement that DuPont retained the right to modify the plans without first bargaining with any individual union.

Pursuant to that *quid pro quo*, DuPont exercised its rights by implementing a wide variety of changes to the DAP and MEDCAP unilaterally on January 1 every year for decades. During that time, members of the Unions continued to receive the very same DAP and MEDCAP benefits, under the very same terms, as every other participant in the plans nationwide.

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[1] The three charging party unions in this case are: The Ampthill Rayon Workers Union, Local 992 ("Local 992"), the International Brotherhood of DuPont Workers Local 593 ("Local 593") and the Freon Craftsman Union Local 788 ("Local 788") (collectively "the Unions").

Following its typical pattern, DuPont announced modifications to the DAP and MEDCAP in August 2012, which became effective in January 1, 2013 ("the 2013 Changes"). The 2013 Changes altered the manner in which DuPont's Medicare-eligible retirees ("MERs") receive secondary health and dental benefits under the DAP and MEDCAP. Prior to 2013, MERs had no choice as to their secondary medical or dental benefits. Starting in January 2013, DuPont began providing those benefits to MERs through a tax-exempt Health Reimbursement Arrangement ("HRA"). DuPont now contributes funds to each MRE's HRA, and allows the retiree to select the supplemental medical and dental coverage that best suits his or her individual needs. Consistent with past practice, Union-represented MERs continued to participate in the DAP and MEDCAP on the very same basis as all other plan participants following the 2013 Changes. And, as in the past, the Company did not bargain with the Unions before implementing the 2013 Changes.

The Unions filed separate unfair labor practice charges at all three sites, challenging DuPont's right to make the 2013 Changes. ALJ Rosas ruled that DuPont violated Sections 8(a)(5) and (1) of the Act by modifying the DAP and MEDCAP without first bargaining with the Unions over the 2013 Changes. DuPont's right to modify the DAP and MEDCAP unilaterally is also at issue in a related case, Case No. 5-CA-33461, which was also presided over by Judge Rosas and is currently pending before the Board. As discussed in detail below, Judge Rosas's decision is fatally flawed in many respects and he repeats in this case several of the errors that plague his decision in Case 5-CA-33461.

First, Judge Rosas ignores the undisputed fact that the Unions agreed to the DAP and MEDCAP reservation of rights language as the price of admission for their members' participation in the plans on the same terms as all other plan participants. Second, the Judge fails

to recognize that DuPont's decades-long practice of unilateral changes is powerful evidence of the deal the parties' struck. Third, the Judge applied an overly rigid construction of the Board's dynamic *status quo* doctrine in finding that DuPont was not authorized to make the 2013 Changes. Fourth, in an attempt to chip away the parties' established past practice, the Judge erroneously found that DuPont had "bargained" in the past over certain DAP and MEDCAP changes merely because it responded to Union inquiries about the changes. Fifth, the Judge failed to appreciate the legal significance of the Unions' failure to object to the unilateral changes to the DAP and/or MEDCAP year after year, even though the Judge found that the vast majority of those changes reduced benefits.

Ultimately, by ruling that DuPont cannot change the DAP and MEDCAP unilaterally, Judge Rosas has re-written the terms of DuPont's long-standing agreement with the Unions, and has upset the *status quo* by creating a situation in which Union members will participate in the DAP and MEDCAP on terms that are vastly different from those offered to every other plan participant. That result is a material departure from past practice and clearly frustrates the expectations of the parties. Moreover, the natural consequence of the Judge's decision is one that benefits neither employers nor Union members, in that it will likely force employers to exclude unionized workers from participation in corporate-wide benefit plans.

PROCEDURAL HISTORY

The Acting General Counsel filed his Complaint on December 28, 2012, alleging that DuPont violated Sections 8(a)(5) and (1) of the Act by failing to bargain with the Unions with respect to the 2013 Changes. (ALJD 1). DuPont filed a timely answer denying any wrongdoing.

A hearing was conducted before ALJ Rosas on June 12 and July 17, 2013 in Washington D.C., and in Nashville, Tennessee on August 27-28, 2013. DuPont and Counsel for the Acting General Counsel filed post-hearing briefs and reply briefs. On December 20, 2013, ALJ Rosas

issued his decision, concluding that DuPont violated Sections 8(a)(5) and (1) by failing to bargain over the 2013 Changes upon request by the Unions. (ALJD 22:43-47).

SUMMARY OF FACTS
(Exception Nos. 1-70)

I. THE PARTIES' BARGAINING RELATIONSHIP

As of January 1, 2013, DuPont employed more than 34,000 employees nationwide, at numerous manufacturing facilities throughout the country; fewer than 3,700 of those employees are represented by labor unions. (ALJD 2:24-26; Jt. Exh. 1).[2] The Company employs approximately 2,500 employees at its Spruance Fibers Plant near Richmond, Virginia ("the Richmond Plant"), of whom approximately 1,170 are hourly workers represented by the Ampthill Rayon Workers Union, Local 992 ("Local 992"). (ALJD 2:29-3:3). The bargaining relationship between DuPont and Local 992 at Richmond dates back more than 50 years. *(Id.*).

DuPont employs approximately 170 employees at its Louisville, Kentucky Plant ("the Louisville Plant"), 96 of whom are represented by the Freon Craftsman Union, Local 788 ("Local 788"). (*Id.* 3:10-12). One of Local 788's predecessors, the Neoprene Craftmen's Union ("NCU"), represented employees at Louisville for approximately 50 years. (*Id.* 3:12-13). In 2002, the NCU voted to affiliate with PACE, which later merged with the United Steel Workers of America in 2005. (*Id*. 3:13-15). In May 2010, employees voted to disaffiliate with the USW and form Local 788. (*Id.* 3:15-17). The local union leadership at Louisville remained largely unchanged during the transition from USW representation to Local 788 representation, and Local 788 agreed to adopt the existing USW collective bargaining agreement with no substantive

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[2] Joint Exhibits are referred to as ("Jt. Exh."), Respondent's Exhibits are referred to as ("Resp. Exh."), and Counsel for the Acting General Counsel's exhibits are referred to as ("GC Exh."). References to specific witness testimony are denoted by the last name of the witness and page number of the transcript where the testimony appears (*e.g.*, "Irvin, 31").

changes. (Lowman, 280-82, 299-301, 320; Bunn, 530). Local 788 and its predecessor unions will be referred to as "Local 788" unless otherwise designated.

DuPont employs approximately 240 employees at its Old Hickory facility near Nashville, Tennessee (the "Nashville Plant"). (ALJD 3:20-21). Approximately 120 of the 240 employees are represented by Local 593. (*Id.*). Local 593 has represented employees at the Nashville Plant for more than 50 years. (*Id*. 3:20-23).

II. DUPONT'S CORPORATE-WIDE EMPLOYEE BENEFIT PLANS

DuPont has maintained a single set of corporate-wide employee benefit plans for decades. (ALJD, 3:28-30; *see also* Jt. Exh. 4 at ¶ 6). DuPont has offered all U.S. employees the opportunity to participate in its corporate-wide plans regardless of where they work, their position within the Company, or whether they are represented by a union. (*Id*.). Having a single set of benefit plans covering all DuPont employees, retirees, and survivors, provides significant benefits to both DuPont and individual plan participants. (ALJD 3:3-35). Each of DuPont's corporate-wide benefit plans contains "reservation of rights" language that expressly states that the Company retains the right to change or modify the plans at its sole discretion. (*Id*. 4:7-9).

Because DuPont's corporate-wide plans cover tens of thousands of participants who are not and may never have been represented by a union, DuPont has always required, as the price of admission to the plan, that its unions agree to the reservation of rights provision in any new plan, allowing the Company the right to make changes to the plan in its discretion, without first bargaining to agreement or impasse over the changes. (*See, e.g.,* Black, 343-344; 473; *see also* Jt. Exh. 25, Tab. 7, p. 2 ("Management advised [Local 593] that the plan language [for a newly offered plan] contained a management prerogative provision")). After reviewing a new plan's language and benefits, the unions have had the choice as to whether their members participate in the plan, subject to the terms of the plan. (Black, 337; Bergthold, 376-78; Harrington, 473-74).

DuPont's unions have not been forced to participate in the Company's corporate-wide plans; their participation in the plans has always been voluntary. (*Id.*) Indeed, each of the Unions in this case has, on occasion, elected not to participate in certain of DuPont corporate-wide plans.

A. The Unions' Agreement to Participate in the DAP

DuPont created the DAP in early 1976 and offered it to employees and retirees nationwide. (ALJD 4:40-5:1). At union-represented sites, such as Richmond, Louisville and Nashville, the Company presented the Unions with the DAP Plan documents, and offered the union-represented employees the opportunity to participate in the DAP on the same basis as non-union employees, subject to the terms of the DAP Plan Document. (ALJD 5:7-10; Jt. Exhs. 16-17). The DAP Plan Document contained a reservation of rights clause that reserved to the Company the right to modify or terminate the DAP at its discretion. (ALJD 5:1-5). DuPont discussed the various features of the DAP and specifically discussed its reservation of rights provision with the Unions. (*See., e.g,* Resp. Exh. 3, Tab 1, pp. 2-3; *see also* Jt. Exh. 4 ¶¶ 15-17).[3]

The reservation of rights language in the DAP has remained virtually unchanged since it was agreed to by the Unions in 1976, and has continued to reserve to the Company the right to "amend or discontinue" the DAP. (ALJD 5:3-5). Union-represented employees at Richmond, Louisville and Nashville have always participated in the DAP on the same basis as employees at DuPont's non-union locations. (Jt. Exh. 4 ¶¶ 17-18).

[3] At Richmond, Local 992 specifically asked if it could bargain over changes to the DAP on "a local basis." (Resp. Exh. 3, Tab 1, p. 3). DuPont told Local 992 that it would not agree to bargain over changes to the DAP because it was a corporate-wide plan, but that the union could propose an alternative plan applicable only at Richmond if it did not wish to participate in the DAP: "[S]ince this is a companywide benefit, we cannot agree to change this specific plan. However, if the Union wishes to substitute a different plan for this location, Management will seriously consider their proposals." (*Id.*).

B. The Unions' Acceptance of MEDCAP

The Company created MEDCAP in 1983, and offered it to employees nationwide. (ALJD 5:19-20). Like the DAP, the MEDCAP Plan documents contained a reservation of rights clause that permitted the Company to modify or terminate MEDCAP at its discretion. (*Id*. 5:20).

1. Local 992's Agreement to MEDCAP at Richmond

The Company and Local 992 engaged in lengthy discussions of MEDCAP during meetings held in 1986 at Richmond. (ALJD 6:20-21). At that time, Local 992-represented employees at Richmond received medical benefits pursuant to a local Blue Cross Blue Shield Plan ("BCBS Plan") that was referenced in the Health, Surgical-Medical ("HMS") article of the parties' contract. (Resp. Exh. 3, Tab 19, at 3). The BCBS Plan was not a corporate-wide plan.

In March 1986, Local 992 objected to MEDCAP's reservation of rights language and told the Company that it would accept MEDCAP if the reservation of rights language was deleted. (Resp. Exh. 3, Tab 19, p. 3). In response, the Company informed Local 992 that reservation of rights language was contained in all of DuPont's corporate-wide plans, and it would not make MEDCAP available to Union-represented employees without the reservation of rights language:

> Management said the Management's Rights Clause[4] is standard language in all corporate plans. Other corporate plans such as the pension plan have the same type language. Management said they will not present a corporate plan that does not have a Management's Rights Clause. Employees do not have to choose the Aetna Plan[5] which contains the Management's Rights Clause if they are concerned.

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[4] The parties at all three work sites typically referred to the reservation of rights provision in DuPont's corporate-wide benefit plans as the "Management's Right's" provision. (*See, e.g.*, Black, 338; Harrington, 462; Kelsey, 497; Jt. Exh. 3 at 239 (Derr).

[5] MEDCAP was often referred to as the "Aetna Plan" at Richmond based on the fact that Aetna was the plan administrator for MEDCAP at that location. (Jt. Exh. 3, 235, 237 (Derr); Resp. Exh. 3, Tab 44, p. 2, Tab 46, p. 4, Tab 47, p. 1; Resp. Exh. 4, Tabs 2-4).

(*Id*.) (emphasis added).[6] The parties discussed the MEDCAP reservation of rights clause at length several times thereafter. (Resp. Exh. 3, Tab 20, pp. 9-11, Tab 21, pp. 4, 19, Tab 22, p. 3).

In September 1986, as ALJ Rosas specifically found in Case 5-CA-33461, "the Union agreed to participation in the new Aetna Plan (MEDCAP), including the reservation of rights clause contained in the Plan Document." (Case 5-CA-22461; ALJD 6:23-25) (emphasis added). The reservation of rights clause agreed to by Local 992 states:

> MODIFICATION OR TERMINATION OF THE PROGRAM
> The Company reserves the right to amend any provision of the Program or terminate the Program in its entirety should either course of action be deemed necessary by the Company.

(*Id.* 6:27-29; *see also* Jt. Exh. 1C, p. 23).[7] Shortly thereafter, the parties discussed how and whether to add language to the labor contract referencing MEDCAP. At that time, Local 992 specifically acknowledged the Company's right to make changes to MEDCAP unilaterally, and the Union suggested that MEDCAP be placed with DuPont's other corporate-wide plans in the contract's Industrial Relations Plans and Practices ("IRP&P") provision:

> The Union said there is a need for [MEDCAP] to be placed in the Labor Agreement where people recognize Management has a right to change without Union agreement.

(Resp. Exh. 3, Tab 24, p. 4) (emphasis added). This key passage, which is ignored in the Judge's decision, reflects Local 992's express waiver, allowing the Company to change MEDCAP unilaterally, "without Union agreement."

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[6] Notably, this critical passage, which appears in meeting notes that Judge Rosas credits as accurate, is ignored entirely in the Judge's decision.

[7] The reservation of rights language set forth in the MEDCAP plan document has remained unchanged since MEDCAP was first introduced and accepted by the Unions. (ALJD 5:20-22; 6:17-32).

The Company objected to MEDCAP being referenced in the labor contract's IRP&P provision because that provision required DuPont to provide Local 992 with one year's advance notice before implementing any changes that had "the effect of reducing or terminating benefits." (Resp. Exh. 3, Tab 24, pp. 1, 4; Jt. Exh. 1C). If DuPont had agreed to list the MEDCAP Plan among the corporate-wide plans identified in Section 1 of the IRP&P provision, it would have been precluded from making any negative changes, including increasing premiums or reducing or eliminating benefits, until one year after notice was given to Local 992. The Company was not willing to agree to that restriction. The Company's credited meeting notes show unequivocally that Local 992 knew full well that it had granted the Company the right to modify MEDCAP unilaterally in exchange for its members' participation in the plan.

On September 26, 1986, the parties agreed to include new, general language in the contract's HMS provision, rather than in the IRP&P provision. The new language made a general reference to MEDCAP as an alternative to the pre-existing Blue Cross Blue Shield medical plan without specifically mentioning MEDCAP by name:

> The Company may make available to employees alternate hospital medical-surgical coverage plans, and any employee may elect such alternate coverage in lieu of the coverage described in the above sections of this Article XIV.

(Resp. Exh. 3, Tab 25, p. 1; Resp. Exh. 6(b), p. 36). That "alternate" plan was MEDCAP, with its reservation of rights provision.[8]

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[8] In the prior case, Judge Rosas speculated that the omission of a specific reference to MEDCAP in the Richmond CBA indicated that Local 992 had successfully resisted the Company's efforts to condition participation in MEDCAP on the Company retaining the right to make changes unilaterally. (Case No. 5-CA-33461, at 13:40-50). That theory was not advanced by Counsel for the Acting General Counsel and is plainly wrong. If Local 992 had convinced DuPont to abandon its long-held and universally-applied position -- that it needed to retain the right to make changes to corporate-wide plans like MEDCAP unilaterally -- the Company's detailed meeting notes would surely have captured it. The Company's

(continued…)

2. Local 593's Agreement to MEDCAP at Nashville

Judge Rosas correctly concluded that Local 593 agreed to have its members participate in MEDCAP, subject to the terms of the plan documents, in December 1983. (ALJD 6:28-30). In addition, Judge Rosas properly found that Local 788's predecessor, the NCU, agreed to have its members participate in MEDCAP in 1984. (*Id.* 6:24-26). Like Local 593, the Unions at Louisville agreed to have their members participate, subject to the terms of the MEDCAP plan, which provides the Company with the right to modify the plan at its discretion. (Jt. Exh. 8).

The deals stuck at both Nashville and Louisville were memorialized in collective bargaining agreements that specifically stated that Union members could participate in MEDCAP as set forth in the terms and provisions of [the] Summary Plan Description (SPD). (*See* Jt. Exh. 30E at p. 28; Jt. Exh. 7 at p. 31). As with Union employees in Richmond, Union-represented employees in Nashville and Louisville have always participated in the MEDCAP plan on the same basis as all other plan participants nationwide.

C. Adoption of the BeneFlex Flexible Benefits Plan

In 1991, DuPont created a new cafeteria-style benefits plan called the BeneFlex Flexible Benefits Plan ("BeneFlex"), which includes several sub-plans providing various types of benefits, including medical and dental benefits. (ALJD 6:36-38). As it had with the DAP and MEDCAP, the Company offered the Unions the opportunity to have their members participate in BeneFlex on the same basis as non-union employees, subject to the terms of the BeneFlex documents. (*Id.* 6:28-7:1-3). In 1993, after considerable negotiation, Local 992 agreed to

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(continued…)

extensive notes do not reflect such an event, and Local 992 presented no evidence of such a victory. The parties' decision to omit MEDCAP from the CBA is without legal effect and does not undermine the key agreement and conditions under which the Local 992 agreed to participate in MEDCAP.

BeneFlex, including its reservation of rights provision, reserving to the Company the right to make changes without first bargaining with the Union. (ALJD 7:5; Jt. Exh. 1A p. 19; Jt. Exh. 1B p. 21). Locals 593 and 788 agreed to BeneFlex in 1994. (ALJD 7:5-6). As a result, all active Union-represented employees at Richmond, Nashville and Louisville began receiving medical and dental benefits under BeneFlex in 1994 and/or 1995. (*Id*. 7:11-13).

Eligible pensioners continued receiving benefits under MEDCAP and the DAP after the Unions accepted BeneFlex; they were not eligible to participate in BeneFlex. (*Id.*). Union-represented employees who retired at Richmond, Nashville and Louisville continued to receive MEDCAP on the same basis as non-union retirees following the Unions' acceptance of BeneFlex. The medical and dental benefits offered to active employees under BeneFlex largely mirror those offered to retirees under MEDCAP and the DAP. (*Id.* 7:16-17).

Because active employees received medical and dental coverage through BeneFlex, the parties agreed to delete the DAP from their respective CBAs. (*Id.* 7:6-9). For the same reason, the HMS provision was deleted from the Richmond and Nashville CBAs and a new Section 3 addressing BeneFlex was added to the Industrial Relations Plans and Practices Provision ("IRP&P") of those contracts. Similarly, the HMS provision was modified in the 1994 CBA at Louisville to add BeneFlex and delete the other medical plans, including MEDCAP, that were formerly referenced in that provision. (ALJD 7:8-9).

III. DUPONT'S HISTORY OF ANNOUNCING AND IMPLEMENTING SIGNIFICANT CHANGES TO THE DAP AND MEDCAP

As Judge Rosas correctly noted, the Company announced and made numerous unilateral changes to the DAP and/or MEDCAP during the period 1976 to 2012. (ALJD 7:31-32). The unilateral changes were typically announced in the late summer or fall of each year, prior to the open enrollment period in which employees and retirees select their coverage for the upcoming

year, and were implemented on January 1 of the following year. (ALDJ 7:32-35; Jt. 4 ¶ 27). (*Id*. 32-35). DuPont implemented a wide array of significant changes to the DAP and MEDCAP, including varying changes to premiums and co-pays. ((Jt. 4, ¶ 26; Jt. Exh. 10(a); Resp. Exh. 11(a)). DuPont likewise made other, further-reaching changes, such as modifying benefit levels, adding or eliminating covered procedures or medicines, and altering the criteria for who was eligible to participate in the plans. (*Id*). Most of the unilateral modifications made to MEDCAP and the DAP were disadvantageous to benefit plan participants, including Union members, as they "tended to reduce or restrict benefits." (ALJD 8:32-33).

The Unions have been fully aware of the unilateral changes made to MEDCAP and the DAP, both positive and negative. DuPont communicated to employees, retirees and the Unions about upcoming benefit changes in a variety of ways, including through email, letters, meetings, and Company-sponsored websites. (Jt. Exh. 4, ¶¶ 13-14). Although the majority of the changes to MEDCAP and the DAP reduced or restricted benefits, neither Local 992 nor Local 788 filed a single grievance or unfair labor practice charge challenging the Company's right to change MEDCAP and/or the DAP unilaterally at any time prior to 2007, or at any time between 2007 and 2012. (ALJD 8:33-34; 10-1-2, n. 76; Jt. Exh. 4 ¶ 52). Local 592 never filed a grievance or unfair labor practice charge at any time prior to filing its charge in this case. (White, 270, 266).

IV. THE 2013 CHANGES TO MEDCAP AND THE DAP

In 2012, the Company decided to make additional changes to secondary retiree medical and dental coverage for Medicare-eligible retirees (MERs) (and their covered dependents), with the changes becoming effective January 1, 2013. (ALJD 12:20-21). DuPont created tax-free accounts for its MERs (and/or their survivors), known as Health Reimbursement Agreements ("HRAs"). On January 1 of each year, beginning January 1, 2013, DuPont credits each

participant's HRA account with $1,200 for medical benefits and $200 for dental benefits. Funds not used in any given year roll over and are available for use during subsequent years. (*Id.*).

Pursuant to the 2013 Changes, MERs enroll in coverage of their choice within the options provided under MEDCAP and the DAP, as amended. (*Id.* 12:33-35). This provides retirees with greater flexibility to meet their health care needs. The benefit enrollment takes place through Extend Health, which assists the retirees in choosing an insurance company and plan. (*Id*.).

The 2013 Changes do not apply to retirees (and their covered dependents) until they become eligible for Medicare. (ALJD 13:1-3). Retirees and their covered dependents who are not yet eligible for Medicare continue to receive medical and dental coverage under MEDCAP and the DAP under the same terms as existed prior to the 2013 Changes, until they reach age 65 or become eligible for Medicare due to a disability. (*Id.* 13:2-5).

Educational sessions concerning the 2013 Changes were conducted for retirees in August and September 2012 at various locations around the country, during which the retirees were given detailed information about how to enroll in the available health care options through Extend Health. (ALJD 13:26-29). Employees were notified of the change through an email from DuPont's Senior Vice President, Human Resources, which described the 2013 Changes and identified websites that employees could visit for additional information about Extend Health and the specific health care plans offered. (*See* Jt. Exh. 10(b); *see also* Resp. Exh. 16)). A retiree, employee or Union official could determine what medical and dental coverage is available, through which carriers, and at what price, simply by going to an Extend Health website, providing some basic personal information (*e.g.*, age, sex, zip code, tobacco use), and clicking through two or three webpages. (Dickerson, 153-159; Resp. Exh. 17). The outreach

process conducted by Extend Health was highly successful as not a single retiree lost coverage as a result of the 2013 Changes. (Anderson, 548).

V. THE ANNOUNCEMENT OF THE 2013 CHANGES

Consistent with past practice, DuPont announced the 2013 Changes to the Unions at Richmond, Nashville and Louisville, explained the nature of the changes, and responded to Union questions about the changes. (*Id.* 13:7, 25-25-26; *see also* Jt. Exh. 4 ¶¶ 54, 66, 77). Union officials at all three locations received the announcement of the 2013 Changes, which identified the website where the Unions (and employees generally) could go to find specific information about the changes, what medical coverage was available, and at what cost. (Dickerson, 152-162; Jt. Exhs. 11 (b) & 17).

The Unions demanded rescission of the 2013 Changes and the Company responded by informing the Unions that the 2013 Changes were permissible pursuant to both the reservation of rights provisions in the MEDCAP and DAP documents and the parties' long-standing past practice of unilateral changes. (ALJD 14:1-7). Each of the Unions filed an unfair labor practice charge alleging that DuPont violated its duty to bargain over the 2013 Changes at issue here.

ARGUMENT

I. THE ALJ ERRED BY FAILING TO FIND EXPRESS WAIVERS OF THE UNIONS' RIGHT TO BARGAIN OVER THE 2013 CHANGES

Judge Rosas erred by concluding that the evidence failed "to reveal the existence of any express waivers by the Unions." (ALJD 19:4-8). As the Judge noted, "there was very little dispute as to the relevant facts," and the Company's notes of union-management meetings were credited as fairly and accurately depicting what was discussed at those meetings. (*Id.* 2, n.3). As explained below, the Judge failed to analyze properly, and in some cases ignored, compelling, and undisputed evidence that undermines his ultimate holding.

The Board considers four factors in determining whether a clear and unmistakable waiver exists: (1) language in the collective bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other "bi-lateral [agreements] that might shed light on the parties' intent." (ALJD 17:9-12, citing *Johnson-Bateman*, 295 NLRB 184, 187 (1989), and *American Diamond Tool*, 306 NLRB 570 (1992)).

As demonstrated below, the parties' bilateral agreements at Richmond, Nashville and Louisville, and the express waivers that were an integral part of those agreements, are reflected in the Company's uncontroverted bargaining notes and the reservation of rights provisions in the DAP and MEDCAP. The fact that the Unions' waivers are not embodied in the current labor contracts does not negate the existence of the waivers. Enforceable agreements need not be contained in a formal collective bargaining agreement: "The [National Labor Relations] Act, it is to be remembered, does not require contracts between employer and the union to be in any particular form, or that they be reduced to writing." *NLRB v. Scientific Nutrition Corp.*, 180 F.2d 447, 449 (9th Cir. 1950); *see also* 29 U.S.C. § 158(d); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550-51 (1964); *NLRB v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058, 1061 (8th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); *Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 524 v. Billington*, 402 F.2d 510, 513 & n.3 (9th Cir. 1968); *Warrior Constructors v. International Union of Operating Engineers*, 383 F.2d 700, 706 (5th Cir. 1967).

The Unions' waivers at Nashville and Louisville are also reflected in the parties' prior collective bargaining agreements, which expressly state that Union members could participate in the DAP and MEDCAP, subject to the terms of the plans. The express waivers are further confirmed by almost three decades of consistent past practice at all three sites.

A. The Unions Fully Discussed and Consciously Explored the Meaning of the DAP and MEDCAP Reservation of Rights Provisions Before Agreeing to Them (Exception Nos. 1, 5-6, 8 28, 30, 32-35, 37, 40, 42-43, 47, 65-70)

As ALJ Rosas correctly noted, "waiver of a statutory right may be evidenced by bargaining history" where "the matter at issue has been 'fully discussed' and 'consciously explored' during negotiations" and there is evidence that a party consciously waived its interest in the matter. (ALJD 18:21-23). *See Kiro, Inc.*, 317 NLRB 1325 (1995) (a waiver of a right to bargain over a particular matter can arise from the express language in a collective bargaining agreement, or it may be implied from the parties' bargaining history, past practice, or a combination thereof). The record contains abundant, undisputed evidence satisfying that standard.

1. Local 992 Waived Its Right to Bargain over Future Changes to the DAP and MEDCAP in Exchange for Its Members' Participation in the Plans on the Same Basis as All Other DuPont Employees

As the Judge previously found in Case No. 5-CA-33461: (1) "the parties bargained over [Local 992 members'] participation in the DAP, and employee participation *was subject to the Company's reservation of rights*," and (2) Local 992 "agreed to participation in MEDCAP, *including the reservation of clause contained in the Plan Document.*" (*See* ALJD Case No. 5-CA-33461, at 4, 6) (emphasis added). Those findings were based on the uncontroverted evidence that DuPont and Local 992 specifically discussed – *i.e.* fully explored – the reservation of rights language in both the DAP and MEDCAP before Local 992 agreed to have its members participate in the plans.

In March 1976, the parties specifically discussed the Company's right to modify the DAP and its benefit schedule, and the reservation of rights language in the plan, which states: "The company reserves the right to change or discontinue the Plan." (*See* Resp. Exh. 3, Tab 1, p. 2)

(emphasis added). The Company further informed Local 992 that the "Dental Assistance Plan language" would be the "governing factor for administration of the [Dental] benefit" irrespective of whether the DAP was referenced in the CBA. (*Id.*). With that clear understanding, Local 992 agreed to the DAP reservation of rights language. (*See* Resp. Exh. 3, Tab 2, p. 1). The record is devoid of any evidence to suggest that Local 992 failed to understand that the reservation of rights language to which it agreed was the "price of admission" for its members' participation in the DAP.

The evidence is equally clear with respect to Local 992's agreement to MEDCAP's reservation of rights language. DuPont and Local 992 engaged in detailed discussions regarding the MEDCAP reservation of rights provision. As Judge Rosas correctly noted, at one point in the discussions, Local 992 "objected to the inclusion of reservation of rights language in the MEDCAP plan document" and proposed that the reservation of rights provision be deleted from the plan. (ALJD 6:19-21; *see also* Resp. Exh. 3, Tab 19, p. 3). However, Judge Rosas omitted two critical facts.

First, the Judge failed to mention that over the course of the discussions, the Company made it crystal clear that because MEDCAP was a corporate-wide plan, the Company would not allow Local 992 members to participate in MEDCAP without the Union's agreement to its reservation of rights language.[9] Indeed, the Company rejected Local 992's proposal to eliminate the reservation of rights language from the MEDCAP plan document for that very reason: (*Id.*).

[9] The Judge's analysis of the history surrounding the Unions' participation in the DAP and MEDCAP fails to appreciate the logic underlying the Company's insistence that it retain the right to change the plans unilaterally as price of the Unions' admission to the plans. Simply put, DuPont needed flexibility to change its corporate-wide plans without having to first bargain with each of its individual unions nationwide. The Company explained this to the Unions on several occasions. (*See e.g.,* Resp. Exh. 3, Tab 20, pp. 10-11 (in response to the Union asking why MEDCAP contained a reservation of

(continued…)

> Management said the Management's Rights Clause is standard language in all corporate plans. Other corporate plans such as the pension plan have the same type of language.[10] **Management said they will not present a corporate plan that does not have a Management Rights Clause**. Employees do not have to choose the Aetna [MEDCAP] Plan which contains the Management Rights Clause if they are concerned.[11]

(Resp. Exh. 3, Tab 19, p. 3) (emphasis added). With this response, the Company made it clear that Local 992's agreement to the reservation of rights clause was the *quid pro quo* for Union members' participation in the plan.

Second, while Local 992 objected to the inclusion of reservation of rights language in MEDCAP initially, the undisputed facts show that Local 992 ultimately agreed to MEDCAP, knowing full well that it contained the reservation of rights language that the parties had discussed at length.

These critical facts, which are ignored in the Judge's analysis, demonstrate the *quid pro quo* that lies at the heart of this case.

(continued…)

rights clause, Management explained "the Blue Cross Blue Shield Plan is a local plan that Management controls; [MEDCAP] is a corporate Plan"; *see also* Harrington, 473). In the absence of such a waiver, a union, having agreed to MEDCAP or the DAP, could later withhold its agreement to any plan changes, which would eliminate many of the advantages of maintaining corporate-wide plans. Moreover, giving any of its unions "veto power" over future changes could result in Union members participating in MEDCAP or the DAP on terms different than other plan participants, and there is no evidence to suggest that such a result was ever contemplated by either DuPont or any of the Unions.

[10] At one point during the negotiations, Local 992 asked why the reservation of rights language was necessary for MEDCAP, when such language was not contained in the BCBS medical plan. In response, the Company explained the material difference between the two medical plans – the BCBS plan was "a local plan" subject to local bargaining, whereas MEDCAP is "a corporate Plan" covering employees nationwide. (Resp. Exh. 3, Tab 20, p. 10).

[11] In 1986, the Company was offering MEDCAP to Local 992 members as an additional option to – not as replacement for – the local, site-specific BCBS medical plan that was in place at Richmond. Thus, employees had the option of continuing to participate in the local BCBS plan if they were concerned about the MEDCAP reservation of rights clause and DuPont's right to make changes to that Plan unilaterally.

2. The Discussions Regarding the Contractual Reference to MEDCAP at Richmond Confirms Local 992's Waiver

Judge Rosas suggests that no express waiver should be found as to Local 992 because MEDCAP was never incorporated into the Richmond CBA. (ALJD 18:42-43). MEDCAP's omission from the Richmond CBA does not in any way negate the deal the parties struck. Indeed, a careful review of the parties' bargaining history reveals that the parties' decision to omit MEDCAP from the CBA confirms, rather than negates, Local 992's express waiver.

After Local 992 agreed to participate in MEDCAP, the parties discussed whether and where MEDCAP should be referenced in their collective bargaining agreement. (*See* Resp. Exh. 3, Tabs 23 & 24). During discussions held on September 15, 1986, Local 992 initially suggested that MEDCAP should be referenced somewhere in the contract so its members would understand that the Company could make changes without the Union's agreement:

> The Union said there is a need for [MEDCAP] to be placed in the Labor Agreement *where people recognize Management has a right to change without Union agreement*.

(*See* Resp. Exh. 3, Tab 23, p. 4) (emphasis added).

The parties revisited the issue a week later on September 23, 1986. Those discussions are reflected in the following passages:

> The Union said that it does not want the Aetna [MEDCAP] Plan mentioned in the contract at all, and asked what the Company's position is on that. Management said if it is offering an option to Blue Cross Blue Shield, then it needs in some way to be referred to that option. It may use words like "the basic Blue Cross-Blue Shield or any other plan management may choose to offer." Management said it is not committed to listing [MEDCAP] as such. There is a way not to mention [MEDCAP] by name. **The Union asked if the alternative insurance plan could be mentioned under the Industrial Relations Plans and Practices with a footnote like the Dental Plan. The logic for that being it contains a Management's Rights Clause in it, and could be listed along with all of the other plans of which the Company has control.**
>
> *** * ***

> Article VII, Industrial Relations Plans and Practices.
>
> Management said the Union's earlier request was to move the HMS reference to the Aetna Plan [MEDCAP] to this Article [the IRP&P provision] in the Labor Agreement and footnote similar to the Dental Assistance Plan. This is the second choice. The first choice is not to reference the Aetna Plan [MEDCAP] at all. Management said it was not appropriate to put it in the IRP's. . . . . since HMS changes need to be made to respond to changing local conditions, Management believes it is inappropriate to place it where one-year restrictions would present a bar. Management said it is willing to reference this by a general statement in the HMS section or leave it as it is.

(Resp. Exh. 3, Tab 23, p. 2 and Tab 24, p. 1) (emphasis added).

As the Company's credited notes show, it was Local 992 that suggested that MEDCAP be referenced in the IRP&P provision of the contract, along with the other corporate-wide benefits plan over which – in the Union's own words – "the Company has control." The Company rejected Local 992's suggestion because the IRP&P provision in the Richmond CBA required that DuPont provide at least one-year's advance notice to the Union of any change that reduces or terminates benefits. (*Id.; see also* Jt. Exhs. 1(a), p. 18 & 1(b), p. 20). DuPont believed that such a restriction would have prevented it from making necessary changes to medical coverage on a timely basis.[12] (*Id.*).

The parties' negotiations, as reflected in the Company's credited notes, constitute powerful evidence confirming Local 992's express waiver. There would have been no logical reason for DuPont to object to the one-year notice restriction, unless it had the right to modify

[12] The Company's concerns proved prescient. The undisputed record shows that DuPont announced changes to MEDCAP in August or September virtually every year and implemented those changes in January of the following year. (ALJD 7:31-8:2). Because most of the changes reduced benefits, the Company would have been contractually barred from implementing them had MEDCAP been listed in the IRP&P provision as Local 992 initially suggested.

the plan in the first place.[13] In short, the record shows, and the Judge previously found, that Local 992 agreed to participate in both the DAP and MEDCAP subject to, and conditioned upon, the Union's agreement to the reservation of clauses contained in the DAP and MEDCAP. (*See* ALJD Case No. 5-CA-33461, at 4, 6; *see also* Resp. Exh. 3, Tab 25, p. 1).

3. Locals 593 and 788 Also Expressly Waived Their Right to Bargain Over Changes to the DAP and MEDCAP

Judge Rosas likewise erred by concluding that Locals 593 and 788 had not waived their right to bargain over changes to the DAP and MEDCAP.

DuPont presented the DAP to Local 593 and to Local 788's predecessor, the NCU, in 1976. (Jt. Exh. 4, ¶¶ 17, 63, 74). At that time, the Unions were provided a copy of the DAP documents, which included the same reservation of rights clause that exists in the DAP today. (*Id.*). The parties stipulated that DuPont "offered union-represented employees the opportunity to participate in the [DAP] on the same basis as non-union employees, subject to the terms of the [DAP] Plan Document itself," and Local 593 and Local 788's predecessor agreed to the DAP in 1976. (Jt. Exh. 4, ¶ 17; ALJD 6:23-24; 28).

After the DAP was adopted by the Unions at Louisville and Nashville, the parties agreed to list the DAP in Section 1 of the IRP&P provision in the Local 593 and Local 788 labor contracts. (Jt. Exh. 4, ¶¶ 63-74; *see also* Jt. Exhs. 7 and 9(a)). The IRP&P provision in the labor contracts at Louisville and Nashville both specifically stated that Union members would receive benefits under the DAP "subject to the provisions of such Plan[s]," including their reservation of

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[13] The Company had the same concern regarding the one-year notice limitation with respect to BeneFlex about a decade later, and the parties addressed that concern by creating a new section within the IRP&P provision that did not contain the one-year notice requirement. (*See* Resp. Exhs. 7(a), p. 18 and 7(b) p. 18).

rights provisions, and "such modifications thereof as may be hereinafter adopted generally by the Company." (*See* Jt. Exhs. 7 and 9(a)).

There can be no serious dispute that Local 593 and Local 788's predecessor agreed to waive their right to bargain over future changes to the DAP when they agreed to participate in the plans and have the DAP included in the IRP&P provision of their labor contracts. Both the Board and labor arbitrators have held that DuPont retains the right, without bargaining, to make changes to the benefit plans listed in the IRP&P provision. *See, e.g., E. I. DuPont de Nemours (Louisville Works)*, 355 NLRB No. 176 (2010) and *E.I. DuPont de Nemours*, 355 NLRB No. 177 (2010); see *also* Resp. Exh. 12, *E.I. DuPont de Nemours & Co. and Ampthill Rayon Workers, Inc.,* AAA Case No. 14 300 002012 06 CNN, Grievance No. S-1-06 (Arb. Jaffe 2010) (finding that DuPont had the right to modify unilaterally the corporate-wide benefit plans listed in the IRP&P provision of the Spruance CBAs).

Local 593's and the NCU's agreements to waive bargaining with regard to future changes to MEDCAP is equally clear. As Judge Rosas found, Local 593 agreed to participate in MEDCAP in 1983, "subject to the terms of the MEDCAP Plan Documents." (ALJD, 6:28-30). The parties' agreement was memorialized in a Supplemental Agreement, which modified the HMS provision of the parties' then-current 1976 collective bargaining agreement, and stated in pertinent part that Local 593 members could participate in MEDCAP "as set forth in the terms and provisions of Summary Plan Description (SPD) ER-8760." (*See* Jt. Exh. 27).

Similarly, at Louisville, the Company provided Local 788's predecessor, the NCU, with a copy of the MEDCAP Plan documents, and, after weighing its options, the NCU agreed to have its members participate in MEDCAP in 1984. (Jt. Exh. 4, ¶ 75). MEDCAP was added as a medical option under the HMS provision of the parties' 1985 labor contract. (*Id.; see also* Jt.

Exh. 30E). As at Nashville, the HMS provision of the Louisville CBA was modified to make it clear that Union members could participate in MEDCAP "as set forth in the terms and provisions of Summary Plan Description (SPD)." (*Id.*).

The MEDCAP SPD, like the formal MEDCAP Plan Document, has always contained a reservation of rights clause which has remained unchanged since 1983. (Jt. Exh. 4, ¶ 16). The reservation of rights provision in the MEDCAP SPD, to which the Unions at Louisville and Nashville expressly agreed, states:

Future of the Plan

> While the Company intends to continue the benefits and policies described in this booklet, the Company reserves the right to suspend, modify, or terminate this Plan at its discretion at any time.

(*See* Jt. Exh. 10(f), at 48) (emphasis added)).

B. The Language Set Forth in the Agreed-Upon Reservation of Rights Provision Constitutes a Clear and Unmistakable Waiver (Exception Nos. 1, 6, 28, 30, 32-35, 42-43, 65-70)

All three Unions clearly and explicitly agreed to participate in the DAP and MEDCAP subject to the plans' reservation of rights language. The only question, then, is whether the reservation of rights language, itself, constitutes a "clear and unmistakable" waiver. *American Broadcasting Co.*, 320 NLRB 86, 88 (1988) (a union can be found to have "relinquish[ed] a statutory bargaining right if the relinquishment is expressed in clear and unmistakable terms").

The reservation of rights provision in the DAP, which has remained essentially unchanged since the Unions agreed to it in 1976, states:

> RIGHT TO MODIFY PLAN AND BENEFIT SCHEDULES
>
> A. The Company reserves the sole right to amend or discontinue this Plan at its discretion by action of the Executive Committee. Any change which has the effect of reducing or terminating benefits hereunder will not be effective until one year following announcement of such change by the Company.

> B. The Company also reserves the sole right at any time and without notice to make general and specific revisions in the benefit schedules in effect at any or all employment locations and any such revision of schedules shall not be construed as a reduction, termination or withdrawal of benefits. The designated benefit schedule at any one employment location shall in no way be dependent on or subject to changes because of the designated benefit schedule, or changes in the designated benefit schedule, at any other employment location. (Jt. Exh. 1C, p. 16).

The reservation of rights language contained in MEDCAP states:

> MODIFICATION OR TERMINATION OF THE PROGRAM
>
> The Company reserves the right to amend any provision of the Program or terminate the Program in its entirety should either course of action be deemed necessary by the Company. (Jt. Exh. 1E, p. 23).

There is nothing remotely unclear or ambiguous about the reservation of rights language in either of the plans. Indeed, courts have held that employers should use these very terms to put benefit plan participants on notice that their employer has retained the right to make unilateral modifications to the plan. (*See, e.g., Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994) (retiree health care plan language stating the "Policy may be amended or discontinued at any time" put employees on notice that employer had the unilateral right to modify or terminate the plan and continued benefits were neither guaranteed nor vested); *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (language stating "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet" was unambiguous)).

By adopting the DAP and MEDCAP, and agreeing to be subject to the reservation of rights provisions of the plan documents, the Unions expressly waived their right to bargain over

future changes to the plans.[14] Judge Rosas's conclusion to the contrary is without record support.

C. The Consistent Past Practice of Unilateral Changes to MEDCAP and the DAP Confirms the Unions' Waiver (Exception Nos. 7-18, 31-35, 37, 39-40, 42-43, 45, 47-48, 53, 65-70)

The Company's decades-long past practice of making unilateral changes to MEDCAP and the DAP removes any doubt regarding the Unions' express waivers. *California Pacific Med. Ctr.*, 337 NLRB 910, 914 (2002) (a "clear and unmistakable waiver may be inferred from past practice"); *Kiro, Inc.*, 317 NLRB 1325, 1328 (1995) ("A waiver may also be inferred from extrinsic evidence of contract negotiations and/or past practice"). Judge Rosas's failure to find express waivers based on the parties' past practice is contrary to controlling Board law.

The Company implemented numerous unilateral changes to MEDCAP and the DAP during the period 1976 to 2012. (ALJD 7:31-32). Indeed, the record shows that DuPont implemented changes unilaterally each and every year for more than 20 years, since at least 1987. (Jt. 4, ¶ 26; Jt. Exh. 10(a); Resp. Exh. 11(a)). Those changes varied widely and included fluctuating changes to premiums, co-pays, deductibles and stop-loss amounts, as well as other, further-reaching changes, such as modifications to benefit levels, additions and eliminations of

[14] The Judge's decision also should be reversed pursuant to the "contract coverage" analysis. As several courts have explained, "[w]hen a union agrees to a management rights clause that gives the employer the exclusive right to [act on a matter], no further bargaining on the issue is required by the NLRA." *Local 15, IBEW v. Exelon Corp.*, 495 F.3d 779, 783 (7th Cir. 2007), citing *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992). *See also NLRB v. United Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993) (holding that a union may exercise its right to bargain about a particular subject by negotiating over a contract provision that "fixes the parties' rights and forecloses further mandatory bargaining as to that subject"). Here, the parties' bilateral agreements as to future bargaining over changes to MEDCAP and the DAP are reflected in the plans' reservation of rights provisions, which formed the "contract" between the parties. As the D.C. Circuit made clear, "neither the Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement." 8 F.3d at 836.

covered procedures or medicines, and changes in the criteria for who was eligible to participate in the plans. (*Id*.). And, as the Judge correctly noted, most of "the Company's unilateral changes tended to reduce or restrict benefits." (ALJD 8:32-33). For example, the Company announced and unilaterally implemented the following changes, among others:

- Increased the cost of MEDCAP premiums, deductibles and/or copays in 1987, 1995, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2007, 2008, 2009, 2010 and 2012.

- Imposed caps on DuPont's contribution toward retiree medical coverage, with a $4,000 cap for MERs and a $9,000 cap for pre-Medicare retirees.

- Reduced coverage from 100% to 80% for outpatient diagnostic and lab services, home health and hospice care, birthing centers, and outpatient hospital and emergency room charges in 1994.

- Reduced MEDCAP benefits for employees who retire early, starting in 1994 (the Company's contributions to retire health care premiums was reduced for those who take an early retirement with a reduced pension).

- Changed eligibility rules for working spouses to require a working spouse to enroll in and be covered by their own employer's medical plan unless actual cost of that coverage was more than $35 in 1994. The Company has steadily increased that amount from $35 to $100 during the period 1994 through 2002.

(Resp. Exh. 11, Tabs 1, 7, 8, 10, 12, 13, 14, 18, 19, 22, 23, 24, 26, 28, 30, 33, 34, 37, 38, 41, 43, 44, 46; Jt. Exh. 10(a)). These changes had an obvious, significant and detrimental impact on future retirement benefits for the Unions' members.

The Company continued making changes to MEDCAP and DAP long after all references to the Plans were deleted from the parties' labor contracts, which included changes to premiums, copays, and deductibles for retirees, and eligibility criteria. The Company "did not seek the agreement of Locals 593, 788 or 992 prior to implementing any of its prior changes to the DAP and MEDCAP." (ALJD, 8:9-10). Indeed, as Judge Rosas found, the Company often reminded

Locals 593, 788 and 992 that it had reserved the right to make changes unilaterally, and "would not bargain over specific changes to its corporate-wide plans because those plans also provide benefits to participants not represented by a union." (ALJD, 8:10-12).

> Management said [Local 992] had asked earlier if a pensioner is guaranteed a medical plan when that person retires . . . Management has reserved the right to change and modify or discontinue the plan if needed."
>
> [Local 992] asked if health care premiums would remain the same over the life of the contract. Management said it reserves the right to modify the plan, and premiums would be changed as necessary.
>
> [T]he MEDCAP Program contains a Management's Rights Clause to allow changes that are deemed necessary by Management.
>
> [T]he Company has reserved the right to amend any provision of the Company plan, MEDCAP, that were deemed necessary. The recent changes in deductibles, stop-loss, and premiums were examples of such changes.

(*See* Resp. Exh. 3, Tab 27, p. 3 & Tab 49, p. 1; Jt. Exh. 25, Tab 4 at p. 2 & Tab 25 at p. 2).

Despite the numerous negative, unilateral changes imposed by the Company: "Until 2007 . . . Local 992 never filed a grievance or unfair labor practice charge challenging the Company's right to make unilateral changes to either DAP or MEDCAP." (ALJD 10:1-2).[15] And Local 992 also did not file any unfair labor practice charges or grievances during the period 2007 through 2012, even though DuPont announced and implemented several significant changes to MEDCAP that reduced benefits during that period. (*See* Jt. Exh. 4, ¶ 26; Jt. Exh. 10(a)).

Similarly, the record shows that prior to 2007, none of the Louisville Unions filed any contract grievances or unfair labor practice charges challenging DuPont's right to make

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[15] The 2007 unfair labor practice charge filed by Local 992 pertains to the unilateral changes to the DAP and MEDCAP that are at issue in Case No. 5-CA-33461 now pending before the Board. (ALJD 10:2-12, 13-17).

unilateral changes to the DAP or MEDCAP. The Louisville Unions only filed one charge concerning the DAP or MEDCAP, which, like the charge filed by Local 992, related to the changes at issue in Case 5-CA-33461.[16]

The record of unilateral changes without objection at the Nashville Plant is even more compelling. Local 593 never filed a single unfair labor practice charge or grievance challenging any of the unilateral changes DuPont implemented to MEDCAP and the DAP at any time prior to filing the charge in this case. (White, 270, 266). Local 593 President Todd White testified that, to his knowledge, Local 593 had never even questioned the Company's right to make changes to MEDCAP and/or the DAP unilaterally at any time prior to filing the current charge, despite acknowledging that DuPont announced and implemented changes to those plans every year and that the changes increased costs of medical coverage for retirees. (*Id*. 269, 264).

The Judge does not even attempt to explain away the Unions' decades-long failure to object to the multitude of significant, adverse and unilateral changes DuPont implemented to the DAP and MEDCAP year after year. If the Unions truly believed that DuPont had no right to make the unilateral changes, as they now contend, they surely would have filed unfair labor practice charges as they did in this case, seeking to prevent DuPont from repeatedly imposing allegedly unlawful, adverse changes upon their members. The Unions' failure to do so is fully

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[16] Counsel for the General Counsel introduced into evidence certain unfair labor practice charges that were filed between 2001 and 2007, "contesting the Company's right to make unilateral changes to premiums, copays, stop-losses, prescription payments health insurance options and dependent coverage between 2001 and 2007." (ALJD 10:31-33). The Judge correctly found that those charges challenged DuPont's right to make changes to BeneFlex for active employees, and did not contest DuPont's right to make changes to the DAP and/or MEDCAP. (ALJD 10-11, n.76). That finding is consistent with the testimony of Local 788 President Greg Lowman, who conceded that from 1994, when he first became a Union officer, through 2007, none of the Unions at Louisville had ever filed any unfair labor practice charges contesting DuPont's right to change MEDCAP or the DAP unilaterally (Lowman, 281-82, 325).

consistent with, and reflects, the deal the parties struck long ago: the Unions waived their right to bargain over changes to the DAP and MEDCAP in exchange for their members' participation in those plans on the same basis as all other plan participants. *California Pacific Med. Ctr.*, 337 NLRB 910, 914 (2002) ("it is unlikely that in each and every past . . . situation the Union would have elected not to assert a right to engage in decision bargaining if it believed it had the right"); *Litton Microwave Cooking Products*, 868 F.2d at 858 (history and practices of the parties reveals that the union believed management could unilaterally exercise its rights, given the absence of union challenges or requests to bargain in the past); *Uforma/Shelby Business Forms* v. *NLRB*, 111 F.3d 1284, 1291 (6th Cir. 1997) (previous acquiescence suggests that the union acknowledged the right of the employer to act without notice or bargaining).

D. Judge Rosas Misapplied Board Law by Failing to Find an Express Waiver (Exception Nos. 1, 6, 28-30, 32-33, 40, 42, 65-70)

ALJ Rosas misapplied the Board's rulings in *Southern Nuclear Operating Co*. 348 NLRB 1344 (2006), *enf'd in part denied in part,* 524 F.3d 1230 (D.C. Cir. 2008) and *Mississippi Power Co*. 332 NLRB 530 (2000), *enf'd in part,* 284 F.2d 605 (5th Cir. 2002) in concluding that the evidence fell short of satisfying the Board's clear and unmistakable waiver standard. Neither case supports the Judge's conclusion in light of evidence in this record.

In *Southern Nuclear*, the employer unilaterally changed certain retiree medical benefits without first bargaining with the relevant unions. The Board and later the court found that the reservation of rights provision contained in the applicable plan documents and summary plan descriptions (SPDs) did not give the Company the right to change retiree benefits unilaterally because there was no evidence that the plans or SPDs were incorporated into the parties' collective bargaining agreement. The penultimate question in *Southern Nuclear*, however, was "did the parties have a meeting of the minds on what would happen if the employer ever changed

the benefits plans." 348 NLRB at 1354. To answer that question, the Board in *Southern Nuclear* focused on whether the parties intended to incorporate the benefit plan at issue into the parties' labor agreement, thereby incorporating the plan's reservation of rights provision into the parties' agreement, albeit indirectly. Unlike here, there was no evidence in *Southern Nuclear* that the parties specifically discussed the relevant reservation of rights language, and there was no evidence of a decades-long past practice of unilateral changes.

Similarly, in *Mississippi Power* the employer was charged with unlawfully announcing and implementing changes to future retiree benefits. The employer there claimed that the unions waived their right to bargain over the changes based on the reservation of rights language set forth in the plan. The Board rejected the employer's argument, noting that the benefit plan at issue was an employer-created document that did not reflect the union's agreement to waive bargaining over future retirement benefits of active workers. 332 NLRB at 531. As in *Southern Nuclear*, there was no evidence in *Mississippi Power* that the parties "consciously explored," much less negotiated at length over, the reservation of rights language.[17]

The Board's decisions in *Omaha World-Herald*, 357 NLRB No. 156 (2011) and *Mt. Clemens Gen. Hosp*., 344 NLRB 450 (2005) compel a finding of waiver here. In *Omaha*, the Board held that the employer's unilateral changes to its pension plan were lawful because the

[17] *Southern Nuclear* and *Mississippi Power* are also distinguishable because here the evidence shows that the Unions specifically agreed to the reservation of rights language in the plans, as the condition for Union members' participation in the plans. When they agreed to the DAP, all three Unions agreed to include that plan in Section 1 of the IRP&P provision of their respective labor contracts, which reflects the parties' agreement that the Company retained the right to modify DAP unilaterally. And, in stark contrast to the facts of *Southern Nuclear* and *Mississippi Power*, Company notes show that the MEDCAP reservation of rights language was discussed at length with Local 992 before the Union agreed to it. Similarly, the labor contracts entered into by Locals 593 and 788 show that both Unions specifically agreed to have their members participate in MEDCAP subject to the terms set forth in the MEDCAP SPD.

union had waived its right to bargain. The pension plan was not described in the parties' labor contract, but the Board recognized that the parties' rights could "only be understood by examining the plan's prior operation and the governing plan documents." (357 NLRB No. 156, Slip Op. at 2). As here, the pension "plan documents include[d] reservation of rights language, which expressly provides that the 'Employer shall have the right to amend the Plan,'" and the parties' agreement that union members would participate in a company-wide plan covering both unit and non-unit employees. *(Id.*). The Board recognized that the parties' "agreement could only be understood by reference to the plan documents and existing practice." (*Id*.). In addition, the employer in *Omaha* had implemented only one prior unilateral change to the pension plan that was disadvantageous to union-members without any objection from the union. While the Board stated that the union's acquiescence to that prior change, without more, did not constitute a waiver, it was fully consistent with the Board's finding that the union had expressly waived its right to bargain over pension plan changes. *(Id.,* Slip Op. at 3).[18]

Similarly, in *Mt. Clemens*, the employer made "available to all its employees, bargaining unit and nonbargaining unit alike," a tax shelter annuity (TSA) program. (344 NLRB at 459). The TSA program in *Mt. Clemens* was <u>not</u> set forth in the relevant collective bargaining agreements. (*Id.*). During a 20-year period, the employer modified the TSA program on several

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[18] The Board in *Omaha* found the employer did not have the right to modify its 401(k) plan because the 401(k) changes occurred after the expiration of the parties' collective bargaining agreement. (*Id.*, slip op. at 4). Even more importantly, the Board held that the union in *Omaha* could not "have been said to have acceded to the reservation of rights language in the plan documents" because the employer's "401(k) plan and its governing documents were created after the parties had negotiated their collective bargaining agreement." (*Id.* Slip Op. n.14). Here, by contrast, the benefit plans and the governing documents were created years ago, the parties specifically discussed the plans' reservation of rights provisions <u>before</u> the Unions agreed to the plans, and, with the exception of MEDCAP at Richmond, the parties' prior collective bargain agreements had specifically referenced the DAP and MEDCAP and made it clear that Union member participation in the plans was <u>subject to the terms of the plans</u>.

occasions "without objection from and without bargaining with the Union." (*Id*). When the employer announced that it was modifying the TSA program once again by reducing the number of third-party investment advisors offered under the program, the union filed an unfair labor practice charge, alleging a Section 8(a)(5) violation based on the unilateral change. (*Id.*). The Board dismissed the union's charge, finding that facts in *Mt. Clemens* made an even stronger case for dismissal than those in *Courier-Journal*.

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

(*Id.* at 460) (emphasis added).

Judge Rosas's attempt to distinguish *Omaha* on the basis that the union in that case did not object to or request bargaining over a single prior "significant" change to the pension plan is baffling given the record in this case. (ALJD 17:35-47). The past practice in *Omaha* consisted of the employer making a <u>*single*</u> change without objection – a change the Board found sufficient to evidence a union waiver. The Judge likewise attempted to distinguish *Mt. Clemens* on the basis that the union there did not make information requests about the changes as the Unions did here. (ALJD 19:40-47). The Judge's attempt to side-step this controlling authority is unavailing because the record shows that the Company never bargained with the Unions over DAP and MEDCAP changes, and the Company's response to information requests about past DAP and MEDCAP changes does not constitute a "request for bargaining" sufficient to affect the Unions' waivers or dilute the extensive past practice evidence in this case. *See infra* at p. 34-38.

In short, the facts here provide an even more compelling case for dismissal than those in *Omaha and Mt. Clemens*. Here, the parties specifically discussed the meaning and effect of the

relevant reservation of rights language before the Unions agreed to participate in the DAP and MEDCAP. The plans have not been referenced in the CBAs at any of the three sites for almost 20 years, and there is an uninterrupted history of the Company making a multitude of changes to the DAP and/or MEDCAP plan without opposition by the Unions for more than 20 years. And there is absolutely no doubt that dozens upon dozens of those changes were "significant." Indeed, notwithstanding the Judge's suggestions to the contrary, many of the changes had a similar, and even greater, impact on Union employees than the 2013 Changes at issue in this case. The past practice of unilateral changes without Union objection here is far more extensive, and occurred over a much longer period, than in *Omaha* or *Mt. Clemens*; that fact alone, should remove any doubt as to whether the parties intended to permit DuPont to make changes to MEDCAP and the DAP unilaterally. Simply put, the past practice here conclusively demonstrates a waiver of the Unions' right to bargain.

II. JUDGE ROSAS'S FINDING THAT THE PARTIES BARGAINED OVER PAST CHANGES TO MEDCAP AND THE DAP IS UNSUPPORTED BY THE RECORD AND PLAINLY ERRONEOUS (Exception Nos. 8-11, 13-18, 28, 34, 37, 39-40)

ALJ Rosas found that DuPont "occasionally agreed to bargain or, at least discuss, the details" associated with the changes it implemented to the DAP and MEDCAP with Local 992. (ALJD 9:25-26). He similarly concluded that DuPont "agreed to bargain in some instances" with Local 788 and Local 593 over certain of the MEDCAP and DAP changes (ALJD 10:25; 11:22-23), and then relied on such prior "bargaining" for his conclusion that the Unions had not waived their right to bargain through past practice or consistent acquiescence. (*See e.g.*, ALJD 17:44-45; 21:43-47). However, the occurrences of "bargaining" cited by ALJ Rosas were simply

instances in which the Company responded to questions or information requests about changes already made.[19]

A. The Record Shows the Company Did Not Bargain Over the Changes it Announced and Implemented to MEDCAP and the DAP (Exception Nos. 8-11, 13-18)

Judge Rosas's conclusion that DuPont bargained over prior changes to MEDCAP or the DAP is erroneous for several reasons. First, he ignores a key stipulation of the parties: "The Company did not seek the agreement of the [Unions] with respect to the benefit plan changes" affecting the DAP and MEDCAP that are "identified in Respondent Exhibit 11(a) and Joint Exhibit 10(a) before implementing them." (Jt. Exh. 4, 28).[20] Consistent with that stipulation, there is no reference in Judge Rosas's decision to a single instance in which the Company and the Unions bargained to agreement or impasse over any of past changes to MEDCAP or the DAP.

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[19] Examples of what Judge Rosas considered "bargaining" prove the point. In one example, cited by the Judge, DuPont announced BeneFlex changes that included new premium increases, and provided Local 992 with a copy of Plain Talk describing the changes. *See* ALJD 9, n.65 citing Resp. Exh. 3, Tab 64, p. 2-3 (p. 8822-8823). Local 992 "asked if it could bargain these health care rates and changes." *Id.* at p. 3. In response, DuPont reminded Local 992, that the BeneFlex plan language, which it had already bargained with the Union, provides DuPont with the right to change rates, and therefore DuPont was "**simply informing the Union of the rate changes under the BeneFlex Health Care**." *Id.* Similarly, the Judge cites to a discussion between DuPont and Local 788 over whether Louisville employees wished to participate in a new Long-Term Care Insurance plan. ALJD 10, n.75, citing Jt. Exh. 32, Tab 16, p.3. This discussion had nothing to do with unilateral changes to the DAP or MEDCAP. The Judge also cites to alleged "bargaining" with Local 593 over MEDCAP changes. *Id.* 11:22-124. Here, DuPont announced unilateral changes to MEDCAP, and Local 593 asked for information about the changes so that it might make a proposal for an alternative health care plan. DuPont responded by saying it would consider Local 593's request, but reminded the Union "that any proposal presented by [Local 593] would only pertain to the Old Hickory [Nashville] site, **since MEDCAP is a corporate plan and cannot be changed by local management."** In short, the examples of "bargaining" cited by the Judge show precisely the opposite – that the Company refused to bargain over changes to its corporate-wide plans.

[20] The parties stipulated that Respondent Exhibit 11(a) and Joint Exhibit 10(a) capture the nationwide changes that DuPont implemented to the DAP and MEDCAP during the period 1976 through 2012. (*See* Jt. Exhs. 4, 26).

Second, DuPont's witnesses, many of whom were lead bargainers spanning decades of negotiations with the Unions, consistently testified, without contradiction, that the Company never bargained with the any of the Unions before implementing changes to the DAP and MEDCAP. (*See*, *e.g*, Black; 334-335, Berghold, 372-73; Waddell, 398; Scurry, 222, 228, 232; Kelley, 421; Kelsey, 500; Bunn, 530; Jt. Exh. 3 (Derr, 236-238; Rhodes, 259-262)). Third, that testimony is corroborated by the Company's meeting notes, which show that the Unions were told, on multiple occasions, that the Company was not bargaining, would not bargain, and was not required to bargain with the Unions over changes to MEDCAP and the DAP:

- Management distributed Benefits Schedule for the Dental Assistance Plan (copy attached to file copy). Management said it continues to routinely look at Benefits Plans, and this upgrade would become effective 10/01/86. . . The Union said it does not feel this is a bargaining session, but that this meeting is being held just for information. . . (Resp. Exh. 3, Tab 25, p. 1).

- Management said the Union had asked earlier if a pensioner is guaranteed a medical plan when that person retires. . . Management has reserved the right to change and modify or discontinue the plan if needed. (Resp. Exh. 3, Tab 27, p. 3).

- The Union asked if Management is in a position to bargain schedule changes to the Dental Assistance Plan? Management said the Plant Manager can replace the Corporate Plan with a local plan. If the Union wants to make a proposal, Management will consider. **The Union asked can Management change the current G and H schedules of the Dental Assistance Plan? Management said it cannot change the G and H schedules because they are Corporate Schedules, but, again, Management will listen to any proposal from the Union concerning a local Dental Assistance Plan**. (Resp. Exh. 3, Tab 32, p. 6) (emphasis added).

- The Union asked if health care premiums would remain the same over the life of the contract. Management said it reserves the right to modify the plan, and premiums would be changed as necessary yearly. (Resp. Exh. 3, Tab 49, p. 1).

This powerful undisputed evidence, along with the parties' stipulation, wholly undercut the ALJ's finding that DuPont bargained with the Unions over any prior DAP or MEDCAP changes.

B. DuPont's Willingness to Provide Information Concerning Medical and Dental Benefits Does Not Constitute an Admission that DuPont Had an Obligation to Bargain Over Changes to MEDCAP or the DAP (Exception Nos. 8-18, 31, 48, 53, 56)

Judge Rosas erroneously concluded that DuPont agreed to "bargain" with the Unions in some instances based on its willingness to provide information, or respond to questions, about certain MEDCAP or DAP changes. (*See e.g.* ALJD 9:27-28; 10:25; 1122-23). In effect, Judge Rosas concluded that DuPont, by providing information requested by the Unions, thereby relinquished its right to make changes to the DAP or MEDCAP unilaterally. That conclusion is both legally and factually erroneous.

Responding to requests for information that relate to a subject over which a union has waived the right to bargain in no way creates a duty to bargain over that subject or otherwise constitutes an admission that no waiver exists. *Ingham Regional Medical Center*, 342 NLRB 1259 (2004) (finding a clear and unmistakable waiver of the right to bargain despite the fact that management provided information to the union regarding the subject matter over which the union had waived its right to bargain); *Western Summit Flexible Packaging*, 310 NLRB 45 (1993) (Union waived the right to bargain over new insurance plan, even though management responded to information requests regarding the new plan); *Budd Co*., 348 NLRB 1223 (2006) (despite Union's requests for information and the company's cooperation with such requests, management rights clause reflected waiver of the Union's right to bargain over new safety rules).

DuPont's witness testified without contradiction that they provided the Unions with information about benefit plan changes, and answered the Unions' questions, simply to ensure that the Unions were kept apprised of events affecting their members. (*See, e.g.*, Waddell, 396,

405). Not only has DuPont consistently refused to bargain over changes to its corporate-wide plans, but it has consistently and repeatedly informed the Unions that it was simply providing information about the changes, and not bargaining about them. Moreover, the Judge's conclusion that DuPont "bargained" over some of the prior MEDCAP and DAP changes by responding to Union information requests is belied by the record, as the Judge did not, and cannot, cite to a single instance in which DuPont ever rescinded or even modified any of the prior DAP or MEDCAP changes it announced in response to the Unions' purported "requests for bargaining" or requests for information. (ALJD 21:46-25).[21]

The Board's decision in *E. I. DuPont de Nemours (Louisville Works)*, 355 NLRB No. 176 (2010) also refutes the Judge's conclusion in this regard. In that case, which involved the Louisville Plant at issue here, the Board recognized that DuPont had the right to make unilateral changes to BeneFlex during the term of the labor contract based on the IRP&P language. Union President Lowman testified that the Louisville Unions made information requests regarding health care changes, including those pertaining to BeneFlex. Using ALJ Rosas's logic, the Company's responses to those information requests would negate the express waiver found in the parties' contract as well as the BeneFlex plan language. Such a result is clearly at odds with the Board's decision in *E. I. DuPont de Nemours (Louisville Works*).

[21] If the Unions really requested bargaining over the prior DAP and MEDCAP changes (as the Judge erroneously concluded), and DuPont never sought the Unions' agreement before making any of the changes, nor retracted or modified any of the changes in response to the Unions' purported bargaining requests, then one would have expected the Unions to file a multitude of unfair labor practice charges seeking to prevent the Company from instituting the changes – just as they did in this case. The Unions' inaction is particularly telling, given the fact that most of the prior MEDCAP and DAP changes reduced or restricted benefits.

Adoption of the Judge's interpretation of a "request for bargaining" in this context would also lead to absurd results. By way of example, assume that a collective bargaining agreement permits an employer to create and modify its employee attendance policy unilaterally. Assume further that the employer, exercising that right, announces that it will implement a modified attendance policy, and in response a union asks the employer a number of questions about the change, such as when the modified policy would go into effect, how tardiness would be handled under the new policy, and/or what forms of discipline would be imposed for a violation of the policy. Applying Judge Rosas's logic, if that employer provided information in response to the union's inquires, it would be viewed as "bargaining" over the change, and would put the pre-existing express waiver in jeopardy. Such a result finds no support under Board law. It is likewise inconsistent with the underpinnings of the Act because it would discourage employers from responding to union inquiries for fear of relinquishing a pre-existing right.

III. THE JUDGE MISAPPLIED THE BOARD's "DYNAMIC *STATUS QUO*" DOCTRINE (Exception Nos. 2-4, 19-27, 29, 37-42, 44-54, 57-70)

Judge Rosas misapplied Board law and confused the record when analyzing the parties' past practice evidence under the now-familiar "dynamic *status quo*" doctrine. It is well established that an employer's obligation to maintain the *status quo* may require unilateral action if such action is part of the *status quo*. *NLRB v. Katz*, 369 U.S. 736, 745-746 (1962). The Board has applied this principle repeatedly, recognizing that "a unilateral change made pursuant a long-standing practice is essentially a continuation of the *status quo* – not a violation of Section 8(a)(5)." *Courier-Journal*, 342 NLRB 1093, 1094 (2004) (citing *Katz* 369 U.S. at 743); *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002) (recognizing that unilateral action, even that involving discretion, may be part of the parties' past practice, such that an employer does not alter the *status quo* by continuing the past practice). The Board has further

recognized that the *status quo* may be determined by the parties' contract and/or by past practice and may be "dynamic." *See National Gypsum Co.*, 359 NLRB No. 116, slip op. at 5 (2013); *see also Post-Tribune*, 337 NLRB 1279 (2002).

As the Board has recognized, "the threshold question" in evaluating whether an employer has deviated from the *status quo* centers on the definition of the *status quo*. *National Gypsum*, 359 NLRB, slip op. at 5. In this case, the *status quo* is defined by bilateral agreements struck between the parties with respect to Union members' participation in the DAP and MEDCAP, as well as the parties' decades-long past practice pursuant to those bilateral agreements. Pursuant to the bilateral agreements forged decades ago, members of the Unions became eligible to participate in the DAP and MEDCAP on the express condition and DuPont retained the right change the plans unilaterally. Consistent with the express agreements, the Company announced a wide variety of changes just prior to the benefit plans' "open enrollment" period every year for more than two decades.

A. The 2013 Changes Are Consistent With and Are a Continuation of Past Practice at Richmond, Louisville and Nashville (Exception Nos. 45-54, 57-70)

The 2013 Changes at issue in this case are fully consistent with, and constitute a continuation of, the *status quo* established at all three locations. The decades-long past practice of unilateral changes clearly satisfies the controlling *Courier-Journal* standard, even assuming, *arguendo*, that the changes were not authorized by the express waivers in the reservation of rights provisions. The Company made more than 75 unilateral changes to the DAP and or MEDCAP, the vast majority of which were significant and tended to reduce or restrict benefits, and the unilateral changes occurred over an extended period, including a 20-year period when

neither the DAP nor MEDCAP were referenced in the parties' collective bargaining agreement.[22] During those periods, the Unions' members had no CBA-based right to participate in the DAP and MEDCAP, and their continued participation could be measured only in terms of the dynamic *status quo*.

Measured against the backdrop of 20-plus years of past practice, the 2013 Changes were clearly a continuation of the existing dynamic *status quo*. First, the 2013 Changes were communicated in the same basic fashion as prior changes to the plans – *i.e.*, they were announced in the late summer just prior to the benefits open enrollment period. Second, the 2013 Changes applied to the DAP and MEDCAP nationwide. Third, and most importantly, Union members at Richmond, Louisville and Nashville continued to participate in the DAP and MEDCAP on the very same terms as all other plan participants – which is consistent with the deal the parties struck long ago, and the past practice ever since.

It is the effect of ALJ Rosas's ruling, not the 2013 Changes, that would generate a material departure from past practice and disrupt the *status quo* that has existed for 30 years. The parties have never agreed, and there is no past practice that would permit, the Unions' members to receive MEDCAP and DAP benefits on terms that are different from those enjoyed by every other participant in those plans. The DAP and MEDCAP are unitary, indivisible ERISA plans and a part of a comprehensive package of benefits. The ALJ's decision, if permitted to stand, would effectively re-write the bargain struck between the parties decades

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[22] To the extent the ALJ's analysis turns on the absence of any mention of MEDCAP and the DAP in the CBAs, his conclusions are contrary to the analytical framework set forth in *Courier-Journal*. There is no question that: (1) a bilateral agreement existed, pursuant to which the Union members participated in MEDCAP and the DAP; and (2) there was a decades-long practice of DuPont making changes unilaterally.

ago, recreate the benefit plans, and produce an untenable situation in which the Unions' members would receive benefits under MEDCAP and the DAP unlike those offered to everyone else. That result is a material departure from the parties' longstanding past practice and is also contrary to notions of fundamental fairness.[23]

B. The Judge Mischaracterizes the Nature and Effect of the 2013 Changes (Exception Nos. 2-4, 19-20, 22-27, 39-41, 44-54, 57-70)

Judge Rosas mischaracterizes the nature and impact of the 2013 Changes in several significant respects that are central to his finding that the changes were inconsistent with the *status quo.* The Judge variously claims that DuPont "eliminate[d] MEDCAP and DAP as secondary coverage for MERS," that the 2013 Changes caused "the elimination of retiree health benefits" and that they constituted an "elimination or [sic] replacement of MEDCAP and DAP." (ALJD 19:6-7, 45-47; 21:25-27). The Judge's analysis does not withstand scrutiny.

1. The Facts Do Not Support the ALJ's Findings

As the record makes clear, the 2013 Changes did not eliminate retiree health benefits. Indeed, there is no evidence that a single MER lost retiree coverage as a result of the 2013 Changes. (Anderson, 548). Not only has DuPont not terminated retiree coverage, but the evidence shows that the 2013 Changes have resulted in a significant benefit to many retirees by

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[23] The Judge's proposed remedy is improper to the extent that it would require the rescission of the 2013 Changes for existing retirees and the creation of a "New DAP" and "New MEDCAP" just for Union represented retirees. As an initial matter, there is no evidence that the Unions represent existing DuPont retirees, as opposed to current employees who may become retirees eligible for the DAP and MEDCAP in the future. Additionally, the Judge's finding and remedy conflict with ERISA because it results in the inconsistent application of unitary, national ERISA plans. In *Conkright v. Frommert,* 559 U.S. 506 (2010), *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan,* 555 U.S. 285 (2009) and *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 122 (2008), the Supreme Court emphasized that one of ERISA's key objectives is to promote uniformity and predictability in employee benefit plans. The Judge's decision is inconsistent with ERISA's policies by requiring that DuPont must treat Union retirees differently than all other DAP and MEDCAP beneficiaries, for the first time, thereby excluding them from the rules and provisions that govern all other plan participants, including the plans' reservation of rights provisions.

allowing them to select the type of coverage that best suits their particular needs. (*See, e.g.,* Black, 351). Indeed, under MEDCAP and the DAP, as amended, MERs may elect to receive coverage that is less costly than that provided through MEDCAP and the DAP previously, and that may be paid for entirely through the DuPont-funded HRAs. (Anderson, 541-42).

The 2013 Changes also did not eliminate or replace the DAP or MEDCAP for MERs as Judge Rosas mistakenly concludes. MERs have continued to receive retiree benefits through the DAP and MEDCAP following the 2013 Changes. The only thing that has changed is the mechanism through which the MERs receive their benefits. Moreover, many key aspects of the secondary coverage applicable to Medicare-eligible retirees under the DAP and MEDCAP have remained unchanged. For example, following the 2013 Changes: (1) MEDCAP and the DAP, as amended, have remained in place and DuPont has remained the sponsor of both plans; (2) coverage under MEDCAP for MERs has remained secondary to Medicare; (3) DuPont has continued to fund retiree benefits for MERs; (4) MEDCAP and DAP participants still cannot be denied coverage due to pre-existing medical conditions; (5) benefit denials must still be appealed to the carrier that provides coverage (not DuPont); (6) DuPont has continued to handle questions concerning eligibility for benefits under MEDCAP and the DAP; (7) once a participant enrolls in MEDCAP, that coverage renews from year to year automatically, unless the participant elects to make a change; (8) a MER's decision to decline MEDCAP or DAP coverage is still irrevocable; and (9) Medical identification cards are still mailed to the pensioner by the carrier, not DuPont.

The Judge claims, erroneously, that the 2013 Changes were a material departure from past practice because they: (1) removed future potential health and dental insurance from the bargaining table; (2) required plan participants to make a selection of future benefits in consultation with a third party; and (3) do not guarantee that individual participants will be able

to secure as beneficial coverage as they enjoyed under prior versions of the DAP and MEDCAP. (ALDJ 21:12-27).[24] None of these findings has merit.

First, implementation of the 2013 Changes did not remove the subject of "potential health and dental insurance plans from the bargaining table" as the Judge mistakenly suggests. (ALJD 21:11-14). As demonstrated above, the Company has never been willing to bargain over changes made to the DAP and MEDCAP because they are corporate-wide plans that provide benefits to thousands of participants, the vast majority of which are not represented by any of the Unions. That decades-long position did not change as a result of the 2013 Changes.

While the Company has told the Unions repeatedly that it will not bargain over changes to its corporate-wide plans, including the DAP and MEDCAP, it has also repeatedly informed the Unions that it is willing to consider proposals from the Unions relating to alternative, site-specific plans. That position also was not affected by the 2013 Changes. Simply stated, the Company's unwillingness to bargain over the 2013 Changes – like it's refusal to bargain over all past DAP and MEDCAP changes – did not remove from the bargaining table all future discussion over alternative, site-specific plans or otherwise deprive the Unions of the ability to make proposals relating to such plan.

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[24] The Judge also found that the "Company had no information as to the type of coverage that would be made available to MERs as a result of the 2013 Changes." (ALJD 13:11-13). That finding is also erroneous. The record shows that information about what medical and dental coverage is available, through which carriers, and at what price, is set forth on the Extend Health website which is easily accessible to plan participants, the Union and even members of the public. (Dickerson 153-159; Resp. Exh. 17). The Extend Health website also contains detailed brochures for the health care plans offered in any specific geographic location, along with the cost of those plans. (*Id.*). Moreover, anyone with questions about any aspect of the offered plans can call a 1-800 number at Extend Health and speak to a benefits consultant who will provide the necessary information. While it is certainly true that the Unions and plan participants cannot determine future cost or features associated with retiree health and dental care under the DAP and MEDCAP following the 2013 Changes, that is not a change in the *status quo* – that has always been the case under these plans. Given the magnitude and variance of prior changes to the DAP and MEDCAP, plan participants have never known the future cost or level of coverage available under the plans, and the 2013 Changes had no impact on that reality.

Second, the fact that plan participants had to make benefit choices as a result of the 2013 Changes is nothing new, and is not a change to the *status quo.* Participants in DuPont's benefit plans have often been required to make benefit elections. For example, there are multiple health care options under BeneFlex, and employees are given the opportunity to make different health care choices every year during annual enrollment. (*See, e.g.*, White, 272-73**)**. Similarly, employees and retirees have to make choices with respect to the various investment options within the Company's 401(k) plan. (*Id.*, 273-74). And the 401(k) plan investment options have changed in the past, requiring employees and retirees to reevaluate their investment choices from time to time. (*Id.*).

Third, there is nothing novel about DuPont contracting with third parties to facilitate the provision of benefits to employees and retirees. In 1998, the Company outsourced part of its benefit processing function to Coopers & Lybrand, who assisted employees and retirees with enrolling for benefits. (Anderson, 545-546). In 2008, DuPont transitioned to a service called "MyInfo", which was initially provided by Convergys, yet another third party. (Anderson, 545-56, 556). Ever since, if participants in MEDCAP or BeneFlex had a question regarding their benefits, they have been required to contact a benefit counselor at MyInfo, not DuPont. (Anderson, 546; White, 267-68). As with Extend Health, there is no evidence that any of the Unions in this case have had a collective bargaining relationship with either Coopers & Lybrand or Convergys. (*See, e.g.*, White, 267-68).

The Company also has an established past practice of using other third party providers to administer its benefits. For instance, MEDCAP has been administered by Aetna which, as Local 593 President White admitted, is merely a contractor for DuPont under MEDCAP, just like Extend Health is a contractor to DuPont. As Mr. White conceded, employees with questions

about MEDCAP have been directed to Aetna – not DuPont – in much the same way that Medicare-eligible retirees are now directed to contact Extend Health after the 2013 Changes.

Similarly, the administration of the DuPont 401(k) plan, and certain unilateral changes to that benefit plan, are virtually identical to the 2013 Change at issue here. Participants in DuPont's 401(k) plan have had multiple choices as to how they invest the monies in their 401(k) accounts, and those choices have changed over time. (Lowman, 313-314; White, 267-68). If an employee or retiree had a question about investment options after the 401(k) accounts were first established, they could call DuPont for answers. In 1994, the Company decided to contract out the administration of the 401(k) plan to Merrill Lynch. (Anderson, 550). After 1994, participants in the 401(k) plan were required to contact Merrill Lynch, rather than DuPont, to change their 401(k) investments or obtain information about the investment options available or performance of investment options under the 401(k). (Anderson, 550; Lowman, 314; White, 273-74). None of the Unions had any collective bargaining relationship with Merrill Lynch. (Lowman, 314-315). Like Extend Health, Merrill Lynch was a contractor hired to assist DuPont in providing benefits. (Lowman, 315). As with Extend Health, if the Unions wanted information as to what 401(k) options retirees have selected, or what the rate of return is on the investment options selected by retirees, the Unions would need to contact Merrill Lynch, not DuPont, for that information. (White, 273-74).

Fourth, Judge Rosas's claim that the 2013 Changes are materially different from past changes based on the potential uncertainty of future benefits is not a change to the *status quo*. Participants in the DAP and MEDCAP, Union and non-union alike, never had any guarantee that their coverage would be as "beneficial" in the future as it was in the past. MEDCAP premiums, copays and/or deductibles have increased nearly every year since MEDCAP was first agreed to

by the Unions in the mid-1980s. And DuPont implemented a wide variety of other changes to MEDCAP and/or the DAP as well, including imposing absolute caps on the total amount of money DuPont would contribute to retiree medical costs. Given the annual, far-reaching changes to both plans, plan participants have never known what the MEDCAP and DAP benefit package would look like from year to year, and they certainly had "no guarantee" that the benefits offered under either plan in any given year "would be as good as" benefits offered in a prior year. (Jt. Exh. 4, ¶ 26).

2. The Law Does Not Support the ALJ's Conclusions

Judge Rosas relied on the Board's decision in *Caterpillar,* 355 NLRB 521 (2010) in support of his conclusion that DuPont violated of Section 8(a)(5) because the 2013 Changes were a material departure from past practice. (ALJD 20:32-35). *Caterpillar* is inapposite. In that case, the union challenged the employer's unilateral implementation of a "generic first" prescription drug program and the employer offered evidence of only *three* prior changes to support its past practice argument (slip op. at 1, 7). Based on that paltry showing, the Board, quite understandably, concluded that the changes were a material departure from the handful of prior changes and found that the employer failed to establish its past practice defense.

The factors that drove the Board's decision in *Caterpillar* are lacking here. Rather than a handful of prior changes, the evidence in this case shows a history of more than 75 prior changes, occurring every year for almost 30 years, with little or no objection by the Unions. In addition, the 2013 Changes are fully in keeping with prior unilateral changes, which include: (1) placing caps on DuPont's contributions to retiree health care coverage; (2) contracting with third party providers to facilitate the provision of retiree benefits; (3) modification of the types and levels of retiree benefits offered; and (4) imposing annual increases in retirees' costs. (*Id*).

Application of the Board's decisions in *Courier-Journal, Mt. Clemens* and *California Pacific Medical Center* compel a finding that the 2013 Changes are a continuation of the dynamic *status quo* and not a violation of Section 8(a)(5).

C. Local 788 is Bound by the Consistent Past Practice and *Status Quo* that Applied to Its Predecessor Unions (Exception Nos. 36, 64-70)

The Board and courts have long held that a successor union is not bound by a predecessor union's collective bargaining agreement, and is entitled to negotiate new terms and conditions of employment for its members. *See American Seating*, 106 NLRB 250 (1953). *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 284 n.8 (1972). It is equally true that the *status quo* remains in effect for a successor union or employer until the parties negotiate a change to the *status quo*. *See, e.g., Capitol Ford,* 343 NLRB 1058 (2004) (successor employer bound by past practice established by predecessor).

Here, neither Local 788 nor DuPont negotiated any change to the *status quo*. As Local 788 President Lowman conceded, Local 788 made no proposals to change the terms of retiree medical or dental coverage under MEDCAP or the DAP after it was elected to represent Nashville workers in 2010. (Lowman, 302-3). Rather, Local 788 simply adopted its predecessor's contract, modifying only the name and date of the contract. (*Id*., 303).

Moreover, Local 788 made no attempt to repudiate any of the past practices that had been developed in the years prior to its certification. More importantly, DuPont's past practice of making unilateral changes to MEDCAP and the DAP continued after Local 788's election. In 2011 and 2012, following Local 788's election, DuPont unilaterally increased MEDCAP premiums, eliminated the Consumer Choice PPO option from MEDCAP, increased the MEDCAP prescription drug deductible and stop loss limit, and modified periodontal coverage under the DAP. (*See* Jt. Exh. 10(a)). Local 788 did not file a grievance or an unfair labor

practice charge over any of these changes, even though most of them increased the cost of health care for current and future retirees. (Lowman, 325).

Finally, Local 788's Leadership was well aware that the 2011 and 2012 MEDCAP and DAP changes were merely a continuation of an established past practice, as most of the Union's leadership was a holdover from the prior USW leadership. (*Id.*, 300-302).

IV. THE UNIONS SHOULD BE ESTOPPED FROM CHALLENGING THE 2013 CHANGES GIVEN THEIR PRIOR INACTION IN THE FACE OF MORE THAN TWO DECADES OF ADVERSE UNILATERAL CHANGES (Exception Nos. 8, 12-13, 39-40, 55, 63-70)

The Complaint should be also dismissed based on principles of equitable estoppel. The Board has long recognized that a union's consistent acquiescence to an employer's unilateral action for a sustained period of time can equitably estop a union from demanding bargaining on that subject. *Tucker Steel Corp.,* 134 NLRB 323, 333 (1961) (equitable estoppel will preclude a party from complaining about a unilateral change in terms and conditions of employment where it has, by its conduct, led the other party to reasonably believe that it could deal unilaterally with the subject – even when the party estopped did not intend to forgo its rights or did not consciously agree); *Speidel Corp.,* 120 NLRB 733, 741 (1958) (union's action, or rather inaction, evidenced a clear understanding that the subject of employee bonuses would remain a management prerogative).

This principle was reaffirmed by the Board in *Manitowoc Ice Co*., 344 NLRB 1222 (2005). There, the employer created separate profit-sharing plans for its union and non-union employees. For several years, the employer unilaterally modified the profit-sharing plans for both groups without bargaining. During bargaining in 2001, the union demanded that the company guarantee the profit-sharing plan. The parties concluded their negotiations, and entered into an agreement that did not contain any reference to the profit-sharing plan. Six months after

the conclusion of negotiations, the employer again implemented changes to the profit-sharing plan, and the union filed a charge alleging a Section 8(a)(5) violation.

The Board dismissed the union's charge, finding that the employer's longstanding practice of making unilateral changes to the plan, coupled with the union's previous failure to request bargaining over those changes, equitably estopped the union from demanding bargaining. The logic applied by the Board in *Manitowoc* applies with equal force here, and compels reversal of the ALJ's decision. The Unions consciously agreed to the reservation of rights provision as the price of admission to the DAP and MEDCAP and, consistent with that agreement, did not object to any of the unilateral changes that the Company implemented with respect to the plans for decades. Locals 992 and 788 (and its predecessor unions) did not object the Company's unilateral changes at any time in the 20 years prior to filing the 2007 charges at issue in case 5-CA-33462, and neither Union objected to any of the changes in the period between 2007-2012. For its part, Local 593 at Nashville never objected to any of the unilateral MEDCAP or DAP changes before filing its charge in this case – a period spanning almost 30 years. As such, the Unions "bargained away" their interest in bargaining over changes to MEDCAP and the DAP and must be equitably estopped from now asserting otherwise.[25]

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[25] Citing *Eugene Iovine, Inc.*, 358 NLRB No. 134 (2011), the Judge concluded that DuPont was not privileged to make the 2013 Changes with respect to Local 788 in the context of the waiver analysis. (ALJD 18-45-56). In *Eugene Iovine* the issue was whether the employer was privileged to implement certain layoffs unilaterally pursuant to a past practice established prior to certification of a new union. The Board found the employer failed to sustain its past practice defense because it did not produce evidence showing the frequency or regularity of the prior unilateral changes. Here, by contrast, DuPont has adduced a mountain of evidence showing that DuPont made changes to MEDCAP/DAP in the fall each and every year for more than two decades. In addition, the employer's past practice defense failed in *Eugene Iovine* because the employer adduced no evidence that its alleged past practice of unilateral changes continued after the certification of the new union. The past practice of unilateral changes in this case continued, unabated after Local 788 was certified.

Judge Rosas disregarded the teaching of *Manitowoc* on the basis that the Unions in this case, unlike the union there, made "numerous information requests" throughout the years, "to which the Company typically acquiesced." (ALJD 21, 43-47). As demonstrated above, a union's request for information about a prior unilateral change, and employer's willingness to provide information to the union's request explaining the changes, does not negate the past practice formed by the unilateral change or constitute "bargaining" over the change.

CONCLUSION

For all of the foregoing reasons, Judge Rosas's Decision should be reversed, and the Complaint should be dismissed.

Respectfully submitted,

/s/ Kris D. Meade

Kris D. Meade
Glenn D. Grant
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500

Counsel for Respondent
E.I. DuPont de Nemours and Company

February 10, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 10th day of February 2014, I caused a true and accurate copy of DuPont's Exceptions to Decision of Administrative Law Judge Michael F. Rosas and Brief In Support thereof to be served by electronic mail on the following parties:

Kenneth Henley, Esq.
One Bala Avenue, Suite 500
Bala Cynwyd, PA 19004
khenleyesq@aol.com

Gregory M. Beatty
Field Attorney
National Labor Relations Board
Region 5, Washington Resident Office
1099 14th Street, N.W., Suite 5530
Washington, D.C. 20570
Gregory.Beatty@nlrb.gov

/s/ Glenn D. Grant
Glenn D. Grant