

E.I. DuPont De Nemours, Louisville Works and Paper, Allied-Industrial, Chemical and Energy Workers International Union and Its Local 5-2002. Cases 9-CA-40777 and 9-CA-41634

August 27, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER
AND BECKER

On December 15, 2005, Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief. The General Counsel and the Charging Party filed reply briefs.*

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue presented is whether the Respondent, E.I. DuPont De Nemours, Louisville Works, violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the employees' benefit plan at a time when the parties were negotiating for a collective-bargaining agreement and were not at impasse. The Respondent, relying on the *Courier-Journal* cases, 342 NLRB 1093 (2004), and 342 NLRB 1148 (2004), contends that its unilateral changes were consistent with an established past practice. We find that the Respondent's reliance on the *Courier-Journal* cases is unavailing because the past changes it relies on were implemented under the authority of a contractual management-rights provision. That contractually authorized past practice does not support unilateral changes made during a hiatus between contracts, when the contractual authorization ceased to be effective.

I.

The Union has long represented the production and maintenance employees at the Respondent's facility in Louisville, Kentucky. In 1994, during contract negotiations, the parties agreed that the employees would be covered by the Respondent's Beneflex Plan, under which the Respondent provides health care and a range of other benefits to many of its employees nationwide. The parties incorporated the Beneflex Plan, which included a reservation of rights provision granting the Respondent authority to modify benefits under the Plan on an annual

basis, into their collective-bargaining agreements in 1994 and 1997. During the terms of those collective-bargaining agreements, the Respondent made unilateral changes to the Beneflex Plan annually under the reservation of rights provision without protest by the Union.

Following the expiration of the parties' collective-bargaining agreement in March 2002, and while the parties were negotiating a successor agreement, the Respondent continued, annually, to make unilateral changes to the Beneflex Plan. The Union objected and asserted that bargaining over the changes was required. The Respondent refused to bargain, citing its past practice of making such unilateral changes under the reservation of rights clause.

II.

It is settled law that when parties are engaged in negotiations for a collective-bargaining agreement an employer is obliged to refrain from making unilateral changes, absent an impasse in bargaining for the agreement as a whole. See, e.g., *Register-Guard*, 339 NLRB 353, 354 (2003); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). As the Supreme Court has recognized, "[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

It is undisputed that, at the time that the Respondent unilaterally implemented changes in the Beneflex Plan, the parties were engaged in bargaining and were not at impasse. But relying on the Board's *Courier-Journal* decisions, the Respondent asserts that its unilateral actions were lawful because they were consistent with the parties' past practice. The Respondent bears the burden of establishing this affirmative defense. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), *enfd.* 317 F.3d 316 (D.C. Cir. 2003).

We find that the Respondent has not carried that burden. In the *Courier-Journal* cases, a Board majority found that the employer's unilateral changes to employees' health care premiums during a hiatus period between contracts were lawful because the employer had established a past practice of making such changes both during periods when a contract was in effect and during hiatus periods. The Respondent's asserted past practice in this case, in contrast, was limited to changes that had been made when a contract, which included the reservation of rights language, was in effect. It is apparent that a union's acquiescence to unilateral changes made under the authority of a controlling management-rights clause has no bearing on whether the union would acquiesce to additional changes made after that management-rights clause expired. The Respondent has simply not carried

its burden of showing relevant past practice under the *Courier-Journal* cases—annual unilateral changes during hiatus periods. As a result, the Respondent’s prior unilateral changes do not establish a past practice justifying the Respondent’s unilateral actions during a hiatus between contracts. The *Courier-Journal* decisions are plainly distinguishable on this basis, as the judge explained in a decision we adopt today in *E.I. Dupont de Nemours & Co.*, 355 NLRB 177 (2010), presenting a similar bargaining issue but at a different facility of the Respondent.

This factual distinction is key because it implicates important collective-bargaining principles. Extending the *Courier-Journal* decisions to the situation presented here would conflict with settled law that a management-rights clause does not survive the expiration of the contract embodying it, absent a clear and unmistakable expression of the parties’ intent to the contrary,¹ and does not constitute a term and condition of employment that the employer must continue following contract expiration.² Those principles apply to a broad management-rights clause as well as to more narrow contractual reservations of managerial discretion addressing, as here, a specific subject of bargaining³ and embodied in a plan document that has been incorporated in a collective-bargaining agreement.⁴ Moreover, extending *Courier-Journal* to circumstances such as those presented here would render the expiration of the management-rights clause meaningless wherever the employer had acted under its authority to make changes during the contract period. This, in turn, “would vitiate an employer’s bargaining obligation whenever a contract containing a broad management-rights clause expired.” *Beverly*

Health & Rehabilitation Services, 335 NLRB at 637. Such an outcome would discourage, rather than promote, collective bargaining, in particular, making unions wary of granting any discretion to management during the contract’s term.⁵

Our dissenting colleague proposes a departure from Board precedent when he rejects the conclusion that the “reservation of rights” provision is a management-rights clause.⁶ A management-rights clause is simply a contractual provision that authorizes an employer to act unilaterally, in its discretion, with respect to a mandatory subject of bargaining. “[T]he essence of [a] management-rights clause is the union’s waiver of its right to bargain.” *Beverly Health & Rehabilitation Services*, supra, 335 NLRB at 636. Nothing in Board law suggests that the breadth or narrowness of such a contractual waiver or whether it is free-standing or embedded in another provision of the contract or an incorporated document should alter how it is treated postexpiration. And, as demonstrated, a “contractual reservation of managerial discretion . . . does not survive expiration of the contract that contains it, absent evidence that the parties intended it to survive.” *Register-Guard*, supra, 339 NLRB at 355.

The dissent argues that our decision (and the Board doctrine underlying it) somehow deprives the Respondent of the benefit of its bargain with the Union.⁷ That argument reflects a basic misunderstanding of the issue posed here: the continuing effect of the “reservation of

¹ See, e.g., *Beverly Health & Rehabilitation Services*, supra, 335 NLRB at 636 fn. 6 (collecting cases), enfd. 317 F.3d 316 (D.C. Cir. 2003). “The law is quite clear that, when a collective agreement expires, any management-rights . . . clause it contains expires with it.” Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* § 20.16 at 638 (2d ed. 2004) (footnote omitted).

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

³ See, e.g., *Register-Guard*, supra, 339 NLRB at 355 (wages); *Iron-ton Publications*, 321 NLRB 1048, 1048 (1996) (merit pay increases); *Blue Circle Cement Co.*, 319 NLRB 954, 954 (1995) (vacation period and shift-starting time), enfd. in part mem. 106 F.3d 413 (10th Cir. 1997); *Furniture Rentors*, supra, 311 NLRB at 754 (subcontracting); *Control Services*, supra, 303 NLRB at 483–484 (scheduling).

⁴ See, e.g., *Mary Thompson Hospital*, 296 NLRB 1245, 1249 (1989), enfd. 943 F.2d 741 (7th Cir. 1991).

⁵ We further observe that the *Courier-Journal* decisions are in tension with previously settled principles. First, it is well established that silence in the face of past unilateral changes does not constitute waiver of the right to bargain. See *Owens-Corning Fiberglass*, 282 NLRB 609 (1987); *Exxon Research & Engineering Co.*, 317 NLRB 675, 685–686 (1995). In this regard, the judge here mistakenly ascribed to the Board a personal statement of position of our dissenting colleague in *Larry Geweke Ford*, 344 NLRB 628, 628 fn. 1 (2005) (Member Schaumber’s personal view that prior acquiescence of the charging party union is not invariably a requisite element in the past-practice analysis).

Second, it is well established that when parties are bargaining for a first contract, the employer may not make unilateral changes if they amount to the exercise of unbounded managerial discretion. See *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), enfd. 1 Fed.Appx. 8 (2d Cir. 2001). Nevertheless, because we find that the *Courier-Journal* cases are not applicable to the factual situation presented here, we need not reconsider the holdings of those cases at the present time.

⁶ Our colleague candidly acknowledges that he “disagree[s] with” *Mary Thompson Hospital*, supra, but the decision represents Board law. He asserts that the other decisions we rely on are “distinguishable,” but offers no persuasive explanation.

⁷ We note that the same argument could be made about all terms and conditions of employment established in a contract containing a management-rights clause, i.e., that the employer agreed to them only in return for discretion in other areas. But this logical extension of the dissent’s position would open a gaping whole in the settled prohibition of unilateral changes.

rights” clause *after* the contract has expired.⁸ The Respondent has had the full benefit of its bargain during the term of the collective-bargaining agreement. It was free to make changes to employee benefits, in its discretion, up to the agreement’s expiration. At that point, the terms and conditions of employment then in place—i.e., the benefits as unilaterally established by the Respondent pursuant to the Union’s waiver—became fixed, subject to the *statutory* duty to bargain. Board law distinguishes between terms and conditions of employment established unilaterally by the employer under a contractual management-rights clause and the clause itself.⁹

Our colleague rejects this distinction, insisting paradoxically that the Respondent preserved the status quo by changing employees’ terms and conditions of employment. Accepting his view would mean discarding a long line of precedent, and he has offered no persuasive reason to do so. The dissent invokes the *Courier-Journal* decisions, but reads them so broadly that they would be in clear conflict with well-established Board doctrine. As for the dissent’s policy argument—that finding a violation here threatens the viability of companywide benefit plans covering both represented and unrepresented employees—it has no clear grounding in the Act, and it is based on a series of speculative leaps. The short answer is that if “[e]mployers and employees both benefit” from the continued operation of reservation of rights clauses in such plans post-expiration, they can easily agree to such continued operation. Moreover, if our colleague were correct, then the Act should permit employers which maintain benefit plans like the Respondent’s to

⁸ Because this case involves postcontract-expiration unilateral changes, it does not implicate the debate between the Board and certain appellate courts over the proper analytical approach to assessing unilateral changes made *during* the contract term under the purported authority of a contractual provision. See generally *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007) (adhering to Board’s traditional “waiver” standard, and rejecting courts’ “contract coverage” standard). Courts that adhere to the “contract coverage” standard have properly recognized the difference between the two situations. See *Honeywell International, Inc. v. NLRB*, 253 F.3d 125, 132–133 (D.C. Cir. 2001) (rejecting employer’s “contract coverage” argument, observing that union invoked statutory, not contractual, claim to continued status quo benefits).

⁹ When the contract no longer is in effect, employment terms and conditions “are kept in place simply by virtue of Section 8(a)(5) of the Act rather than by force of contract.” *Holiday Inn of Victorville*, 284 NLRB 916, 916 (1987). In contrast:

A management-rights clause is not a term and condition of employment To the extent it authorizes unilateral action to change matters that are mandatory subjects of bargaining, it is, in effect, a *union’s waiver of its statutory right to bargain* over those matters. Given the established rule that such waivers must be clear and unmistakable . . . the waiver normally would be limited to the time during which the contract that contains it is in effect.

Id. (emphasis added).

refuse to engage in collective bargaining over their plans at all, so long as they treat unionized and nonunionized parts of the work force identically. The Board has rightly rejected that position. See *Larry Geweke Ford*, 344 NLRB 628 (2005).

III.

The Respondent also contends that its unilateral changes were privileged under *Stone Container Corp.*, 313 NLRB 336 (1993). There, the Board held that an employer may implement a proposal regarding a discrete, recurring annual event that occurs while contract negotiations are ongoing, so long as it gives the union notice and an adequate opportunity to bargain about that topic.

Here, the record shows that the Respondent flatly refused the Union’s request during contract negotiations to bargain over the Respondent’s proposed changes to employee benefits under the Beneflex Plan. Indeed, the parties have stipulated that the “Union requested to bargain over these changes” in the Beneflex Plan in 2004 and 2005 but that the “Respondent did not offer to, nor did it, negotiate over these changes.” Accordingly, *Stone Container* provides no defense to the Respondent’s conduct.

As discussed above, it was the Respondent’s statutory obligation to follow the terms and conditions of employment in the expired contract, until it bargained to agreement or impasse for a new agreement as a whole. *Id.*; *R.E.C. Corp.*, 296 NLRB 1293 (1989); *Cisco Trucking Co.*, 289 NLRB 1399, 1400 (1988). By unilaterally implementing changes to the Beneflex Plan prior to reaching impasse, the Respondent breached its obligation to maintain the status quo.

The Respondent was, of course, free to seek agreement of the Union that the parties’ reservation of rights language would remain in effect following contract expiration,¹⁰ or to show that was the intent of the parties when they included that language in their contracts. The Respondent did not do so. Because the Respondent has failed to justify its unilateral conduct either by proving relevant past practice or the existence of such an agreement, we find that the Respondent violated Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, E.I. DuPont De Nemour, Louisville Works, Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹⁰ In fact, the judge found that Respondent made such a proposal during the subject negotiations.

(a) Making unilateral changes to the benefits of unit employees during periods when the parties are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

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

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

(a) On request of the Union, restore the unit employees' benefits under the Beneflex package of benefit plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2004, and January 1, 2005, and maintain those terms in effect until the parties have bargained to a new agreement or a valid impasse, or until the Union has agreed to changes.

(b) Make unit employees whole by reimbursing them, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), for any loss of benefits and additional expenses that they suffered as a result of the unilateral implemented changes in benefits.

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

(d) Within 14 days after service by the Region, post at its Louisville, Kentucky facility copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Raymond to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former at any time since January 1, 2004.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

MEMBER SCHAUMBER, dissenting.

In finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing certain aspects of unit employees' benefits following the 2002 expiration of the parties' collective-bargaining agreement, the majority both applies an incorrect legal analysis and incorrectly limits Board precedent. I therefore dissent and, like the judge in this case, would dismiss the complaint.

Facts

The Union has represented the Respondent's production and maintenance employees at its Louisville Works facility for over 50 years. The parties' most recent collective-bargaining agreement ran from June 13, 1997, to March 21, 2002 (the 1997 agreement). The previous contract ran from May 25, 1994, to March 21, 1997 (the 1994 agreement). At the time of the hearing, in September 2005, the parties had not entered into a successor agreement.

The Respondent provides benefits to its employees throughout the United States under its Beneflex Flexible Benefits Plan (Beneflex Plan). The Beneflex Plan is a cafeteria-style benefits plan that includes a variety of benefit options in addition to health care coverage, such as dental coverage, vision coverage, life insurance, and (more recently) financial planning and legal services. The Beneflex Plan covers approximately 60,000 of the Respondent's domestic employees, including the unit employees at the Louisville Works facility. The Beneflex Medical Care Plan is a self-insured medical care option encompassed within the Beneflex Plan.¹ The Beneflex Plan documents have contained, since the inception of those Plans, identical reservations of the Respondent's right to change either Plan at its sole discretion. The "reservation of rights" provision in the Beneflex Plan documents states:

The Company reserves the sole right to change or discontinue this Plan in its discretion provided, however, that any change in price or level of coverage shall be announced at the time of annual enrollment and shall not be changed during a Plan Year unless coverage provided by an independent, third-party provider is significantly curtailed or decreased during the Plan Year.

¹ All references to the Beneflex Plan include the Beneflex Medical Care Plan, unless otherwise indicated.

During the negotiations for the 1994 agreement, the parties agreed that employees would be covered by the Beneflex Plan. During those negotiations, the Respondent informed the Union that, under the terms of the Beneflex Plan, the Respondent would have the authority to modify the level and/or price of benefits under the Plan on an annual basis. The Respondent also indicated that these modifications would occur on a U.S. region-wide basis. So informed, the Union accepted the Beneflex Plan, and it was instituted at Louisville Works on January 1, 1995. During the negotiations for the 1997 agreement, the Respondent proposed language intended to confirm the existing benefits received by employees under the Beneflex Plan, and also that the receipt of those benefits was subject to all terms and conditions of the Beneflex Plan. The Respondent, however, ultimately abandoned this proposal, deciding that it was unnecessary in light of the parties' existing understanding concerning the Beneflex Plan.

From 1995, the first year of implementation, through 2002, the Respondent made annual changes to the Beneflex Plan. Each fall, the Respondent presented the Union with a summary of any contemplated changes to the Beneflex Plan for the upcoming year. On January 1 of each year from 1996 to 2002, the Respondent instituted the changes to the Beneflex Plan at all of its U.S. sites. In each of those years, the changes took place while a collective-bargaining agreement covering the Respondent's bargaining-unit employees was in effect. The Respondent did not offer to bargain over the changes, nor did the Union request bargaining or object to the changes once implemented.

In February 2002, the parties began negotiations for a successor collective-bargaining agreement. In the fall of 2002, as it had done in the fall of every year since implementing the Beneflex Plan pursuant to its agreement with the Union, the Respondent presented the Union with a summary of changes for the Beneflex Plan for the upcoming year. The Union objected to the proposed changes and requested bargaining. On January 1, 2003, the Respondent implemented the changes to the Beneflex Plan. The Union again sought bargaining, and the Respondent refused to negotiate over the changes.

The same scenario occurred in 2004 and 2005. In sum, following the expiration of the 1997 agreement in 2002, the Respondent implemented changes to the Beneflex Plan in 2003, 2004, and 2005 without bargaining with the Union, just as it had every year since the Beneflex Plan was instituted.

Judge's Decision

In finding the Respondent's 2004 and 2005 modifications to the Beneflex Plan lawful, the judge relied on the Board's decisions in *Courier-Journal*, 342 NLRB 1093 (2004) (*Courier-Journal I*) and *Courier-Journal*, 342 NLRB 1148 (2004) (*Courier-Journal II*). In the *Courier-Journal* cases, the Board addressed the question of whether an employer's unilateral increase of employee health insurance contribution rates violated Section 8(a)(5). The Board found that, where the employer had established a past practice of making annual changes to its health insurance plan, where the annual changes affected represented and nonrepresented employees equally, and where the union had acquiesced in the employer's practice in treating represented and nonrepresented employees equally in this regard, the employer had established a past practice of unilateral changes that the employer was permitted to continue, postcontract expiration, without running afoul of the Act. *Courier-Journal I*, 342 NLRB at 1094–1095; *Courier-Journal II*, 342 NLRB at 1149–1150.

Analysis

Generally, an employer violates Section 8(a)(5) and (1) if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the Union notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). “[T]he vice involved in [a unilateral change] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.” *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (quoting *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970)) (emphasis in original), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). It is well understood, however, that the concept of “change” within labor law cannot be approached simplistically: under certain circumstances, *not* to change would be *to change*. Thus, where an employer's “changes” actually continue a status quo past practice of like changes, the employer has not changed existing conditions of employment, and therefore has not violated Section 8(a)(5) and (1).

In the instant case, the Respondent's modifications to the Beneflex Plan on January 1, 2004, and 2005 did not alter the status quo, and thus the Respondent did not violate Section 8(a)(5). As in the *Courier-Journal* cases, the changes here were implemented pursuant to a well-established past practice. During the negotiations for the 1994 agreement, the parties agreed that unit employees would be covered by, and subject to, the Beneflex Plan. The Union accepted the Beneflex Plan in its entirety, and

it did so on the express understanding that the Respondent reserved the discretion to make changes in the price or level of benefits under both the Medical Care Plan and the broader Beneflex Plan on an annual basis pursuant to the “reservation of rights” provisions. Indeed, during the parties’ 1994 negotiations, the Respondent specifically notified the Union that, under the terms of the Beneflex Plan, the Respondent would have the authority to make unilateral changes to the Plan. Thus, the Union’s decision to have its members covered by the terms of the Beneflex Plan was made with the knowledge that the Respondent would have the authority to make unilateral, annual changes to the employee contribution levels and benefits associated with the Plan. From 1996 to 2002, the Respondent unilaterally implemented changes to the Beneflex Plan on an annual basis pursuant to the “reservation of rights” clause. In each instance, the Union did not oppose the Respondent’s changes.

Following the expiration of the parties’ contract in 2002, the Respondent was required to maintain the terms and conditions of employment under the expired collective-bargaining agreement until the parties negotiated a new agreement or bargained in good faith to impasse. See, e.g., *Cisco Trucking*, 289 NLRB 1399, 1400 (1988). That duty to maintain the status quo required the Respondent to continue to provide unit employees with benefits under the Beneflex Plan and to implement the Beneflex Plan in *the same manner* that it had been implemented in the preceding years, including its annual changes to the Plan, which it implemented nationwide for unit and nonunit employees alike. Thus, the Respondent’s modifications to the Beneflex plan on January 1, 2004, and 2005, did not constitute unilateral changes but, rather, were consistent with the status quo.²

My colleagues say, however, that the Respondent did not establish that its changes were consistent with past practice under the *Courier-Journal* decisions. They attempt to distinguish those cases on two grounds and I discuss each in turn. First, they claim that, unlike the *Courier-Journal* cases, the 1996–2002 modifications to the Beneflex Plan were implemented under a management-rights clause which expired when the parties’ contract expired and therefore did not permit post-contract modifications. The majority’s characterization of the “reservation of rights” clause in the Beneflex and Beneflex Medical Core Plans as a management-rights provision is incorrect. These “reservation of rights” clauses are unlike negotiated management-rights provisions, which

typically reserve to management discretion over a broad range of otherwise bargainable matters. Instead, they are discrete, specific, and integral components of the benefit plans. Because these reservations of rights clauses are integrated elements contained within the benefit plans, and pertain solely to the Respondent’s duties and authority in implementing the Plan, the clauses do not constitute management-rights clauses, as those clauses are construed under the Act.³

Further, in contrast to management-rights clauses which cover subjects not otherwise dealt with in the contract, the reservation of rights clause in the Beneflex Plan is itself part of the benefits plan to which the parties agreed contractually. The Respondent and the Union struck a deal, under which unit employees would receive the benefits provided under the Plan, subject to the Plan’s terms and conditions, one of which is the Respondent’s reservation of a right to make changes to the Plan. To hold that latter condition, as a matter of law, to be a management-rights clause would be to create, postcontract expiration, an arrangement to which the Respondent *never agreed*. The Respondent *never* agreed to provide benefits under the Plan uncoupled from a unilateral right to make changes therein. It agreed to provide those benefits *conditionally*, and those conditions are as much a part of the parties’ agreement concerning benefits as are the benefits themselves. The law should operate to maintain that benefits agreement postcontract, not to change it by stripping out the conditions.⁴

My colleagues next claim that the *Courier-Journal* cases are inapposite because “[in the *Courier-Journal* cases] the employer had established a past practice of making such changes during both periods when a contract was in effect and during hiatus periods” and here the Respondent’s past practice of changes occurred only

³ Thus, *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001), *enfd.* 317 F.3d 316 (D.C. Cir 2003); *Control Services*, 303 NLRB 481 (1991); and other similar cases cited by the majority are distinguishable because they all involve management-rights clauses. Further, I disagree with *Mary Thompson Hospital*, 296 NLRB 1245, 1249 (1989), cited by the majority, to the extent that it treated a reservation of rights clause contained within a corporatewide benefit plan as a negotiated management-rights clause waiving a union’s right to bargain over changes to the plan only for the contract term.

⁴ The majority contends that the Respondent has had the full benefit of its bargain during the term of the contract and, once the collective-bargaining agreement expired, the terms and conditions of employment established under the reservation of rights clause became fixed and subject to bargaining over its discrete elements. This is incorrect. It is the Beneflex Plan, in its entirety, that is the term and condition of employment and, under this plan, the Respondent has reserved the right to make changes to the level and/or price of benefits. Once the parties’ contract expired in 2002, the status quo required the Respondent to maintain this term and condition of employment until the parties negotiated a new contract.

² Because I find that the Respondent’s changes to the Beneflex Plan were implemented pursuant to a past practice, I find it unnecessary to address the majority’s analysis of the Respondent’s changes under *Stone Container Corp.*, 313 NLRB 336 (1993).

in the contract term so that the postcontract changes at issue here were not done pursuant to a past practice. They sum up—“[t]he Respondent has simply not carried its burden of showing relevant past practice under the *Courier-Journal* cases—annual unilateral changes during hiatus periods.” In so concluding, my colleagues have misinterpreted and significantly limited the holding of the *Courier-Journal* cases. There is nothing in the reasoning of the *Courier-Journal* decisions to support the contention that prior hiatus changes were conclusive to the outcome. The holding of the *Courier-Journal* cases, and the established precedent upon which it is based, is that parties by their actions can create a past practice authorizing an employer’s unilateral action, which becomes the status quo. The logic of these decisions is that it is the creation of the practice that controls, not the timing of when the practice happened to arise. The majority’s focus on whether a contract was in existence and governed the changes, in determining whether a past practice had been established, is essentially a waiver analysis. But the *Courier-Journal* decisions expressly rejected the application of waiver principles, since a status quo based on a past practice depends upon the extent of the parties’ actions, not on the continued existence of contract language. Accordingly, my colleagues’ interpretation of the *Courier-Journal* cases cannot stand.⁵

Further, dismissal of the complaint here is consistent with sound policy and the realities inherent in the way in which large, companywide health and benefit plans covering both represented and unrepresented employees, such as that at issue here, operate. In the face of continuously skyrocketing healthcare costs, and the questionable financial status of many multiemployer pension and health and welfare plans, parties seeking to provide decent coverage to employees frequently look to companywide programs as the only economically viable option. Such large-scale plans achieve economies of scale and thus reduce costs on a per capita basis, making it more feasible for the employer to offer attractive benefits. Employers and employees both benefit—employers, by being able to attract and retain skilled employees by

⁵ The majority claims my position discards precedent but it is fully in accord with, inter alia, the *Courier-Journal* cases and the Board’s decision in *Friendly Ford*, 343 NLRB 1058 (2004). They also contend that I have interpreted the *Courier-Journal* decisions too broadly. Yet, the principle that I rely on from the *Courier-Journal* decisions—that parties by their actions can create a past practice authorizing an employer’s unilateral action, which becomes the status quo—is established under Board and court precedent. See, e.g., *Post Tribune Co.*, 337 NLRB 1279 (2002) (no unlawful unilateral change where employer’s action does not alter the status quo, and thus there is no change in existing conditions), relying on, e.g., *Daily News of Los Angeles*, supra, and *NLRB v. Dothan Eagle*, supra, discussed above.

virtue of offering a strong benefits package; employees, by virtue of having access to the relatively low-priced benefits afforded by the economies of scale involved in such plans. Under the majority’s holding, however, employers will be deterred from offering participation in such plans to union-represented employees. Companies like du Pont, with multiple contracts covering multiple bargaining units nationwide, will be compelled to freeze in place, unit by unit as contracts expire and successor agreements are not immediately concluded, extant benefit-plan terms at the moment of expiration, creating a checkerboard of plans—despite the fact that the unions expressly agreed to be bound by the plan conditions. Costs will skyrocket, and the company, rather than absorb them and the administrative nightmares of post-hoc reconstruction of plan terms to comply with Board orders,⁶ will simply stop offering the option to bargaining unit members. That, in turn, will drive up the costs and diminish the availability of quality health insurance options for employees.⁷

In sum, as the Respondent argues in its brief, the Union specifically accepted the Beneflex Plan, accepted the reservation of rights language contained in the plan, and both parties understood that the Respondent had the right to make annual changes to the plan. That right, based on the parties’ mutual agreements and understandings, continued after the contract was reopened because the right and past practice was never based on any express waiver contained in the collective-bargaining agreement. Fundamental fairness and the Board’s past practice doctrine

⁶ In the instant case, the Respondent will be required to continue to provide the 2002 Beneflex Plan benefits to unit employees, even though the Plan benefits had subsequently undergone three different annual revisions. Certainly, there is a chance that, had the Respondent bargained with the Union over the annual changes, it could have reached impasse prior to 2006, but there is no guarantee that this would have occurred.

⁷ My colleagues assert that I am advocating a policy that would enable employers maintaining benefit plans like the Respondent’s to refuse to engage in collective bargaining over their benefit plans so long as they treat unionized and nonunionized parts of the work force identically. The majority misconstrues my position. I have in no way suggested that the Respondent should not have to bargain over health care with the Union. My point is that, here, where the Respondent has established a past practice of modifying its Beneflex Plan, it is sound policy that the Respondent maintain the discretion to continue this practice while the parties are bargaining for a successor contract. The majority also contends that the parties can explicitly agree to the continued operation of the reservation of rights clauses. However, I find that the Respondent should not be required to do so.

Further, my colleagues’ reliance on *Larry Geweke Ford*, 344 NLRB 628 (2005), to support their assertion is misplaced. As I stressed in that case, the Respondent did not establish that its changes to its health insurance benefits were implemented pursuant to a well-established past practice. *Id.* at fn. 1. Further, that case did not involve a plan provision authorizing management’s unilateral action.

govern the result here because the Union can not have it both ways. The Union is claiming that it is entitled to receive all benefits available under the plan without the language (via the reservation of rights clause) that permits the Respondent to modify that very benefit. The Union cannot take the benefits of the plan while ignoring the provisions it finds distasteful. The parties specifically agreed to continue the terms of their bargaining agreement until such terms were modified. The Beneflex Plan with the Respondent's corresponding right to make annual changes to that plan is one of the benefits continued and the Louisville employees have benefited because the benefits available under the plan continue to be available to them.

Accordingly, for the reasons stated herein, I agree with the judge's finding that the Respondent did not violate Section 8(a)(5) and (1) of the Act by its modifications to the Beneflex Plan on January 1, 2004, and 2005 following the expiration of the 1997 agreement, and I would dismiss the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT make unilateral changes to your benefits during periods when the Union is engaged in negotiations with us for a collective-bargaining agreement and we have not reached overall impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, on request of the Union, restore the unit employees' benefits under the Beneflex package of benefit plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2004 and January 1, 2005, and maintain those terms in effect until the parties have bargained to a new agree-

ment or a valid impasse, or until the Union has agreed to changes.

WE WILL make unit employees whole by reimbursing them, with interest, for the loss of benefits and additional expenses that they suffered as a result of the unilateral changes in benefits that we unlawfully implemented on January 1, 2005.

E.I. DU PONT DE NEMOURS & COMPANY

Kevin P. Luken, Esq., for the General Counsel.
Mark L. Keenan, Esq. (McGuire Woods, LLP), of Wilmington, Delaware, for the Respondent.
Kathleen A. Hostetter, Esq., of Denver, Colorado, for the Charging Party.

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Louisville, Kentucky, on June 21, 2005. The charge in Case 9-CA-40777 was filed January 2, 2004, and a charge in Case 9-CA-41634 was filed January 5, 2005.¹ (The additional allegations in Case 9-CA-40919 were settled). The consolidated complaint was issued March 18, 2005. It alleges that the Respondent, E.I. DuPont De Nemours, Louisville Works, violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by implementing changes to its Beneflex 2004, Health and Welfare Benefits without the consent of the Union, the recognized collective-bargaining representative of the employees at its Louisville Works, and without affording the Union an opportunity to bargain.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs and reply briefs filed by the General Counsel, the Union and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the manufacture of fluoro-products at its facility in Louisville, Kentucky, where it annually sold and shipped goods valued in excess of \$50,000 from its Louisville, Kentucky facility directly to points outside the Commonwealth of Kentucky. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

This case presents the legal issue based upon a stipulated factual record, whether the Respondent violated the Act by unilaterally changing health care benefits for unit employees following the expiration of the collective-bargaining agreement. The record consists of the stipulation of facts and 56 exhibits, including the expired collective-bargaining agreement, copies of DuPont's medical insurance plan, known as DuPont Beneflex Medical Care Plan and copies of DuPont's benefit plan for

¹ All dates are from 2004-2005, unless otherwise indicated.

its employees, known as Beneflex Flexible Benefits Plan, as well as letters sent by the parties. The record also contains the testimony of Pamela Murray, senior consultant of DuPont. The following summary of relevant facts is primarily based on the Stipulated Facts and the exhibits received into the record (Jt. Exh. A).

The Respondent, E.I. DuPont De Nemours, Louisville Works, and the Union have had a bargaining relationship for over 50 years. During that time, the Neoprene Craftsmen Union (NCU) represented the production and maintenance employees at the Louisville Works. In June 2002, NCU voted to affiliate with the Paper, Allied-Industrial, Chemical, and Energy Workers International Union (PACE) and became Pace Local 5-2002. In April 2005, Pace merged with the Steelworkers of America and became USW.

The Respondent and the Union (NCU) were parties to collective-bargaining agreements covering DuPont's bargaining unit employees. The agreement continued year to year unless reopened by one of the parties 60 days prior to the expiration date of the contract. The contracts provided for a wage re-opener which was exercised annually. The parties' most recent collective-bargaining agreement was effective from June 13, 1997, to March 21, 2002. The prior agreement ran from May 25, 1994, to March 21, 1997.

Of significance are the Respondent's Beneflex Plan (Jt. Exh. 2), and the Beneflex Medical Care Plan (Jt. Exh. 3). During negotiations for the March 1994 agreement, the Respondent proposed and the Union (NCU) accepted the proposal to have the employees covered by the DuPont Beneflex Medical Care Plan (Beneflex Medical). More specifically, the bargaining agreement provides: "The COMPANY will provide basic Hospital and Medical-Surgical coverage as set forth in the DuPont BeneFlex Medical Care Plan." (Jt. Exh. 1.) The parties further agreed that employees would be covered by the DuPont U.S. regionwide Beneflex Flexible Benefits Plan (Beneflex Plan). The Beneflex Plan is a cafeteria-style benefits plan, which includes a variety of benefit options in addition to health care coverage, such as dental coverage, vision coverage, and life insurance. Employees are provided with annual enrollment periods each fall at which point the employee elects the level of health care desired and other elections of benefit options. Beneflex Medical is a self-insured medical care option encompassed within the Beneflex Plan. All DuPont sites in the United States participate in Beneflex. The Beneflex Plan, including Beneflex Medical, was implemented at the Louisville site effective January 1, 1995.

During the negotiations for the 1994 collective-bargaining agreement, the Respondent pointed out to the Union that under the terms of the Beneflex Plan, the Respondent would be permitted to alter the level and/or costs of benefits under the plan on an annual basis. The Respondent also noted that such changes would be made on a U.S. regionwide basis. Based on these understandings, the union membership accepted the Beneflex Plan. In May 1994, the Union (NCU) ratified the collective-bargaining agreement which cited DuPont's Beneflex Medical Plan. Under the terms of the Beneflex Plan and the Beneflex Medical Plan, the Respondent has the right to change or alter the level or cost of benefits under the plan on an annual basis. Both documents, the

Beneflex Plan and the Beneflex Medical Plan, contain identical provisions to that effect, stating, *inter alia*: "The Company reserves the sole right to change or discontinue this plan in its discretion, provided." (Jt. Exhs. 2, 3.)

In the fall of 1995, the Respondent presented to the Union (NCU) with a summary of any upcoming changes to the Beneflex Plan, as well as any changes or premium increases for Beneflex Medical, for the upcoming year. The Respondent subsequently mailed a "Plain Talk" to all U.S. Region DuPont employees, including Louisville employees represented by the Union (NCU). The Plain Talk was a publication used and distributed by the Respondent each fall to communicate changes to the Beneflex Plan, including any changes or premium increases to Beneflex Medical, to all participants in the Beneflex Plan for the upcoming calendar year.

On January 1, 1996, the Respondent implemented the changes to the Beneflex Plan. The terms of the Beneflex Plan and the Beneflex Medical allowed the Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Plan. The Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

In the fall of each year thereafter, from 1995 to 2001, the Respondent and the Union met. The Respondent presented the union representatives with a summary of any changes for the upcoming year to the Beneflex Plan, as well as any changes or premium increases for Beneflex Medical. The Respondent subsequently mailed a "Plain Talk" each year to all U.S. Region DuPont employees, including the Louisville employees represented by the Union. On January 1 of each year, from 1996 to 2002, the Respondent implemented the changes to the Beneflex Plan which had earlier been presented to the Union. The Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes. In some years the Respondent implemented 5 changes, in other years 7 changes, and in 2002 the Company implemented 13 changes. The changes included, increases in premiums for medical coverage, changes to pharmacy benefits, increases to premiums for vision coverage and, in the following year, decreases in premiums for vision coverage, and changes in the rules for spousal medical coverage.

On January 16, 2002, the Union (NCU) notified the Respondent that it intended to open negotiations for a successor contract. On February 26, 2002, the parties began negotiations for a successor collective-bargaining agreement. The parties agreed that if an agreement had not been reached by the contract negotiation date, management would honor the terms and conditions of the contract day-to-day until something different was bargained. On March 21, 2002, the bargaining agreement between the Respondent and the Union (NCU) expired (Jt. Exh. 9).

In June 2002, the Union (NCU) voted to affiliate with Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE). The Respondent immediately recognized PACE.

In the fall of 2002, the Respondent met with the Union and presented a summary of the changes for the Beneflex Plan, as well as changes and/or premium increases in Beneflex Medical, for the upcoming year. The Respondent subsequently mailed a "Health Care 2003 Communication for Employees" (in lieu of a

“Plain Talk”) to all U.S. Region DuPont employees, including Louisville employees represented by the Union.

On October 24 and November 27, 2002, the Union (PACE Local 5-2002) on behalf of the DuPont bargaining unit, wrote to the Respondent, contending that any changes to the Beneflex were subject to good-faith bargaining before implementation, and requesting bargaining on this subject (Jt. Exhs. 35, 37(a)). On November 21 and December 19, 2002, the Respondent wrote to the Union reiterating its position that it was not required to bargain over any changes to the Beneflex Plan, including premium increases (Jt. Exhs. 36, 37).

On January 1, 2003, the Respondent implemented the changes to the Beneflex Plan for the DuPont bargaining unit employees. The terms of the Beneflex Plan and Beneflex Medical allowed the Respondent to alter the costs incurred by unit members and/or the levels of benefits received by unit members. The Union requested bargaining, however, the Respondent did not offer to, nor did it, negotiate over these changes.

On June 2, 2003, the Union (PACE Local 5-2002) filed an unfair labor practice charge (Case 9–CA–40262–1), alleging that the Respondent violated the Act by unilaterally implementing changes to the Beneflex Plan, including increased premiums, for the DuPont bargaining unit employees. On December 10, 2003, these charges were dismissed on (10(b) issue) procedural grounds. The decision was upheld on March 5, 2004, by the Office of Appeals.

In the fall of 2003, while negotiations for a successor agreement were ongoing, the Respondent and the Union (PACE Local 5-2002) met and the union representatives were presented with a summary of changes for the upcoming year to the Beneflex Plan, as well as changes and/or premium increases for Beneflex Medical for the upcoming year. The Respondent subsequently mailed a “Plain Talk” to all U.S. Region DuPont employees.

On October 22, 2003, the Union (PACE Local 5-2002) again wrote to the Respondent contending that any changes to the current Beneflex Plan for the Dupont bargaining unit were subject to good-faith bargaining before implementation, and requesting bargaining on the proposed changes (Jt. Exh. 43). On October 22, 2003, the Respondent wrote to the Union restating its position that the Respondent had the right to make changes to the Beneflex Plan (Jt. Exh. 44). The Union reiterated its position on November 4, 2003, that the Respondent was required to bargain over any changes to the Beneflex Plan and that any reliance on the management rights clause was misplaced (Jt. Exh. 45).

On January 1, 2004, the Respondent implemented the changes to the Beneflex Plan for the DuPont bargaining unit employees. These changes included increases in premiums for medical coverage, implementation of a new dental plan, and the addition of a legal services plan. The Union requested to bargain over the changes, however, the Respondent did not offer to, nor did it, negotiate over these changes.

The same scenario was repeated the next year. In the fall of 2004, while negotiations for a successor agreement were continuing, the Respondent presented the Union with a summary of changes to the Beneflex Plan, as well as changes or premium

increases for the Beneflex Medical Plan for the upcoming year. On October 14, 2004, the Union (PACE Local 5-2002) wrote to the Respondent contending that any changes to the current Beneflex Plan for the Dupont bargaining unit were subject to good-faith bargaining (Jt. Exh. 48). On October 20, 2004, the Respondent wrote to the Union, restating its position that the Respondent had reserved the right to make changes to the Beneflex Plan, and that the Respondent had consistently taken this position the past few years (Jt. Exh. 49).

On January 1, 2005, the Respondent implemented changes to the Beneflex Plan for the DuPont bargaining unit employees. The Union requested to bargain over these changes, but the Respondent did not offer to, nor did it, negotiate over these changes. In short, following the expiration of the collective-bargaining agreement in 2002, the Respondent implemented changes to the Beneflex Plan, including the Beneflex Medical Plan in 2003, 2004, and 2005 without bargaining with the Union.

In sum, for a period, from 1994 to 2001, during the existence of successive collective-bargaining agreements, the parties had agreed that the Respondent would make annual changes to the Beneflex Plan, including the Beneflex Medical Plan. Indeed, by the terms of the Beneflex Plan and the Beneflex Medical Plan the Respondent had reserved the right to make changes. Following the expiration of the bargaining agreement, the Respondent rejected the Union’s repeated demands to bargain over any changes to these plans.

On January 2, 2004, the Union filed the charges in Case 9–CA–40777, giving rise to the instant complaint, challenging the Respondent’s unilateral changes implemented on January 1, 2004, and those implemented on January 1, 2005.

Analysis

The General Counsel and the Union argue that the Respondent’s unilateral changes to the Beneflex Plan were lawful during the term of the bargaining agreement, because the parties had agreed, but when the agreement expired, so did the Union’s consent to any further unilateral changes. The Respondent argues that the parties agreed that “management would honor the terms and conditions of contract day-to-day until something different was bargained,” and that, in any case, the changes were authorized by past practice.

Section 8(a)(5) of the Act establishes an employer’s duty to bargain collectively with the employees’ representative. The parties agree that unilateral changes by an employer during the course of a collective-bargaining relationship concerning matters that are mandatory subjects of bargaining are usually considered a refusal to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). It is also not disputed that health insurance and medical benefits are mandatory subjects of bargaining. *Mid-Continent Concrete*, 336 NLRB 258 (2001), *enfd.* 308 F.3d 859 (8th Cir. 2002). Accordingly, without the Union’s consent, health care benefits cannot lawfully be changed. And a union’s waiver of its bargaining rights must be clear and unmistakable. *Metro-politan Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983).

Here, the expired contract contained a management rights provision which operates as a waiver of the Union’s bargaining rights as to mandatory subjects and which authorized the Re-

spondent to implement the annual changes. However, such provisions usually terminate with the expiration of the contract. In *Register-Guard*, 339 NLRB 353, 355 (2003), the Board stated that a “contractual reservation of managerial discretion, like the provision relied on by the Respondent, does not survive expiration of the contract that contains it, absent evidence that the parties intended it to survive,” citing *Ironton Publications, Inc.*, 321 NLRB 1048 (1996), and *Blue Circle Cement Co.*, 319 NLRB 954 (1995). More recently, the Board reaffirmed that principle in *Long Island Head Start Child Development Services*, 345 NLRB 973 (2005). There the Board similarly stated: “A contractual reservation of management-rights does not extend beyond the expiration of the contract in the absence of the parties’ contrary intentions.” Here, there is no clear evidence that the parties had expressed such intentions. Instead, the Respondent has taken the position that its agreement, namely, “management would honor the terms and conditions of contract day-to-day until something different was bargained,” as implying that the terms of the contract continued in effect, thereby maintaining the status quo between the parties.

The record supports that notion. The Respondent’s changes in the Beneflex Plan, including the Beneflex Medical Plan, for the duration of the collective-bargaining agreements from 1995 to 2002, affected both, the represented and also the nonrepresented employees. In some years, medical premiums increased, but other benefits showed decreases in premiums, as for example in 2001, premiums for dependent life insurance and for accidental death insurance were decreased. In 2000, the annual changes included decreases in premiums for vision coverage. And the 1999 changes included reductions in deductibles for medical care options A and B. These examples and others are indicative that the unilateral changes made by DuPont to the many benefit packages under the Beneflex Plan often benefited the employees. The changes were implemented annually at the beginning of the year with advance notice to the Union and to the employees. There is also no evidence that the Respondent abused its rights to effectuate changes in the Beneflex Plan during the life of the collective-bargaining agreement to the detriment of the unit employees, or that the implemented changes after the expiration of the contract deviated from the established pattern.

Under these circumstances, I find two recent Board decisions to be most relevant, *Courier-Journal*, 342 NLRB 1093 (2004), and *Courier-Journal*, 342 NLRB 1148 (2004). In the former case, referred to as *Courier-Journal I*, the Board under a factual scenario similar to the one here, decided that the Respondent had not violated the Act, because the union’s acquiescence in past unilateral action by the employer had established a past practice. The Board emphasized that in so holding, it did “not pass on the legal issue of whether a contractual waiver of the right to bargain survives the expiration of the contract,” and that its “decision is not grounded in waiver,” but that it “is grounded in past practice, and the continuation thereof.” In the second case, the Board succinctly restated its holding applicable to both cases as follows:

There (*Courier-Journal I*), as here, the Respondent’s collective-bargaining agreement (with a different union) authorized

the Respondent to change the costs and benefits of the health care plan for bargaining unit employees unilaterally, on the same basis as for nonrepresented employees. There, as here, the Respondent made numerous unilateral changes in the health care plan, both during the term of the agreement and during the hiatus periods between contracts, without opposition from the Union. In these circumstances, we find, as we did in *Courier-Journal I*, that the Respondent’s practice has become an established term and condition of employment, and therefore that the Respondent did not violate Section 8(a)(5) when it acted consistently with that practice by making further unilateral changes.

The General Counsel and the Charging Party properly point out that the unilateral changes made by the Respondent, unlike those in *Courier-Journal*, were made only during the life of the contract and never during a contract hiatus period. To be sure, that is a valid distinction and that is the only factor which detracts from the full precedential value of the decisions. In my opinion, that difference would clearly be relevant if the Board’s holding were based on a waiver theory, because there the union failed to challenge the unilateral changes during the hiatus period. As already stated, however, the Board emphasized that its holding was based on past practice, and concluded that the respondent’s practice had become an established term and condition of employment. Arguably, an established past practice could be considered a form of a waiver, and it is not clear if the Board would have come to the same conclusion, had it not been for the hiatus period. In *Larry Geweke Ford*, 344 NLRB 628 (2005), the Board addressed the issue, while commenting on its holdings in *Courier-Journal*, stating that the “prior acquiescence of the charging party union is not invariably a requisite element in the past practice analysis” (at fn. 1). There, the Board held that providing the same health plan for all its employees on a companywide basis was insufficient to exempt it from the bargaining obligation, unless an employer can “claim that it had an established past practice of making regular annual changes in premium amounts or other aspects of the health coverage of its employees.”

Here, the Respondent implemented the unilateral changes routinely from January 1, 1996, and every year thereafter until January 1, 2002, a 7-year period, with reasonable certainty, not more frequently than once a year. The Union was always notified in the fall of the preceding year and presented with a summary of changes, including increases in premiums, if any. The Respondent mailed the “Pain Talk” publication to all participants in the Beneflex Plan. The changes were predictably implemented each year on the first of January. The record does not suggest that any unilateral changes, implemented during the life of the contract or thereafter, were made arbitrarily or on an ad hoc basis to the disadvantage of the represented employees. Moreover, when the bargaining representatives for the respective parties began negotiations for a successor contract in 2002, the parties agreed that the Respondent would honor the terms and conditions of the contract until something different was bargained. Although required by law, according the General Counsel, that agreement has maintained the working conditions of the unit employees and the respective positions between the

parties until they negotiate a mutually agreeable understanding as to the Respondent's rights to effectuate changes to its Beneflex Plan, including the Beneflex Medical Plan.

Mindful of the positions so forcefully argued by the General Counsel and particularly, the Charging Party, that the prior agreement did not automatically renew, and that the Union's consent had expired following the expiration of the contract, I have some reservation. However, I find that the *Courier-Journal* decisions are most closely analogous to the case before me. There, as here, the Respondent established a several year routine amounting to a past practice which survived the contract and maintained the status quo. Unlike the employer in *Long Island Head Start Child Development Services*, 345 NLRB 973, 973 fn. 5 (2005), I find (in the words of the Board) that the Respondent has "demonstrated an established past practice of exercising its own discretion in changing its health

care plan."

CONCLUSIONS OF LAW

1. The Respondent, E.I. DuPont de Nemours, Louisville Works, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent's unilateral changes to the Beneflex Plan following the expiration of the collective-bargaining agreement did not violate Section 8(a)(5) of the Act, because the conduct was consistent with a lawful, established past practice.

[Recommended Order for dismissal omitted from publication.]