

**E.I. DuPont de Nemours and Company and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) and its Local 4-786.** Case 4-CA-33620

August 27, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER  
AND BECKER

On December 23, 2005, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.<sup>1</sup>

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 and to adopt his recommended Order as modified.

In finding that the Respondent's unilateral changes to its benefits plan violated Section 8(a)(5) and (1), the judge properly rejected the Respondent's argument that the changes were simply a continuation of its past practice. The Respondent relied on the *Courier-Journal* cases, 342 NLRB 1093 (2004), and 342 NLRB 1148 (2004).<sup>2</sup> In those cases, the Board found that the employer's unilateral changes to employees' health care premiums during a hiatus between contracts were lawful because the employer demonstrated a past practice of making such changes both when a contract was in effect and during hiatus periods. As the judge explained, however, the Respondent's asserted past practice in the instant case was limited to changes made at times when the parties' contract and its management-rights provision, which authorized the changes, were in effect. As a result, the judge properly found that the *Courier-Journal* cases were inapposite. Here, because the Respondent's

prior changes do not establish a past practice of changes implemented during a hiatus, the unilateral changes at issue violated the Act.

Our dissenting colleague reiterates the arguments he advances in the companion case, *Louisville Works*, supra. We reject his view here, for the reasons explained in *Louisville Works*.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, E.I. DuPont de Nemours and Company, Edge Moor, Delaware, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(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, 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.”

2. Substitute the attached notice for that of the administrative law judge.

MEMBER SCHAUMBER, dissenting.

In a companion decision issued today, *E.I. DuPont de Nemours, Louisville Works*, 355 NLRB 1098 (2010), (*Louisville Works*), I set out at length my reasoning why I would dismiss the complaint in that proceeding alleging that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing certain aspects of unit employees' benefits. For the reasons expressed there, and here, I would likewise dismiss the complaint in this case alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes to the benefits of unit employees on January 1, 2005, following the expiration of the parties' collective-bargaining agreement.

Facts

The Union has represented the production and maintenance employees at the Respondent's Edge Moor, Delaware facility for many decades. Over the years, the Respondent and the Union were parties to various collective-bargaining agreements, the most recent of which ran from June 1, 2000, until May 31, 2003, and was extended for an additional year until May 31, 2004. At the time of the hearing, in September 2005, the parties had not entered into a successor agreement.

The Respondent's Beneflex Flexible Benefits Plan (Beneflex Plan) is a comprehensive, corporatewide welfare benefit plan that provides a variety of benefit op-

<sup>1</sup> On May 5, 2006, the Respondent filed a letter with the Board calling our attention to *St. Mary's Hospital of Blue Springs*, 346 NLRB 776 (2006), enf.d. 426 F.3d 455 (1st Cir. 2005). The General Counsel and the Charging Party each filed a letter in response.

<sup>2</sup> In the decision we also issue today in *E.I. DuPont de Nemours, Louisville Works*, 355 NLRB 176 fn. 5 (2010) (*Louisville Works*), resolving a similar issue arising at a different facility operated by Respondent, we explain why extending the holding in the *Courier-Journal* cases to this situation would conflict with settled law and undermine established principles of collective bargaining. In addition, as we also explain in the companion case, the *Courier-Journal* cases are in tension with other lines of Board precedent. Nevertheless, because the judge properly found that the *Courier-Journal* cases are distinguishable, we need not reconsider the holdings of those cases at the present time.

tions, including healthcare, dental, and vision coverage, and life insurance. The Respondent provides these benefits to employees at all of its domestic locations, including to the unit employees at the Edge Moor facility. Approximately 60,000 employees—both union and nonunion—receive benefits under the Beneflex Plan. The Beneflex Medical Care Plan is a self-insured medical care option encompassed within the Beneflex Plan.<sup>1</sup> Since the Plans' inception, both the Beneflex Plan and the Beneflex Medical Care Plan documents have contained an express and specific reservation of the Respondent's right to change either program in 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.

The Beneflex Plan was implemented at the Edge Moor plant on January 1, 1994. Prior to that, the parties executed a memorandum of understanding superseding the benefits language in the existing collective-bargaining agreement and memorializing the Union's agreement to be bound by the terms stated in the Beneflex documents. During the 1993 negotiations over the implementation of the Beneflex Plan, the Union agreed that, consistent with the terms of the Beneflex Plan, the Respondent reserved the right to modify the Plan without bargaining with the Union, with the understanding that any such modifications would be made on a U.S. nationwide basis. The 2000–2004 collective-bargaining agreement indicated that the employees' benefits were being provided pursuant to "all terms and conditions" of the Beneflex Plan.

From 1995 to 2004, the Respondent made annual changes to the Beneflex Plan. These changes were implemented uniformly at all of the Respondent's U.S. sites on January 1 each year, and, in each of these years, the changes took place while a collective-bargaining agreement covering the bargaining unit was in effect. Some changes occurred almost every year, while others were made only once or periodically during this time. The Respondent did not offer to negotiate over the annual changes, nor did the Union seek to bargain over them or raise any other objection.

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<sup>1</sup> All references to the Beneflex Plan include the Beneflex Medical Care Plan, unless otherwise indicated.

In the spring of 2004, the parties commenced negotiations for a successor collective-bargaining agreement. In the fall of 2004, the Respondent—consistent with its practice in prior years—presented the Union with a summary of the changes for the Beneflex Plan for 2005. The Union objected to the proposed changes and requested bargaining, which the parties did. On January 1, 2005, the Respondent implemented changes to the Beneflex Plan.

#### Judge's Decision

The judge found a violation in the Respondent's January 1, 2005 changes and rejected the Respondent's defense that it was privileged to make the changes to the Beneflex Plan. The judge reasoned, among other things, that the 2000–2004 collective-bargaining agreement incorporated the Beneflex Plan, and the "reservation of rights" provision in the Beneflex Plan was a management-rights provision. Thus, the judge found that the Union waived its right to bargain over changes to the Beneflex Plan during the contract's term, but that there was no evidence that the parties had intended the contractual waiver to survive the expiration of the collective-bargaining agreement. Thus, he concluded that the January 1, 2005 unilateral changes to the Beneflex Plan were not permitted by the "reservation of rights" clause and were unlawful.

#### Analysis

For the reasons discussed below and in *Louisville Works*, supra, I find that the Respondent's modifications to the Beneflex Plan on January 1, 2005, did not alter the status quo, and thus the Respondent did not violate Section 8(a)(5). During the 1993 negotiations over the implementation of the Beneflex Plan at Edge Moor, the Union expressly accepted the Beneflex Plan in its entirety, and it did so on the understanding that the Respondent reserved the discretion to change the price or level of benefits under the Beneflex Plan on an annual basis. The 2000–2004 collective-bargaining agreement specifically indicated that the employees' benefits were being provided pursuant to "all terms and conditions" of the Beneflex Plan. From 1995 to 2004, the Respondent unilaterally implemented changes to the Beneflex Plan on an annual basis. In each instance, the Union did not oppose the Respondent's changes. These changes were implemented nationwide for tens of thousands of employees.

Following the expiration of the parties' contract in 2004, as explained in *Louisville Works*, the Respondent was required to continue to provide unit employees with benefits under the Beneflex Plan. The Respondent's obligation to continue the status quo included the obliga-

tion to continue 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.

As I explained in *Louisville Works*, supra, and contrary to the majority there and here, the “reservation of rights” clause in the Beneflex Plan is not a management-rights provision, which is typically a negotiated clause giving management sole discretion over a broad range of otherwise bargainable matters. Instead, it is a discrete, specific, and integral component of the Beneflex Plan as a whole, pursuant to which the Plan explicitly allows for periodic changes to be made.<sup>2</sup> And, as I explained in *Louisville Works*, the Respondent was entitled to follow its past practice in making the January 2005 changes. See *Courier-Journal*, 342 NLRB 1093 (2004); and *Courier-Journal*, 342 NLRB 1148 (2004). As in *Louisville Works*, the majority claims that the Board’s decisions in *Courier-Journal* do not support the Respondent’s actions because the employer’s unilateral changes in the *Courier-Journal* cases, undertaken during a contractual hiatus, were consistent with prior changes made during the contract and during the hiatus periods whereas here the Respondent’s postcontract changes had no precedent in prior postcontract changes. As I explained in *Louisville Works*, however, there is nothing in the reasoning of the *Courier-Journal* decisions to support the conclusion that prior hiatus changes were conclusive to the outcome of those cases. Rather, the holding there was that parties by their actions can create a past practice authorizing an employer’s unilateral action, which becomes the status quo. That holding, as explained more fully in *Louisville Works*, privileges the Respondent’s changes here.

Thus, in accord with my analysis in *Louisville Works*, the Respondent’s unilaterally implementing annual changes to the Beneflex Plan became an established past practice involving a term and condition of employment, and therefore the Respondent did not violate Section 8(a)(5) and (1) when it acted consistently with that practice by its modifications to the Beneflex Plan on January 1, 2005. Accordingly, I would dismiss the complaint.

APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

<sup>2</sup> Accordingly, I disagree with the Board’s decision in *Mary Thompson Hospital*, 296 NLRB 1245, 1249 (1989), 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.

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 United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, and its Local 4-786, are engaged in negotiations with us for a collective-bargaining agreement and have not reached 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, 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.

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. DUPONT DE NEMOURS & CO.

*Bruce Conley, Esq.*, for the General Counsel.

*Denise Keyser, Esq.* and *Steven W. Suflas, Esq. (Ballard, Spahr, Andrews & Ingersoll)*, of Voorhees, New Jersey, for the Respondent.

*Kathleen Hostetler, Esq.*, of Denver, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on September 13, 2005. The Regional Director of Region 4 of the National Labor Relations Board (the Board) issued the complaint on March 31, 2005, based on a charge that was filed on January 3, 2005. The complaint alleges that E.I. DuPont de Nemours and Company (the Respondent or the Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by announcing,

and implementing, changes to unit employees' benefits without meeting the obligation to bargain over those changes. The Respondent filed a timely answer in which it denied that it had violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.<sup>1</sup>

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, a corporation, produces titanium oxide and ferric chloride at its facility in Edge Moor, Delaware, where it annually sells and ships goods valued in excess of \$50,000, directly to points outside the State of Delaware. 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. In addition, I find that the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (U.S.W.), and its Local 4-786 (formerly Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) and its Local 2-786) (the Union)<sup>2</sup> are labor organizations within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Background Facts

The Union has represented a bargaining unit of employees at the Respondent's chemical production facility in Edge Moor, Delaware, for many decades. The unit includes approximately 113 to 200 employees.<sup>3</sup> The most recent collective-bargaining

<sup>1</sup> The General Counsel and the Respondent have both filed unopposed motions to correct the transcript. Those motions are granted and received into evidence as GC Exh. 18 and R. Exh. 47.

<sup>2</sup> By "the Union," I refer not only to the USW and its Local 4-786, but also to the bargaining representative's prior designations. The DuPont Edge Moor Union (DEMU) represented a bargaining unit of employees at the Respondent's Edge Moor, Delaware facility for approximately 60 years. In May 1998, the DEMU affiliated with the Oil, Chemical and Atomic Workers International Union (OCAW), and became OCAW Local 8-786. The OCAW merged with the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) in January 1999, and the local became PACE Local 2-786. In April 2005, after the complaint in this case was issued, PACE merged with the United Steelworkers of America and has subsequently been known as the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW). The union local was redesignated USW Local 4-786.

At trial, I modified the caption of this case to reflect the collective-bargaining representative's current designation—United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) and its Local 4-786.

<sup>3</sup> The unit is defined as follows:

All employees of the Edge Moor Plant with the exception of the Administrative Secretary to the Plant Manager, Human Resources Assistant, Technologists (Training, Planning, DCS), Work Leader, Nurses, salary role employees exempt under the Fair Labor Standards Act, and supervisory employees with the authority to hire, promote, discharge,

agreement covering the unit went into effect on June 1, 2000, and expired on May 31, 2004. Prior to that, the parties operated under a collective-bargaining agreement that was in effect from September 1, 1987, to May 31, 2000. As of the time of trial in September 2005, the parties had not completed a successor to the agreement that expired on May 31, 2004.

This case concerns multiple unilateral changes to the benefits of unit employees. The Respondent announced and implemented these changes after the expiration of the most recent collective-bargaining agreement, at a time when the parties were engaged in negotiations for a successor agreement. On October 11, 2004, the Respondent presented the Union with written summaries of the planned changes in employees' benefits, and discussed the changes with union officials. Subsequently, the Respondent announced the planned changes to the unit employees. In a letter dated October 14, 2004, the Union requested that the Respondent bargain concerning the changes. The Union also stated that it objected to the implementation of any changes and that "the Employer must bargain in good faith to impasse or agreement on any proposed changes." Notwithstanding the Union's letter, the Respondent implemented the changes in benefits on January 1, 2005, without first bargaining to impasse or agreement. The following changes were made: the amount that employees paid for prescription drugs was increased; cost penalties were implemented for employees who filled "maintenance medication" prescriptions at retail pharmacies rather than through a mail order service designated by the Respondent; the "Employee + One" coverage level for medical, dental, and vision benefits was eliminated and replaced with "Employee + Child(ren)" and "Employee + Spouse" coverage levels; employee premiums were increased for some medical options and coverage levels; employee premiums were increased for the "high" dental coverage option; coverage levels for medical, dental, and vision options, were altered; employee premiums were increased for the financial planning program; and a health savings account plan was created.<sup>4</sup>

#### B. The Respondent's Employee Benefits Package

The Respondent refers to the package of employee benefit plans it provides as the Beneflex Flexible Benefits Plan. These benefits are provided to employees at all of the Respondent's domestic locations, including to the unit employees at the Edge Moor facility. In all, approximately 60,000 employees—both union and nonunion—receive the benefits. As of 2004, the benefit plans provided by the Respondent included: a medical care plan; a dental care plan; a vision care plan; employee life insurance; accidental death insurance; dependent life insurance; a vacation "buy back" program; a health care spending account;

discipline or otherwise effect changes in the status of employees or effectively recommend such action.

<sup>4</sup> The creation of the new health savings account plan is demonstrated by comparing the benefits package document listing the 11 benefit plans the Respondent provided in 2004 with the document listing the 12 benefit plans the Respondent provided in 2005. Compare Jt. Exh. 3(C) (sec. V) and Jt. Exh. 3(D) (sec. V). The stipulation between the parties also recognizes the addition of the health savings accounts in 2005. See Jt. Exh. 1A (stipulated facts) at pp. 22 to 23, par. 59.

a dependent care spending account; and a financial planning program. Most of these benefit plans are self-insured, rather than provided through a third-party insurer. This means the contributions of the Respondent and the participating employees pay the cost of claims under the plans, as well as the costs for administration. It also means that the Respondent, rather than a third-party insurer, is responsible for implementing any modifications to those plans.

Since the inception of the Beneflex package, the plan documents have included an express management-rights provision that gives the Respondent discretion to change or discontinue employees' benefit plans, as long as any changes in the price or level of coverage are announced at the time of annual enrollment.<sup>5</sup> The Beneflex package of plans was first applied to unit employees on January 1, 1994. When the Respondent and the Union agreed to the package, they executed a memorandum of understanding that superseded the benefits language in the existing contract and provided that the unit employees would be bound by the terms stated in the Beneflex documents. The collective-bargaining agreement that went into effect on June 1, 2000, stated that the employees' benefits were being provided subject to all terms and conditions of the Beneflex plan.<sup>6</sup>

<sup>5</sup> The management-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. Termination of this Plan or any benefit plan incorporated herein will not be effective until one year following the announcement of such change by the Company.

If any provision of this Plan is or in the future becomes contrary to any applicable law, rule, regulation or order issued by competent government authority, the Company reserves the sole right to amend or discontinue this Plan in its discretion without notice.

<sup>6</sup> Art. IX, sec. 1 of that now-expired collective-bargaining agreement states:

Section 1. All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the Company shall continue, subject to the provisions of such Plans and to such rules, regulations and interpretations as existed prior to the signing of the Agreement, and to such modifications thereof as may be hereafter adopted generally by the Company to govern such privileges; provided, however, that as long as any one of these Company Plans and Practices is in effect within the Company, it shall not be withdrawn from the employees covered by this Agreement; and provided, further, that any change in the Industrial Relations Plans and Practices which has the effect of reducing or terminating benefits will not be made effective until one (1) year after notice to the Union by the Plant of such change:

Career Transition Financial Assistance Plan  
Short Term Disability Plan  
Pension and Retirement Plan  
Special Benefits Plan  
Vacation Plan  
Service Emblem Plan  
Continuity of Service Rules  
Treatment of Employees Called or Enlisting for Military Service

From 1995 to 2004, the Respondent implemented annual changes to employee benefits. In each of those instances, the changes were implemented while an agreement was in effect that made the benefits subject to the management-rights clause in the Beneflex documents. The Respondent did not offer to negotiate over the changes during that period, and the Union never sought bargaining, or challenged the Respondent's right to make the changes. The changes during the 1995 to 2004 period included both increases and decreases in premiums, modifications in insurance co-payment and deductible levels, alterations of coverage rules, and the creation of new benefits. Some of the changes, such as the adjustment of the medical premium and coverage levels, were made almost every year. However, the Respondent also made other types of changes to benefits only once or intermittently during the 1995 to 2004 period. These nonroutine changes included modifications to the employee assistance program and targeted nutrition counseling program, addition of a portability feature to the life insurance plan, alteration of dental claim review procedures, modification of the dependant care spending account plan, addition of direct deposit to flexible spending account plans, institution of "stop loss protection" for prescription drugs, and creation of a legal services and financial counseling plans.

In general, the changes the Respondent made to employee benefits each year were applied to all plan participants in the United States, not just to the members of the Edge Moor bargaining unit. An exception was made at the Respondent's facility in Tonawanda, New York, from 1997 to 2001. During those years, the Respondent held employees' premiums at the Tonawanda facility to 1996 levels, even when premiums were changed for other plan participants. This was done as part of a settlement agreement negotiated between the Respondent and Region 3 of the NLRB.

### C. Negotiations

On March 31, 2004, the Respondent notified the Union that it was exercising its contractual right to terminate the existing collective-bargaining agreement and commence negotiations for a new contract. This meant that unless the existing agreement was renewed or extended it would expire on May 31, 2004. The Union proposed extending the contract for a 30-day "rolling" period, but the Respondent rejected that proposal. The Respondent also informed the Union that when the contract expired, the Company would cease deducting union dues from unit employees' earnings and would not honor the arbitration provisions in the contract except to the extent it was legally required to do so.

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Payment to Employees on Jury Duty  
Savings & Investment Plan  
Total & Permanent Disability Income Plan

Art. IX, sec. 3 of the expired agreement states:

Section 3. In addition to receiving benefits pursuant to the Plans set forth in Section 1 above, employees shall also receive benefits as provided by the Company's Beneflex Benefits Plan, subject to all terms and conditions of said Plan.

The first bargaining session for a successor agreement took place on April 29. At that meeting, the Respondent informed the Union that it intended to propose new contract language stating that the Respondent had the right to change the benefit plans in the Beneflex package during hiatus periods between contracts. The Respondent stated that it believed the Company already had authority to unilaterally make “out-of-contract” changes to benefits, but wished to expressly confirm that authority given litigation over such changes at other facilities. The Union disagreed that the Respondent already had the claimed authority, and stated that the contractual waiver authorizing unilateral changes would expire when the collective-bargaining agreement expired. The Union set forth its position in a May 27 letter to the Respondent.

The contract expired on May 31. On June 14, the Respondent presented the precise contract language regarding its proposal on out-of-contract changes, which the Respondent referred to as the “Beneflex waiver.” The language provided that the contract section that subjected employees’ benefits to the terms set forth in the Beneflex documents—including the management-rights provision—would survive expiration of the collective-bargaining agreement.<sup>7</sup> The same day that the Respondent made this proposal, the Union notified the Respondent, by letter, that the proposal concerned a permissive subject of bargaining, that the Union was not required to bargain to impasse over the issue, and that the Respondent could not “legally implement any contract proposal if it insisted on the above-referenced permissive subject.” The Union expanded on this contention in a letter dated June 21, 2004, stating that the Respondent’s proposal to “extend its management rights provision to the post-expiration period effects [sic] the right to bargain over the plan, and not the terms of the plan itself” and was a permissive subject of bargaining for that reason. The Union also stated that it was “not interested” in “voluntarily considering” the Respondent’s waiver proposal, and considered the subject “off the bargaining table.” The Union stated that it had not yet determined whether it would agree to the existing contract language.

During negotiations, the Respondent conceded that the proposal on waiver language was a permissive subject of bargaining. Nevertheless, at sessions on July 13 and/or 15, 2004, the Respondent stated that it considered the waiver a “major” proposal and that if the Union would not agree to discuss it, the Union would have to propose an alternative to the entire Beneflex package of benefit plans. The Union offered to accept the existing benefits, but without the addition of the Respondent’s proposed waiver language. The Respondent rejected that proposal, and linked the nonmandatory waiver proposal to the mandatory subject of the benefits themselves by stating that it would not continue providing its benefits package to unit em-

<sup>7</sup> The Respondent’s proposal was to add language to art. IX, sec. 3 of the contract, stating that: “[T]he provisions of this Section 3 shall survive the expiration of this Agreement and shall remain in full force and effect unless and until the Parties mutually agree to change or terminate this Section 3.”

ployees unless the Union accepted the proposed waiver language.

In mid-July, as a result of the conversations summarized above, the Union began the effort to develop a package of benefit plans that would be comparable to the Respondent’s package, but would not require the Union to accept the waiver proposal. The Union made a request to the Respondent on July 14 for information that the Union believed a third-party insurer would require in order to create an alternative to the Respondent’s benefit plans. On July 27, 2004, approximately 2 weeks after the Respondent told the Union that there would be no Beneflex package for unit employees without agreement regarding the waiver, the Union contacted Blue Cross Blue Shield of Delaware (BCBS) and asked it to create a package of plans to “mirror” the benefits provided by the Respondent.

Subsequently, on July 28, August 6, and September 29, the Union requested that the Respondent provide additional information relating to the development of alternative benefit plans. In many respects, the Union’s information requests to the Respondent reflected what BCBS had requested from the Union. The Union would provide BCBS representatives with information, and when the BCBS officials told the Union that additional information was needed, the Union would, in turn, request any information it did not have from the Respondent. The information requested by BCBS included census data, Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) rate information, and 2005 changes to the employees’ benefit’s plans. The Union requested information relating to the Respondent’s costs for the existing plans in order to determine how much the Respondent might be expected to contribute towards the BCBS alternatives. The Respondent provided a good deal of the requested information in a prompt manner, but resisted providing other information that, in the Respondent’s view, was not needed to design alternative benefit plans.<sup>8</sup>

<sup>8</sup> According to the Respondent, the Union requested unnecessary information as a means of delaying negotiations. In an effort to substantiate this contention, the Respondent introduced printouts of email communications from August 2004 in which a BCBS representative provided some type of benefits quote to an insurance consultant who was acting on behalf of counsel for the Respondent. The record evidence regarding this rate quote is insufficient to support the Respondent’s contention regarding delay by the Union. First, the record does not show that the Union possessed all the information that was provided to BCBS in order to generate the quote. Second, the record does not show that the quote BCBS provided to the insurance consultant covered benefits that were comparable to those being provided by the Respondent. Third, in the email communication forwarding the quotes, the BCBS representative includes a caveat that “the group is just 20 percent credible.” That statement calls into question whether the rate quote—whatever information it was based on and whatever benefits it covered—was final. The General Counsel raised a question at trial regarding the “20 percent credible” caveat, but the Respondent’s witness could not clarify its meaning. Fourth, the record does not show that information which was sufficient to allow BCBS to make a rate quote to the Respondent’s insurance consultant, would have been sufficient for BCBS to make a concrete offer of an actual plan to the bargaining unit at a competitive rate. Perhaps more to the point, the record does not rebut testimony that the Union was requesting information from the Respondent that BCBS had specifically demanded in order to develop

The Union invited a BCBS representative to a bargaining session on September 29 in order to make a presentation to the Respondent regarding a potential benefits package. At the same session, the Union asked the Respondent to provide information about the benefits changes the Company was planning for 2005 because BCBS needed to know what those changes were in order to mirror the Respondent's benefit plans as they would exist in 2005. The parties discussed the BCBS presentation, and other issues relating to benefits, at bargaining sessions on October 6 and 13. On October 11, the Respondent informed the Union of the changes it was planning to make to employees' benefits in 2005. In an October 14 letter, the Union requested bargaining on the proposed changes and objected to implementation of the changes. The Union did not suggest or propose specific modifications to the planned changes. For its part, the Respondent never answered the Union's written request to bargain over the 2005 benefits changes and never suggested any modifications to those changes. The Respondent's lead negotiator testified that she did not believe the Company was required to respond to the Union's request to bargain over the planned changes in benefits since the parties were already discussing a BCBS alternative to the benefit plans being provided by the Respondent.

On November 8, 2004, the Union provided the Respondent with its actual proposal for an alternative benefits package. The proposal included BCBS plans covering medical benefits, dental benefits, vision benefits, and life, accidental death and dismemberment insurance. The Union also proposed that the Respondent would continue to provide its own vacation buyback program and financial planning program. The Union informed the Respondent that employees would have to enroll by December 15, 2004, in order to be covered by the BCBS plans on January 1, 2005. The Respondent did not agree to the Union's benefits proposal.

At a negotiating session on November 16, the Union withdrew its November 8 benefits proposal, and substituted two alternative offers. First, the Union offered to accept the Respondent's benefit plans, along with all the changes that the Respondent planned for 2005, while the parties negotiated a new contract, if the Respondent would withdraw the waiver proposal. The second proposal contained almost all the elements of the November 8 proposal, except now rather than offering to divide the plan costs 70 percent (employer)/30 percent (employee), the Union proposed that unit employees would "be responsible for the same monthly costs that the employee would assume pursuant to the current Beneflex cost savings arrangement." The Respondent rejected these proposals.<sup>9</sup>

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the benefits package. I also note that, despite its purported concern that the Union was not generating a benefits proposal quickly enough, the Respondent never attempted to expedite the Union's efforts by providing union representatives with the rate quote information that the Company's insurance consultant had obtained.

<sup>9</sup> Denise Keyser, who in addition to being the Respondent's lead negotiator was one of its trial attorneys in this matter, testified that the Union's November 8 proposal was more expensive for the Respondent than the existing benefits plans and that the Union's November 16

At a bargaining session on December 16, the Respondent told the Union that it was going to implement the previously announced benefits changes on January 1, 2005. The Respondent stated that it believed it had the right to do this and noted that it was too late for an alternative to its benefit plans to be implemented by January 1, given the December 15 enrollment cut-off for the BCBS plans.<sup>10</sup> The Union responded that it did not agree to the implementation of the changes, that the benefits were a mandatory subject of bargaining, and that, in its view, the Respondent's planned course of action was unlawful. The Respondent expressed a willingness to discuss the BCBS proposal during future negotiations, and the parties scheduled additional bargaining sessions for 2005.

The Respondent implemented the previously announced changes to its benefit plans on January 1, 2005. Those changes included increases in employee premiums for certain medical and dental options, increases in prescription drug costs, modification of various insurance coverage levels, increases in premiums for the financial planning benefit, and the creation of a health savings account. Subsequent to the unilateral implementation of these changes, the parties engaged in further negotiations about the Respondent's waiver proposal and the Union's objections to the unilateral changes. The Respondent concedes that the parties were not at impasse when it made those changes.<sup>11</sup>

#### *D. The Complaint Allegations*

The complaint alleges that the Respondent failed and refused to bargain in violation of Section 8(a)(5) and (1) of the Act by announcing and implementing changes to the employees' benefit plan without affording the Union an opportunity to bargain.

#### *Analysis and Discussion*

Employee benefits, such as healthcare insurance and employee savings plans are mandatory subjects of collective bargaining. *Larry Geweke Ford*, 344 NLRB 628 fn. 1 (2005)

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modification of that proposal was regressive. The record is insufficient to substantiate the claims regarding the costs of the various packages. Keyser's pronouncements on this and other matters often gave the impression of being the self-serving representations of an advocate, and the record does not show that her opinions regarding the relative costs of the benefits plans were based on fact.

<sup>10</sup> The record does not show that, in 2005, the Company could not have provided its benefit plans to unit employees under the 2004 terms while the negotiations for a new contract were ongoing. In its Reply Brief, the Respondent summarily dismisses the idea that this could have been done as "fanciful." However, the Respondent did not offer the testimony of a benefits administrator or other reliable evidence to show that continuing the 2004 benefits terms for unit members would have been impossible, or even difficult. As noted above, for several years the Respondent exempted a plant in Tonawanda, New York, from a generally applicable change in benefits. The Respondent's lead negotiator testified that the Respondent was willing to bargain with the unit over the specifics of the 2005 changes, a claim that suggests an ability to control whether those changes were made.

<sup>11</sup> See Transcript 26 (Counsel for the Respondent states: "Let's be clear at the start what this case is not about. . . . This case is not about impasse, there is no allegation that [t]he parties have reached that point."). See also *Jt. Exh. 1A* (stipulated facts) at p. 24, par. 64.

(change in health care plans); *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002) (healthcare benefits); *Allied Mechanical Services*, 332 NLRB 1600, 1610 (2001) (medical savings plan for employees); *National Broadcasting Co.*, 252 NLRB 187, 190 (1980) (income savings plan for employees). When, as in the instant case, the “parties are engaged in negotiations for a collective-bargaining agreement,” the employer’s obligation to refrain from unilateral changes regarding such mandatory subjects extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. *Register-Guard*, 339 NLRB 353, 354 (2003), quoting *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. sub nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). The employer’s obligation to refrain from implementing unilateral changes survives the expiration of the contract, and failure to meet that obligation is a violation of Section 8(a)(5) and (1) of the Act. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003); *Made 4 Film, Inc.*, 337 NLRB 1152 (2002).

On January 1, 2005, during negotiations for a new collective-bargaining agreement, the Respondent implemented numerous, substantial, changes to the benefits of unit employees without bargaining to impasse or obtaining the Union’s agreement to the changes. These changes concerned mandatory subjects of bargaining, including the modification of employees’ medical insurance, dental benefits, vision care benefits, prescription drug benefits, and financial planning benefits, and the creation of a health savings account plan. The Respondent raises three defenses that it contends permit its unilateral implementation of the 2005 changes in benefits. First, the Respondent argues that the parties intended for the contractual waiver of bargaining over benefit plan changes to continue in effect during out-of-contract periods. Second, the Respondent argues that the changes were lawful because they were made pursuant to its established past practice of unilaterally modifying employees’ benefits. Last, the Respondent argues that the company was not required to refrain from implementing the various changes in benefits until an overall impasse in bargaining because those changes were a discrete and recurring event. For the reasons discussed below, I find that the Respondent has not established any of these defenses, and conclude that it violated Section 8(a)(5) and (1) by unilaterally changing unit employees’ benefits on January 1, 2005.<sup>12</sup>

<sup>12</sup> The complaint alleges that the Respondent failed and refused to bargain over the changes in violation of Sec. 8(a)(5), but it does not specifically aver that the Respondent did so by making unilateral changes during negotiations for a collective-bargaining contract and without bargaining to impasse. That allegation is, if not strictly encompassed by the complaint allegations, then closely related to those allegations, and it was the focus of the parties’ arguments at trial and in their briefs, as well as of the evidence. I conclude that this allegation was fully litigated. See *Seton Co.*, 332 NLRB 979, 981 fn. 9 (2000) (violations may be found if they are closely connected to the subject matter of the complaint and have been fully litigated); *Pergament*

#### *A. Were the Unilateral 2005 Changes to Beneflex Permitted by the Management-Rights Clause*

The Respondent may avoid a finding of violation if it can show that the Union waived bargaining regarding the subjects of the unilateral changes. A waiver of bargaining rights by a union is not to be lightly inferred, but rather must be demonstrated by the union’s clear and explicit expression. *Beverly Health & Rehabilitation Services*, supra at 636; *Rockford Manor Care Facility*, 279 NLRB 1170, 1172 (1986). In this case, the collective-bargaining agreement between the parties stated that the employees’ benefits were being provided “subject to all terms and conditions of [the Beneflex] Plan,” which included a management-rights provision giving the Respondent the right to make unilateral changes to employee benefits. Although the parties agree that this constituted a contractual waiver by the Union of its right to bargain over changes to employees’ benefits during the contract’s term, they disagree about whether the waiver survived the contract’s expiration.

The Board has held that a contractual waiver does not extend beyond the expiration of the contract unless the contract provides that it does. *Blue Circle Cement Co.*, 319 NLRB 954, 954 (1995); see also *Long Island Head Start Child Development Services*, 345 NLRB 973 (2005) (A contractual reservation of management rights does not extend beyond the expiration of the contract in the absence of evidence of the parties’ contrary intentions.) In this case, the contract had expired at the time of the at-issue changes, but the Respondent contends that the evidence shows the parties intended for the management-rights clause to survive expiration of the contract. The Respondent relies on language in article IX, section 1, of the contract which states that “the following Industrial Relations Plans and Practices of the Company shall continue, subject to the provisions of such Plans.” According to the Respondent, the phrase “shall continue” shows that the parties agreed that the contractual right to make unilateral changes to benefits was to continue indefinitely, not just continue for the term of the contract. I do not agree that this language refers to the period beyond the contract’s expiration, but the bigger problem is that section 1 does not apply to any of the benefit plans that are at-issue here. The Respondent uses ellipsis to conveniently omit the portion of section 1 that enumerates the “Industrial Relations Plans and Practices” that it covers—11 in all—none of which are benefit plans at issue here. See, supra, fn. 6 (art. IX, secs. 1 and 3). The provision in the contract that does cover the Beneflex package of benefit plans (art. IX, sec. 3), and which makes the unit employees’ entitlement to those benefits subject to the management-rights provision, does not include the “will continue” language relied on by the Respondent, or any other language that arguably evidences an intent that the waiver will continue postcontract. *Id.*

The Respondent also claims that the Union’s bargaining notes from one of the sessions for the expired contract show that the parties intended for the waiver to survive the contract. I doubt that under *Blue Circle Cement Co.*, supra, such parol

*United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990) (same).

evidence can meet the Respondent's burden.<sup>13</sup> At any rate, the bargaining notes do not indicate that the waiver was meant to outlive the contract. The passage relied on by the Respondent concerns the deletion of an old contract provision, article XIV, that related to employees' pre-Beneflex hospital and medical benefits. The Union's bargaining notes report: "Management is proposing to eliminate [art. XIV] since it is old and it is now covered in the Beneflex Package. The Union stated that by Management doing this, they are taking it out of the bargaining realm. Management said accurate." The language about taking something out of the bargaining realm is, in my view, so ambiguous as to be virtually devoid of meaning. It is impossible to tell with any certainty what it is that's being taken out of the bargaining realm by the deletion of article XIV, or for how long. That being said, the Respondent's interpretation that the passage refers to changes in the Beneflex Package of plans is a particularly unlikely one since article XIV was being deleted specifically because it related to no-longer-extant benefit plans, *not* to the Beneflex package. Even if I could somehow conclude that by deleting a provision relating to non-Beneflex contract terms, the parties meant to take future changes to the Beneflex package of plans "out of the bargaining realm," the passage in the bargaining notes would not suggest that the parties meant that such waiver would outlive the bargaining agreement. The passage makes no reference to out-of-contract periods and does not otherwise suggest that it has anything to do with such periods. I conclude that the Respondent has not introduced any significant evidence that the parties intended for the waiver to outlive the contract, and certainly has not demonstrated such intent through the type of "clear and explicit" evidence that is generally required to establish a contractual waiver. *Beverly Health & Rehabilitation Services*, supra; *Rockford Manor Care Facility*, supra.

For the reasons discussed above, I reject the Respondent's argument that the parties intended for the contractual waiver to survive the expiration of the contract.

*B. Were the Unilateral 2005 Changes to Employees' Benefits the Lawful Continuation of an Established Past Practice*

The Respondent also argues that, irrespective of waiver, the unilateral changes to employees' benefits in 2005 were lawful because they were a continuation of a past practice. To prove this defense, the Respondent has the burden of showing that the unilateral changes were consistent with an established past practice. *Beverly Health & Rehabilitation Services*, supra at 636; *Eugene Iovine, Inc.*, 328 NLRB 294, 294-295 fn. 2 (1999), enf. 1 Fed Appx. 8 (2d Cir. 2001). The Respondent argues that this burden is met here by the Company's 10-year history of making annual changes to employees' benefit plans without bargaining over those changes, and without objection

by the Union. The 2005 unilateral changes being challenged in this case were, according to the Respondent, merely a continuation of that long-time practice. The General Counsel and the Charging Party counter that the Respondent never previously made, and the Union never acquiesced in, unilateral changes to benefits during out-of-contract periods when the contractual waiver was not in effect. For the reasons discussed below, I conclude that the General Counsel and the Charging Party have the better argument.

The Respondent contends that the "prior practice" issue in this case is controlled by the Board's decisions in two cases involving *Courier-Journal I*, 342 NLRB 1093 (2004), and *Courier-Journal II*, 342 NLRB 1148 (2004). Like the Respondent here, *Courier-Journal* had a longstanding practice of making unilateral changes to its health care plan without opposition from the Union. *Courier-Journal I*, supra at 1093; *Courier-Journal II*, supra at 1148. Unlike the Respondent, however, the *Courier-Journal's* past practice included changes made both when contracts were in effect and during hiatus periods between contracts. *Id.* The Board held that, under those circumstances, the *Courier-Journal's* unilateral changes to employees' health care premiums during a hiatus period between contracts were "essentially a continuation of the status quo—not a violation of Section 8(a)(5)." *Courier-Journal I*, supra. Regarding the argument that the prior changes had been made pursuant to a contractual waiver that did not survive the expiration of the contract, the Board stated that it did not have to reach the issue because its decision was "not grounded in waiver," but "in past practice, and the continuation thereof." *Detroit Newspaper*, 343 NLRB 1041 (2004).

Although the Respondent recognizes that the past practice in the *Courier-Journal* cases included unilateral changes during out-of-contract periods, it argues that this fact is of no special significance and does not meaningfully distinguish the situation in those cases from the one at issue here. I disagree. In its analysis in both *Courier-Journal* cases, the Board highlighted the fact that the *Courier Journal's* established practice included making unilateral changes during the hiatus period between contracts. In *Courier-Journal I*, supra at 1093, the Board stated: "The changes were implemented pursuant to a well-established past practice. For some 10 years, the [employer] had regularly made unilateral changes in the costs and benefits of the employees' health care program, both under the parties' successive contracts and during hiatus periods between contracts." In *Courier-Journal II*, supra at 1148, the Board's analysis regarding the "past practice" issue is as follows: "[T]he [employer] made numerous unilateral changes in the health care plan, both during the term of the agreement and during the hiatus period 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."<sup>14</sup> These refer-

<sup>13</sup> Moreover, the Respondent itself expresses doubt that the bargaining notes are a reliable representation of what was said at the sessions. It points out that "There is nothing in the record that either describes the manner in which these exhibits [the bargaining notes] were generated or vouches for their accuracy." R. reply br. at 9. The Respondent dismisses the bargaining notes as "nothing more than a general summary."

<sup>14</sup> When explaining the *Courier-Journal I* decision in a subsequent case, Member Schaumber also recognized the prior out-of-contract changes, stating, "[I]n *The Courier-Journal*, the health insurance

ences suggest that the history of prior out-of-contract changes was a factor relevant to the Board's finding that *Courier-Journal* had an established past practice that extended not only to unilateral changes made during periods when the contractual waiver was in effect, but also encompassed unilateral changes made during out-of-contract periods. As discussed above, in the instant case the Respondent's past practice did not include making unilateral changes during out-of-contract periods and there is no other evidence that the practice extended to such periods. I conclude that the unilateral changes at issue in the instant case, which occurred during an out-of-contract period, were not shown to be within an established past practice since any such practice was confined to in-contract periods when the waiver was in effect.

The Respondent has not only failed to show the existence of a past practice that encompassed out-of-contract unilateral changes to employees' benefits, but has failed to show that a practice of unilateral changes existed *at all* independent of the contractual waiver. Since the employer in the *Courier-Journal* cases had a history of making unilateral changes to health benefits even when the contractual waiver was not in effect, the Board reasonably concluded that the practice of making unilateral changes had come to have a life independent of the contractual waiver, regardless of any part that such waiver played in the creation of the practice. Further out-of-contract unilateral changes could, therefore, be made by *Courier-Journal* as a continuation of the established prior practice regardless of whether the contractual waiver was still in effect. In the instant case, however, the Respondent has never made unilateral changes to employees' benefits during out-of-contract periods, the Union has never acquiesced in such changes, and the record does not otherwise establish that a prior practice of unilateral changes exists independent of the expired contractual waiver.

My conclusion is supported by the Board's decision in *Register-Guard*, supra. At issue in *Register-Guard* was an employer's unilateral implementation of new employee sales commissions. The parties' bargaining agreement contained language that gave the employer the "sole discretion" to make such changes, but that agreement had expired at the time the new commissions were implemented. The employer argued that it had "a past practice of implementing other types of advertising sales incentive programs, without objection from the Union," and therefore that the newly implemented commission was a lawful "continuation of the past practice" and "did not change the status quo." 339 NLRB at 355. The Board rejected that argument, noting that "in contrast to the new . . . commissions at issue here, all but one of the [employer's] past incentive programs were implemented while the collective bargaining agreement was still in effect." *Id.* Under those circumstances, the Board held, the employer's past changes, "implemented under a contractual provision that has since expired, do not establish a past practice allowing the [employer] to implement the new . . . commissions." 339 NLRB at 356. Similarly,

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changes at issue were implemented pursuant to a well established past practice to which the union had acquiesced for 10 years, *both during contract terms and during contract hiatuses.*" *Larry Geweke Ford*, 344 NLRB 628 fn. 1 (2005) (emphasis added).

the Respondent's past unilateral changes to employees' benefits, were implemented under an expired contract provision, and do not establish a past practice allowing the Respondent to unilaterally make new changes during the postexpiration period.

The Respondent contends that the decision in *Register-Guard*, supra, "has no applicability" because the employer in that case had not established a strong, entrenched, past practice. (R. br. at 16-17; R. reply br. at 6-7.) Contrary to the Respondent's argument, the Board's decision in *Register-Guard* does not take issue with the employer's proof that it had a past practice of unilaterally implementing various sales incentive programs. Rather the Board's rejection of the defense based on that practice turned on the fact that the practice, like the Respondent's in this case, did not include the requisite history of unilateral changes made during out-of-contract periods when the waiver was not in effect.<sup>15</sup> The Respondent also argues that the *Register-Guard* decision should not be followed because it was not cited in the *Courier-Journal* cases issued the following year. However, because of the absence of an established history of out-of-contract changes in *Register-Guard*, that decision is not inconsistent with the rationale or holding of the *Courier-Journal* cases and there is no basis for concluding that the latter cases overruled *Register-Journal* sub silentio. Recent Board precedent is not obliterated simply because it is not cited by a consistent decision in a later case.

The Respondent's argument that the 2005 changes in benefits should be considered merely a continuation of an established past practice also fails because those changes went well beyond the types of adjustments to coverage levels and premiums that the Respondent had a history of making routinely each year. The 2005 changes included, inter alia, the creation of an entirely new health savings account plan and the institution of penalties for an employee's failure to use a specified pharmacy for certain prescriptions. Although the Respondent's prior unilateral changes to benefits had included the creation of other types of new benefit programs, those changes had been made only intermittently and were quite variable. The Board's decision in *Larry Geweke Ford*, supra at fn. 1, states that past changes that are "wholly discretionary" and "variable," and which are "made on an ad hoc basis" "d[o] not constitute an established past practice that bec[omes] part of the status quo." Similarly, the Board has rejected an employer's claim that unilateral changes were the continuation of a dynamic status quo when it was not shown that those changes "were consistent with an established past practice, that the changes [we]re the product of limited discretion on [the employer's] part, or that the [u]nion had previously acquiesced in similar changes within the limits of the longstanding practice." *Berkshire Nursing Home*, 345 NLRB 220 fn. 2 (2005); see also *Eugene Iovine, Inc.*, 328 NLRB at 294 (consistency with past practice does not

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<sup>15</sup> It is true that in *Register-Guard*, the Board found that the employer had not shown an established practice of making unilateral changes to the particular commission program involved, but the Board addressed separately the employer's claim that the unilateral changes were consistent with a more general past practice of unilaterally implementing sales incentive programs.

justify unilateral changes where such practice fails to create “reasonable certainty” as to the “timing and criteria” for the changes). In the instant case, the Respondent’s argument, if accepted, would authorize it to unilaterally create and implement any type of new program or plan it chose for unit employees, as long as that plan fit under the general rubric of “benefits” and was applied to both unit and nonunit employees. Pursuant to the Board’s decisions in *Larry Geweke Ford, Berkshire Nursing Home*, and *Eugene Iovine*, such changes are too discretionary, variable, and ad hoc, to be considered part of an established past practice.<sup>16</sup>

To support its argument that the challenged changes merely continued an established past practice, the Respondent relies on the Board’s decision in *Friendly Ford*, 343 NLRB 1058 (2004).<sup>17</sup> In *Friendly Ford*, a successor employer made unilateral changes to employee bonuses, something that was within the past practice of its predecessor. The Board stated that “the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice.” *Friendly Ford*, supra at fn. 3. However, the decision in *Friendly Ford* did not include a finding that the employer’s past practice of unilateral changes had been confined to in-contract periods when a contractual waiver was in effect. Therefore, the decision in *Friendly Ford*, in no way undermines the conclusion that the Respondent’s past practice, which the record shows has been confined to in-contract periods, does not encompass out-of-contract unilateral changes. Moreover, in *Friendly Ford* the employer’s discretion to make unilateral changes was limited because those changes were confined to a single benefit—bonuses. As noted above, the Respondent’s unilateral changes were far more discretionary, variable, and ad hoc than that.<sup>18</sup>

*C. Were the Unilateral 2005 Changes to Beneflex Lawful Because Such Changes Were a Discrete and Recurring Event*

As previously noted, when parties are negotiating a collective-bargaining agreement, the employer’s obligation to refrain from unilateral changes regarding mandatory subjects extends beyond the duty to provide notice and an opportunity to bargain, but rather encompasses a duty to refrain from implementation at all, absent impasse on bargaining for the agreement as a whole. *Register-Guard*, supra; *Bottom Line Enterprises*, su-

pra. In *Stone Container Corp.*, 313 NLRB 336, 336 (1993), the Board recognized an exception to that duty where a change concerns a discrete, annually recurring, event that is scheduled to take place during contract negotiations. Under this exception, the Board has not required employers to await overall impasse in negotiations before implementing annual wage increases or annual adjustments to employee health insurance, but rather has found that employers met their bargaining obligations when they gave the unions reasonable notice of the changes and an opportunity to bargain, but the unions either failed to request bargaining, or did not do so in a timely manner *TXU Electric Co.*, 343 NLRB 1404, 1405 (2004) (employer twice notified union of change, but union did not request bargaining either time); *Nabors Alaska Drilling, Inc.*, 341 NLRB 610 fn. 1 (2004) (union did not timely request bargaining); *Alltel Kentucky*, 326 NLRB 1350, 1350 (1998) (employer informed union of its intention not to grant annual wage increase, but union failed to request bargaining); *Stone Container Corp.*, supra at 336 (employer “made its proposal in time for bargaining over the matter,” but the union “made no counterproposal concerning the April wage increase, and did not raise the issue again during negotiations”). The Respondent contends that the unilateral implementation of the 2005 changes in benefits was permissible under the *Stone Container* exception. As discussed below, I conclude that the *Stone Container* exception does not apply here both because the changes were not a discrete, recurring event, and because the Respondent did not satisfy even a diminished bargaining duty.

The recurring event that the Respondent attempts to frame does not concern a discrete subject—such as the annual adjustment of medical insurance—but rather extends to all subjects that fall under the general heading of benefits. The actual changes the Respondent unilaterally implemented in 2005 were not confined to recurring adjustments to a single plan, but included the initiation of an entirely new healthcare savings account plan, the creation of penalties for employees who do not use a designated mail-order pharmacy for certain prescriptions, and wide-ranging changes to employee costs and/or coverages for financial planning, medical care, dental care, and vision care. The collection of changes in this case bears no meaningful resemblance to the “discrete” events that were at issue in *Stone Container* and the cases applying it. In *Stone Container*, *TXU Electric*, and *Alltel*, the discrete event was a yearly wage increase/review. In *Saint-Gobain Abrasives*, 343 NLRB 542 (2004), enfd. 426 F.3d 455 (1st Cir. 2005), *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994), and *Nabors*, the discrete event was the annual review and adjustment of a health insurance program. Those events were reasonably viewed as “discrete” ones that could be handled separately from the ongoing negotiations for a contract. None of those cases involved anything like the breadth of changes at issue in the instant case. Moreover, the changes in those cases involved regularly scheduled issues about which the employer had no choice but to take some action.<sup>19</sup> The Respondent’s changes, on the other hand,

<sup>16</sup> In *Courier-Journal I*, the Board found that the employer’s discretion was adequately limited where it could only make the same changes to unit employees’ health care premiums that it was making to those of nonunit employees. 342 NLRB 1093. However, in *Courier-Journal I*, the Respondent was merely adjusting healthcare premiums—something it had done routinely in the past. The employer’s discretion was limited to a narrow subject matter. The discretion the Respondent seeks is far broader and includes, for example, the ability to unilaterally implement new benefit plans, and to make varied changes to a whole range of existing benefit plans.

<sup>17</sup> The Respondent refers to the case as *Sonic Automotive*.

<sup>18</sup> The Respondent also relies on the Board’s decision in *Shell Oil Co.*, 149 NLRB 283 (1964). However, the Board has stated that *Shell Oil* has been overruled to the extent it held that contractual waivers of bargaining survive the contract that creates them. *Beverly Health & Rehabilitation*, 335 NLRB at 636 fn. 6.

<sup>19</sup> See *TXU Electric Co.*, 343 NLRB 1405 (The date for annual review and possible wage adjustment was approaching. Absent a contract on that date, the Respondent had to do something with respect to

included a number of ad hoc actions that were not annually occurring events, and about which the Respondent was not required to take some action—e.g., the new healthcare savings plan, the new prescription drug penalty, the change in financial planning premiums. Finding the *Stone Container* exception applicable to the mixed bag of changes in the instant case would alter the meaning of the exception dramatically. In *TXU Electric*, the Board stated that the *Stone Container* exception had “no broad application or disruptive potential” because its application was limited to a “discrete recurring event.” 343 NLRB 1405. Acceptance of the Respondent’s argument that changes to a wide range of benefits, and even the addition wholly new benefit plans, should all be considered part of one discrete, recurring, event would deprive that limitation of much of its meaning and would transform the *Stone Container* standard into what the Board indicated it should not be—i.e., an exception of “broad application” and “disruptive potential.”

Even if it were possible, in the abstract, to consider the Respondent’s collection of changes to be a “discrete recurring event,” those changes became part of the overall contract negotiations due to the Respondent’s negotiating strategies. When the Union requested bargaining over the 2005 benefits package changes in its October 14, 2004 letter, the Respondent’s lead negotiator declined to respond because the parties’ ongoing contract negotiations included discussion of a union-sponsored replacement to the Respondent’s benefits package. Previously, the Respondent told the Union that it would not continue to provide its benefits package to unit employees in the new contract unless the Union agreed to language setting forth management’s right to make unilateral out-of-contract changes to benefits, such as the 2005 benefits changes at issue here. The Respondent has not shown that prior to implementing the changes to benefit plans on January 1, 2005, it ever indicated that the Company viewed those changes as a discrete event that should be bargained about in isolation from the ongoing contract negotiations concerning the continued existence of those plans. Under these circumstances, the Respondent’s 2005 changes to its benefit plans cannot reasonably be characterized as a “discrete” event in the sense of being separate from the contract negotiations regarding those plans.

Even if the lowered, *Stone Container*, bargaining standard were applicable, I would conclude that the Respondent failed to meet its obligations under Section 8(a)(5). At the time the Respondent implemented the 2005 changes, the parties were actively exploring the possibility that they could resolve the issues regarding those changes through the adoption of replacement plans, or by the Union’s acceptance of the changes in exchange for the Respondent compromising its waiver proposal. Indeed, on December 16, the Respondent expressed an interest in continuing to discuss the Union’s proposal for replacing the existing benefit plans with BCBS plans, and additional bargaining sessions were scheduled for 2005. After the

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that matter.) (emphasis in original); *Saint-Gobain Abrasives*, supra at 556 (if employer had not acted unilaterally regarding health insurance, the policies of half the employees would have expired); *Stone Container*, supra at 336 (since wage increases are annually occurring event, the employer “could not await an impasse in overall negotiations”).

Respondent implemented the 2005 changes in benefits, the parties negotiated further regarding the waiver proposal and the Union’s challenge to the unilateral changes. Despite the possibility of a negotiated resolution, the Respondent did not delay the implementation of the 2005 changes by even a day.

In *Stone Container*, and cases applying it, the Board found that the employers met their bargaining obligations regarding discrete events where those employers gave reasonable notice of a change, but the unions either did not then request bargaining, see *TXU Electric Co.*, supra, *Alltel Kentucky*, supra, *Stone Container*, supra, did not request bargaining in a timely manner, see *Nabors Alaska Drilling, Inc.*, supra, or the parties bargained to impasse, see *Saint-Gobain Abrasives*, supra. That did not occur in this case. Here, the Union requested, and pursued, bargaining in a timely manner, but the employer unilaterally implemented the changes at a time when negotiations concerning those changes were ongoing.<sup>20</sup>

The Respondent argues that, although the Union requested bargaining regarding the 2005 changes in benefits, the *Stone Container* exception applies because the Union failed to pursue bargaining regarding those changes and intentionally delayed negotiations. Neither assertion is consistent with the facts present here. Regarding the Respondent’s claim that the Union failed to bargain over the 2005 changes, the evidence establishing the contrary is clear. On October 14, 2004—3 days after the Respondent notified the Union of the proposed 2005 changes—the Union demanded, in writing, that the Respondent bargain regarding those changes. On November 8, the Union bargained over those changes by proposing the BCBS plans as an alternative to the Respondent’s benefit plans as they would exist after incorporating the 2005 changes. When the Respondent rejected the November 8 proposal, the Union further bargained regarding the 2005 changes by proposing to accept those changes in exchange for the Respondent withdrawing the Beneflex waiver proposal. On the same day, the Respondent also proposed a modified version of its BCBS alternative.

According to the Respondent, the above-described bargaining efforts by the union negotiators did not constitute bargaining over the 2005 changes because the Union never proposed modifications to the specific changes announced by the Respondent. However, a party is not required to bargain over changes by proposing modifications to the nuances of proposed changes, but may bargain over those changes, as the Union did

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<sup>20</sup> The Respondent does not contend that it bargained to impasse regarding the 2005 changes, Tr. 26, something it was likely required to do even if it did not have await an overall impasse in the contract negotiations. See *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (where an employer is confronted with an economic exigency that requires prompt action it need not await overall impasse, but may act unilaterally if the union “waives its right to bargain or the parties reach impasse on the matter proposed for change”); but see *Saint-Gobain*, supra at 542 fn. 3 (Board majority leaves unresolved the question of whether an employer is required to negotiate to impasse on change to a “discrete” issue.) At any rate, under the facts present in this case, I conclude that the Respondent unilaterally implemented changes in benefits at a time when the parties were not approaching impasse regarding those changes.

here, by offering alternatives that moot or subsume the changes, or by proposing to accept the changes in exchange for something else of value. See *Anderson Enterprises*, 329 NLRB 760, 772 (1999), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001) (Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas.), quoting *Korn Industries v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967). Indeed, if there was any party that could be said to have demonstrated an unwillingness to bargain over the specifics of the 2005 changes it was the Respondent, which explicitly took the position that it was not required to bargain over such changes and did not respond to the Union's written request to bargain about the changes. The Union's timely request to bargain over the 2005 changes in benefits, not to mention its actual bargaining over those changes, distinguishes the instant case from those in which application of the *Stone Container* exception was appropriate. The record shows that the Respondent unilaterally implemented its 2005 changes when negotiations regarding those changes were still open. I conclude that the Respondent failed to meet even the lower bargaining duty that pertains in cases controlled by *Stone Container*.

The Respondent also contends that the Union intentionally, and unnecessarily, delayed bargaining regarding benefits in order to force the Respondent to implement those changes unilaterally, thereby creating a pretense for the Union to file an unfair labor practices charge. See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (employer not required to bargain to overall impasse where union "insists on continually avoiding or delaying bargaining"). The Respondent offers no meaningful evidence to support this accusation impugning the Union's motives. To the contrary, the facts established by the record belie the Respondent's claim of intentional and unnecessary delay. It was in mid-July 2004 that the Respondent stated, for the first time, that the Union would either have to agree to the Beneflex waiver language—something the Respondent conceded was a nonmandatory subject of bargaining—or would have to develop a union alternative to the entire collection of benefit plans provided by the Respondent. When it gave this ultimatum, the Respondent surely knew that developing an alternative to those plans would be a huge undertaking for the Union. There were 11 (later 12) separate plans under the Beneflex umbrella, and much of the information necessary to develop alternatives to those plans was in the Respondent's, not the Union's, possession. Moreover, the Union would have to give an outside provider sufficient information to convince that provider to replace the plans at a competitive cost.

The record shows that the Union offered the BCBS alternative less than 4 months after the Respondent presented its ultimatum. On its face, I consider that a reasonable period of time given the complexity of the task. Moreover, the evidence supports the view that the Union promptly began its effort to develop alternative plans, and pursued that effort diligently. On July 14, no more than a day after the Respondent gave its ultimatum, the Union requested information that it believed a third-party insurer would need to develop alternatives to the Respondent's benefit plans. Two weeks later, the Union engaged BCBS to develop alternative benefit plans. The Union

made multiple information requests for information required by BCBS.

On October 11, the Respondent provided the information the Union had been requesting regarding the 2005 changes and less than a month later the Union presented its proposal for an alternative to the Respondent's package of benefit plans for 2005. There is no significant evidence showing that the Union did not work diligently with BCBS to develop its alternative plans promptly. It is not alleged that the Union ever refused to meet to negotiate at reasonable times and places. The Respondent's allegation that the Union intentionally delayed bargaining regarding benefits is not only unproven by the record evidence, it is rebutted by that evidence.

#### CONCLUSIONS OF LAW

1. The Respondent 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).
3. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to the benefits of unit employees at a time when the parties were engaged in negotiations for a collective-bargaining agreement and the parties had not reached impasse.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be ordered to restore, for unit employees, the benefit terms that existed before the 2005 unilateral changes to the Beneflex package of benefit plans, and to maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. See *Larry Geweke Ford*, 344 NLRB 628 (2005) (The standard remedy for unilaterally implemented changes in health insurance coverage is to order the restoration of the status quo ante.) I recommend that the Respondent be ordered to make whole the unit employees and former unit employees for any loss of benefits they suffered as a result of the Respondent's unlawful implementation of its 2005 changes to their benefits, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, I recommend that the Respondent be ordered to reimburse unit employees for any expenses resulting from the Respondent's unlawful changes to benefits as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons for the Retarded*, supra.

#### ORDER

The Respondent, E.I. DuPont de Nemours and Company, Edge Moor, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (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) 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, 2005, and maintain those terms in effect until the parties have bargained to a new agreement or a valid impasse, or the Union has agreed to changes, as provided in the remedy section of this decision.

(b) Make the unit employees whole by reimbursing them for any loss of benefits and additional expenses that they suffered as a result of the unlawful unilateral changes to benefits that were implemented on January 1, 2005, as provided in the remedy section of this decision.

(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 backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Edge Moor, Delaware, copies of the attached notice marked "Appendix."<sup>22</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 the Respondent 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, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2005.

(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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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<sup>22</sup> 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."