

Nos. 10-1300, 10-1301, 10-1353, 10-1355

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

E.I. DUPONT DE NEMOURS AND COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

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

Intervenor

ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS
FOR ENFORCEMENT OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

E.I. DUPONT DE NUMOURS AND COMPANY	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 10-1300
	*	10-1301
	*	10-1353
v.	*	10-1355
	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	4-CA-33620
	*	
Respondent/Cross-Petitioner	*	
	*	
And	*	
	*	
UNITED STEEL, PAPER AND FORESTRY, RUBBER	*	
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL	*	
AND SERVICE WORKERS INTERNATIONAL	*	
UNION	*	
Intervenor	*	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici

E.I. DuPont De Nemours, Louisville Works and E.I. DuPont de Nemours and Company were the respondents before the National Labor Relations Board and are the petitioners/cross-respondents in Case. Nos. 10-1300, 10-1301, 10-1353, and

10-1355. The Board is the respondent/cross-petitioner. The Board's General Counsel was a party before the Board. The United Steel, Paper and Forestry, Rubber, and Manufacturing, Energy, Allied Industrial and Service Workers International Union (and its predecessors) was the charging party before the Board.

B. Rulings Under Review

Two orders of the Board (Chairman Liebman and Members Schaumber and Becker) are under review. The first, *E.I. DuPont De Nemours, Louisville Works*, Case No. 9-CA-41634, was issued on August 27, 2010, and reported at 355 NLRB No. 176. In that case, the Board reversed an administrative law judge and found that DuPont violated Section 8(a)(5) and (1) of the Act by making unilateral changes to unit employees' benefits. In the second order, *E.I. DuPont de Nemours and Company*, Case No. 4-CA-33620, issued on August 27, 2010, and reported at 355 NLRB No. 177, the Board upheld an administrative law judge and, again, found that the Company violated Section 8(a)(1) and (5) of the Act by changing unit employees' benefits.

C. Related Cases

Board Counsel is unaware of any related cases either pending in this Court

or any other court.

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Dated at Washington, DC
this 28th day of March, 2011

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BRIEF FOR
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STATEMENT OF JURISDICTION

These cases are before the Court on the petitions of E.I. DuPont de Nemours and Company and E.I. DuPont de Nemours, Louisville Works, to review Orders of

the National Labor Relations Board issued on August 27, 2010 and reported at 355 NLRB No. 176¹ and 355 NLRB No. 177.² The Board has cross-applied for enforcement of those Orders. The Board's Orders are final with respect to all parties under Section 10(e) and (f) of the National Labor Relations Act, as amended.³

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act,⁴ which empowers the Board to prevent unfair labor practices. DuPont's petitions, filed on September 24, 2010, and the Board's cross-applications, filed on November 1 and 2, 2010, were timely; the Act places no time limitation on such filings. This Court has jurisdiction over both the petitions for review and the cross-applications for enforcement pursuant to Section 10(e) and (f) of the Act,⁵ which provide that petitions for review of Board orders may be filed in this Court and that the Board may cross-apply for enforcement of its order.

¹ JA 15. "JA" references are to the joint appendix. "Br." refers to DuPont's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² JA 27.

³ 29 U.S.C. §§ 151, 160(e) & (f).

⁴ 29 U.S.C. § 160(a).

⁵ 29 U.S.C. §§ 160(e) & (f).

STATEMENT OF THE ISSUE PRESENTED

It is illegal for an employer to make changes to terms and conditions of employment without bargaining with the collective-bargaining representatives of its employees. Here, after the parties' collective-bargaining agreements had expired, DuPont changed the terms of its employee benefit plan without bargaining with the Union. The issue is whether substantial evidence supports the Board's findings that these unilateral changes violated Section 8(a)(5) of the Act.

PERTINENT STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the attached addendum.

STATEMENT OF THE CASES

After DuPont's corporate office made unilateral changes to the benefits available to employees at DuPont's Louisville, Kentucky and Edge Moor, Delaware facilities, the Union filed unfair labor practice charges in the Board's Regional Offices in Cincinnati (Region 9)⁶ and Philadelphia (Region 4).⁷ The Regional Directors of both offices, on behalf of the General Counsel, issued unfair labor practice complaints alleging that DuPont violated Section 8(a)(5) and (1) of

⁶ JA 68, 80, 119.

⁷ JA 554.

the Act⁸ by refusing to bargain in good faith with the Union and unilaterally implementing numerous changes to the benefits received by unit employees at Louisville⁹ and Edge Moor.¹⁰

Both cases were tried before an administrative law judge. The judge in the DuPont Louisville (Region 9) case issued a decision on December 15, 2005, recommending that the complaint be dismissed.¹¹ The judge in the DuPont Edge Moor (Region 4) case issued a decision on December 23, 2005, finding merit to the complaint allegations and issuing a recommended remedy.¹² The General Counsel filed exceptions in the DuPont Louisville case, and DuPont filed exceptions in the DuPont Edge Moor case.

On August 27, 2010, the Board issued decisions in both cases, reversing the judge in the DuPont Louisville case¹³ and agreeing with the judge in the DuPont Edge Moor case.¹⁴ The Board ruled that the unilateral changes at both locations violated Section 8(a)(5) and (1) of the Act. The stipulated facts supporting the

⁸ 29 U.S.C. 158(a)(5) & (1).

⁹ JA 124.

¹⁰ JA 558.

¹¹ JA 22.

¹² JA 30.

¹³ JA 15.

¹⁴ JA 27.

Board’s findings are set forth below, followed by a summary of the Board’s decisions.

STATEMENT OF FACTS

I. THE BOARD’S FINDINGS OF FACT

A. The BeneFlex Plan

In 1991 or 1992, DuPont created the BeneFlex Plan, a comprehensive, corporate-wide welfare benefit plan, for its employees.¹⁵ The BeneFlex Plan is a cafeteria-style benefits plan that includes a variety of benefit options, such as healthcare, dental, and vision coverage; life insurance; financial planning; and legal services.¹⁶ The BeneFlex Medical Care Plan is the healthcare option encompassed within the BeneFlex Plan.¹⁷ The BeneFlex Plan contains a provision giving DuPont the right to make changes to the Plan at its discretion.¹⁸ This “reservation of rights” provision 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.¹⁹

¹⁵ JA 15; JA 45, 625 ¶ 6.

¹⁶ JA 15; JA 144-45 ¶ 6, 624 ¶ 3.

¹⁷ JA 15; JA 144-45 ¶ 6, 624 ¶ 3.

¹⁸ JA 15; JA 145 ¶ 7, 625 ¶ 8.

¹⁹ JA 31 n.5; JA 625 ¶ 8.

The Plan also specifically contemplates collective bargaining over its application:

Benefits under this Plan shall not apply to any employee or the dependent(s) of any employee in a bargaining unit represented by a union for collective bargaining unless and until collective bargaining on the subject has taken place and any requisite obligations thereunder have been fulfilled.²⁰

Even though DuPont created the BeneFlex Plan in 1991 or 1992, it was not applied to bargaining-unit employees in these cases until after negotiations were completed and the Union agreed to accept BeneFlex benefits.²¹

DuPont made changes to the BeneFlex Plan every year, and it is the changes made during 2004 and 2005 that are at issue in these cases. In making such changes, DuPont considered costs, trends, the competitiveness of the plan, and “what might be attractive to employees.”²² The vice president of human resources then determined what changes would be made to the plan.²³ The changes were announced in the fall of each year and implemented January 1 of the following year.

²⁰ JA 171, 744.

²¹ JA 15, 31; JA 144 ¶ 4, 625 ¶ 7.

²² JA 51.

²³ JA 51.

B. Louisville Works

The Union has represented the production and maintenance employees at DuPont's Louisville Works facility for over 50 years.²⁴ At the time BeneFlex was implemented nationwide to non-bargaining unit employees, the employees in the Louisville bargaining unit received medical coverage through local HMOs pursuant to their collective-bargaining agreement. That agreement expired March 21, 1994. Prior to its expiration, the parties began negotiating for a successor contract.

During negotiations for a successor contract in 1994, DuPont and the Union agreed that unit employees would be covered by the BeneFlex Plan, including BeneFlex Medical, beginning January 1, 1995.²⁵ At that time, the Union was aware that the BeneFlex Plan permitted DuPont to make annual changes to the level of benefits and costs to employees.²⁶ The parties signed a contract that was in effect from May 25, 1994, through March 21, 1997.²⁷ In 1996 and 1997,

²⁴ JA 15; JA 413 ¶ 1.

²⁵ JA 15; JA 144 ¶ 4.

²⁶ JA 23; JA 145 ¶ 7.

²⁷ JA 23; JA 144 ¶ 3.

DuPont made changes to the BeneFlex Plan, as permitted by the contract, and the Union did not object.²⁸ The contract expired March 21, 1997.²⁹

In March 1997, the Union and DuPont began negotiating for a successor contract. In June 1997, the parties signed a new contract, which contained benefits provisions that were identical to the benefits provisions of the 1994 contract.³⁰ The contract was in effect from June 13, 1997 through March 21, 2002.³¹ During the term of this contract, DuPont continued to provide BeneFlex to unit employees. From 1998 through 2002, DuPont made annual changes to the Plan, and the Union did not object.³²

In February 2002, the parties began negotiating for a successor contract.³³ They agreed that “management would honor the terms and conditions of [the old] contract day-to-day until something different was bargained.”³⁴ Bargaining continued through the fall, when DuPont presented the Union with the changes it

²⁸ JA 23-24; JA 147 ¶ 14-17.

²⁹ JA 23; JA 144 ¶ 3.

³⁰ JA 149 ¶ 20.

³¹ JA 23; JA 144 ¶ 3.

³² JA 23-24; JA 150 ¶ 22, 152 ¶ 26, 153-54 ¶ 28, 155-56 ¶ 33, 158-59 ¶ 42.

³³ JA 24; JA 159-60 ¶ 47.

³⁴ JA 24; JA 159-60 ¶ 47.

intended to make to the BeneFlex Plan on January 1, 2003.³⁵ The Union objected, stating such changes were subject to good faith bargaining before implementation.³⁶ DuPont refused to bargain over the changes, asserting that it was not required to do so.³⁷ On January 1, 2003, DuPont implemented the changes.³⁸ The Union subsequently filed an unfair labor practice charge, alleging that these unilateral changes violated Section 8(a)(5) of the Act, but the charge was dismissed as untimely.³⁹

Negotiations for a successor contract continued throughout 2003. In the fall of that year, DuPont again notified the Union of changes it intended to make to the BeneFlex Plan.⁴⁰ The Union objected and requested bargaining over the changes.⁴¹ DuPont refused to bargain, and it implemented the changes on January 1, 2004.⁴² DuPont increased premiums for medical care coverage; added the BeneFlex Legal Services Plan; implemented a new dental plan feature; changed the

³⁵ JA 24; JA 160 ¶ 52.

³⁶ JA 24; JA 161 ¶ 53.

³⁷ JA 24; JA 161 ¶ 54.

³⁸ JA 24; JA 161 ¶ 55.

³⁹ JA 24; JA 162 ¶ 57.

⁴⁰ JA 24; JA 162 ¶ 58.

⁴¹ JA 24; JA 163 ¶ 59.

⁴² JA 24; JA 163 ¶¶ 60, 62.

definitions for dependent coverage; eliminated one option from the financial-planning service; changed the list of qualifying life events; changed the rules for reimbursement under the Health Care Spending Account Plan; changed benefits provided for infertility treatment; and changed the Mental Health/Chemical Dependency benefits.⁴³ The Union filed a timely unfair labor practice charge.

These events were repeated the following year. In fall 2004, DuPont notified the Union of changes it intended to make to the BeneFlex Plan.⁴⁴ The Union objected and requested bargaining.⁴⁵ DuPont refused to bargain and implemented the changes on January 1, 2005.⁴⁶ DuPont increased the premiums for medical care coverage; changed the prescription drug benefit; added new coverage levels for medical, dental, and vision; changed the premiums for Dental Option A; increased premiums for financial planning; and redesigned the catastrophic medical option.⁴⁷ The Union again filed a timely unfair labor practice charge.

⁴³ JA 24; JA 163 ¶ 62.

⁴⁴ JA 24; JA 164 ¶ 63.

⁴⁵ JA 24; JA 164 ¶ 64.

⁴⁶ JA 24; JA 165 ¶ ¶ 65, 66.

⁴⁷ JA 24, 33-34; JA 165 ¶ 66, JA 644 ¶ 59.

C. Edge Moor

Similar events took place at DuPont's facility in Edge Moor, Delaware. The Union has represented the production and maintenance employees at this location for 60 years.⁴⁸ When DuPont introduced the BeneFlex Plan in 1991, unit employees were already receiving benefits under a collective-bargaining agreement that had been in place since 1987.⁴⁹ DuPont and the Union engaged in bargaining over the application of the BeneFlex Plan to unit employees, but the Union rejected participation in the Plan at that time.⁵⁰

In 1993, after further negotiations, the Union accepted the BeneFlex Plan.⁵¹ Because there was a collective-bargaining agreement in effect at that time, the parties executed a Memorandum of Understanding to supersede the part of the contract dealing with benefits.⁵² The Union understood that the BeneFlex Plan contained language permitting DuPont to make changes each year without bargaining.⁵³ Each year during the term of the contract, from 1995 through 2000,

⁴⁸ JA 30; JA 623 ¶ 1.

⁴⁹ JA 31; JA 625 ¶ 6, JA 648.

⁵⁰ JA 625 ¶ 7.

⁵¹ JA 31; JA 625 ¶ 7.

⁵² JA 31; JA 625 ¶ 7.

⁵³ JA 31; JA 626 ¶ 9.

DuPont made changes to the BeneFlex Plan, and the Union did not object.⁵⁴

The contract expired May 31, 2000. The parties negotiated a successor agreement to take effect June 1, 2000, which included a specific reference to the BeneFlex Plan: “In addition to receiving [other benefits], employees shall also receive benefits as provided by the Company’s BeneFlex Benefits Plan, subject to all terms and conditions of said Plan.”⁵⁵ The Union was aware that the BeneFlex Plan contained a clause permitting DuPont to make changes to the Plan.⁵⁶ From 2001 through 2004, during the term of the 2000 contract, DuPont made annual changes to the BeneFlex Plan. The Union never objected to these changes.⁵⁷

The contract expired May 31, 2004, and the parties began negotiating a successor contract a short time before that.⁵⁸ During these negotiations, DuPont expressed its belief that it could legally continue to make annual changes to the BeneFlex Plan, even after the expiration of the contract.⁵⁹ The Union disagreed.⁶⁰ DuPont proposed including language in the successor contract to explicitly give it

⁵⁴ JA 31; JA 627 ¶¶ 13, 15, JA 628 ¶ 17, JA 629 ¶ 19, JA 630 ¶ 21, JA 631 ¶ 24.

⁵⁵ JA 31 n.6; JA 632 ¶ 25.

⁵⁶ JA 31; JA 633 ¶ 27.

⁵⁷ JA 31; JA 634 ¶ 30, JA 635 ¶ 32, JA 637 ¶ 34, JA 638 ¶ 37.

⁵⁸ JA 32; JA 638 ¶ 38.

⁵⁹ JA 32; JA 639 ¶ 39.

⁶⁰ JA 32; JA 641 ¶ 46.

permission to make changes after the contract expired.⁶¹ The Union rejected this proposal.⁶² DuPont then responded that it would not provide BeneFlex benefits to unit employees without explicit recognition by the Union that DuPont could make annual changes to the Plan, even if no contract was in place.⁶³ So the Union proposed that unit employees instead be covered by Blue Cross Blue Shield.⁶⁴ The Union alternately proposed that it would accept BeneFlex for 2005, including all the changes DuPont wanted to make, if DuPont would drop its separate proposal permitting DuPont to make unilateral post-expiration changes.⁶⁵ DuPont rejected both proposals.⁶⁶

On January 1, 2005, while negotiations for a successor contract were ongoing, DuPont made the changes to the BeneFlex Plan described on pages 9-10, above.⁶⁷ Despite the Union's objection and request for bargaining, DuPont refused to bargain over the changes.⁶⁸ The Union filed an unfair labor practice charge.

⁶¹ JA 32 n.7; JA 639 ¶ 41, JA 640 ¶ 43.

⁶² JA 32; JA 640 ¶ 45.

⁶³ JA 32; JA 641 ¶ 48.

⁶⁴ JA 32; JA 643 ¶ ¶ 56, 57.

⁶⁵ JA 33; JA 643 ¶ 57.

⁶⁶ JA 33; JA 643 ¶ 57.

⁶⁷ JA 33; JA 644 ¶ 59.

⁶⁸ JA 33; JA 644 ¶ 58.

The parties continued to negotiate, but no successor contract had been reached at the time this case was tried.⁶⁹

II. THE BOARD'S CONCLUSIONS AND ORDERS

On August 27, 2010, the Board issued two Orders finding that DuPont violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the employees' benefit plan at its Louisville and Edge Moor facilities. In the Louisville case, the Board reversed the judge's decision, which had recommended dismissal of the complaint. In the Edge Moor case, the Board affirmed the judge's decision, which had found merit to the complaint's allegations. In both Orders, the Board concluded that DuPont was obligated to bargain with the Union over the changes to the BeneFlex Plan and had failed to establish any affirmative defense that would justify making such changes without bargaining.⁷⁰

As a remedy, the Board's Orders require DuPont to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Board's Orders require DuPont to restore the prior benefits

⁶⁹ JA 646 ¶ 66.

⁷⁰ JA 15, 27.

package, make whole the employees who were affected by its failure to bargain, and post remedial notices.⁷¹

SUMMARY OF ARGUMENT

This case involves the straightforward application of well-settled law to the undisputed facts. The Board reasonably found that DuPont violated the Act by changing employee benefits without bargaining with the Union to impasse. DuPont concedes that the parties were not at impasse. It argues instead that the parties' expired collective-bargaining agreements justified the changes. However, the Board reasonably found that the management-rights clause of the expired contracts, which gave DuPont the right to make such changes during the life of the contracts, did not survive expiration of the contracts.

DuPont further argues that it had an oral agreement with the Union, separate from the collective-bargaining agreements, and that the changes at issue here were "covered by" this oral agreement. But DuPont failed to present any evidence of an additional agreement about BeneFlex. Rather, the evidence overwhelmingly demonstrates that the parties agreed about BeneFlex as part of their collective-bargaining agreements.

DuPont's related argument, that it merely adhered to a "past practice" of making unilateral changes, is equally without merit. DuPont failed to meet its

⁷¹ JA 18, 27, 40.

burden of proving that the changes it made were justified by the Board's past practice doctrine. Furthermore, changes in previous years were made pursuant to the management-rights clause of the collective-bargaining agreements, and the Board reasonably held that such changes cannot justify continued discretionary changes post-expiration. To hold otherwise would conflict with the longstanding principle that management-rights clauses do not survive the expiration of a contract. DuPont's argument would mean that when the Union accepted the BeneFlex package in the mid-nineties, it unknowingly agreed to allow DuPont to make changes to BeneFlex without bargaining *forever*. The Union could not object during the term of the contracts because of the management-rights clauses, and – according to DuPont – it should not be permitted to object after the contracts expired because, by then, DuPont had established a “past practice” permitting it to continue making unilateral changes. The Board reasonably rejected this argument, finding that it would discourage rather than promote collective bargaining and make unions reluctant to accept management-rights clauses.

DuPont also failed to prove that the Union waived its right to bargain over changes to benefits in 2004 and 2005. It presented no evidence that the parties fully discussed and consciously explored these changes and that the Union consciously yielded its bargaining rights. Nor did DuPont prove that the changes at issue were discrete annual events, or that it gave the Union the opportunity to

bargain over the changes. The evidence shows instead that the changes were dramatic and wide ranging, and that DuPont flatly refused to bargain over them.

Finally, DuPont's arguments about the remedy and its arguments related to ERISA are jurisdictionally barred. DuPont never presented these arguments to the Board in the first instance, so it may not do so here. Because substantial evidence supports the Board's findings, the Court should enforce its Orders in full.

STANDARD OF REVIEW

The Supreme Court has recognized that "Congress made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain."⁷² For this reason, "[i]f the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference from the courts."⁷³ And courts must "give the greatest latitude to the Board when its decision reflects its 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management."⁷⁴ The case for judicial deference is particularly appropriate here because of the

⁷² *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

⁷³ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991).

⁷⁴ *Litton*, 501 U.S. at 201-02 (citing *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)).

Board’s expertise in determining whether an employer has satisfied its bargaining obligations.⁷⁵

This Court’s review of the Board’s factual conclusions is “highly deferential.”⁷⁶ Under Section 10(e) of the Act, the Board’s factual findings are “conclusive” if supported by substantial evidence on the record as a whole.⁷⁷

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT DUPONT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY CHANGING THE TERMS AND CONDITIONS OF EMPLOYMENT WITHOUT BARGAINING WITH THE UNION

A. Well-Settled Precedent Requires an Employer To Bargain Over a Change in a Term or Condition of Employment

Under Section 8(a)(5) of the Act, an employer commits an unfair labor practice by “refus[ing] to bargain collectively with the representatives of [its] employees.”⁷⁸ Section 8(d) defines collective bargaining as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and

⁷⁵ *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) (“[T]he Board [is] the expert in this field.”)

⁷⁶ *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998).

⁷⁷ 29 U.S.C. § 160(e).

⁷⁸ 29 U.S.C. § 158(a)(5).

other terms and conditions of employment.”⁷⁹ These categories, “wages, hours, and other terms and conditions of employment,” are referred to as mandatory subjects of bargaining. There can be no doubt that health insurance and similar benefits are mandatory subjects of bargaining.⁸⁰

Pursuant to this statutory bargaining obligation, the Board has long held that when “parties are engaged in negotiations [for a collective-bargaining agreement], an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.”⁸¹ Stated another way, during negotiations for a collective-bargaining agreement, an employer must maintain the

⁷⁹ 29 U.S.C. § 158(d).

⁸⁰ *Allied Chem. & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971) (noting that “mandatory subjects of collective bargaining include pension and insurance benefits for active employees”); *Scepter, Inc. v. NLRB*, 448 F.3d 388, 389-90 (D.C. Cir. 2006) (enforcing Board order requiring bargaining over health benefits); *NLRB v. Carilli*, 648 F.2d 1206, 1217 n.12 (9th Cir. 1981) (“It is undisputed that the medical and dental plans provided under the labor-management health trust fund are mandatory subjects of bargaining.”).

⁸¹ *Bottom Line Enter.*, 302 NLRB 272, 274 (1991).

status quo with regard to all mandatory bargaining subjects absent overall impasse in negotiations.⁸²

This rule is rooted in longstanding Supreme Court precedent and is fundamental to the Act's purpose of fostering stable labor relations through the collective-bargaining process. In its 1962 decision *NLRB v. Katz*, the Supreme Court held that an employer violates the duty to bargain by unilaterally changing a term and condition of employment under negotiation, regardless of its motivation for doing so.⁸³ The Court reasoned that such a change constitutes "a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy."⁸⁴ Accordingly, the Court held that the employer's unilateral grant of discretionary merit wage increases was "tantamount to an outright refusal to negotiate on that subject" and therefore a violation of Section 8(a)(5).⁸⁵ Consistent with *Katz*, the Court has since recognized that the prohibition against unilateral changes is

⁸² *Visiting Nurse Servs. of W. Massachusetts, Inc. v. NLRB*, 177 F.3d 52, 57 (1st Cir. 1999) ("[U]nless the employer has bargained to impasse on the agreement as a whole, there is a violation of §§ 8(a)(1) and (5) if the employer makes unilateral changes in mandatory subjects of bargaining.").

⁸³ *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

⁸⁴ *Id.* at 747.

⁸⁵ *Id.*

grounded in the reality “that it 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.”⁸⁶

The proscription against unilateral changes in terms and conditions of employment applies with full force “where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed.”⁸⁷ When the contract expires, “terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them.”⁸⁸ This is required “in order to protect the statutory right to bargain.”⁸⁹

This Court has noted the serious damage inflicted by an employer’s implementation of unilateral changes to terms and conditions of employment:

A unilateral change not only violates the plain requirement that the parties bargain over “wages, hours, and other terms and conditions,” but also injures the process of collective bargaining itself. “Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.”⁹⁰

⁸⁶ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

⁸⁷ *Id.* at 198.

⁸⁸ *Id.* at 206.

⁸⁹ *Id.*

⁹⁰ *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992) (quoting *May Dep’t Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)).

For this reason, a violation of Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act: unilateral changes tend “to interfere with, restrain, or coerce employees in the exercise of” their right to engage in concerted activity.⁹¹ As the Supreme Court observed in *NLRB v. Katz*, unilateral changes “plainly frustrate[] the statutory objective of establishing working conditions through bargaining.”⁹²

B. The Board Reasonably Concluded that DuPont’s Unilateral Changes Violated the Act

Applying these well-settled principles to the undisputed facts compels the conclusion that DuPont violated Section 8(a)(5) by unilaterally changing the benefits available to its unit employees at the two facilities. After its previous contracts had expired and while it was negotiating for successor contracts at the Louisville and Edge Moor facilities, DuPont made dramatic and wide-ranging changes to the BeneFlex Plan, as explained on pages 9-10, above. All of these changes were made without bargaining with the Union.

Indeed, despite repeated requests to bargain over these issues, DuPont flatly refused.⁹³ As the cases above make clear,⁹⁴ these changes involve terms and

⁹¹ *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004) (“[A]n employer who violates section 8(a)(5) also, derivatively, violates section 8(a)(1).”).

⁹² *Katz*, 369 U.S. at 744.

⁹³ JA 15, 24, 331 JA 163 ¶ 62, JA 165 ¶ 66, JA 644 ¶ 59.

⁹⁴ *See supra* text accompanying note 80.

conditions of employment that are mandatory subjects of bargaining. Accordingly, DuPont violated Section 8(a)(5) and (1) of the Act by implementing changes to employees' terms and conditions of employment without bargaining to impasse with their employees' representative.

C. DuPont's Arguments That It Was Entitled to Make the Unilateral Changes Have No Merit

DuPont presents a variety of arguments to defend its unilateral changes: it argues that the parties at each facility had an agreement that it could make changes to the BeneFlex Plan, and that the unilateral changes at issue are "covered by" these agreements; it claims that its changes were justified by a "past practice" to which the Union consented; it contends that the Union waived its right to bargain over the changes; and it asserts that the changes were "discrete recurring events" permissible under the Board's *Stone Container* doctrine. None of DuPont's arguments have merit.

1. DuPont's changes are not "covered by" a contract because no contract was in effect when the changes were made

DuPont's first argument, that the changes it made to unit employees' benefits were "covered by" its contracts with the Union,⁹⁵ is easily dismissed. Although this Court has stated that "there is no continuous duty to bargain *during*

⁹⁵ Br. 27-38.

the term of an agreement with respect to a matter covered by the contract,”⁹⁶ the “contract coverage” doctrine explicitly presupposes that a contract is in effect. Accordingly, as the Board noted,⁹⁷ this Court has not applied the contract-coverage rubric in cases involving an expired contract.⁹⁸ Because no contract was in effect when DuPont made changes to BeneFlex in 2004 and 2005, those matters were plainly not covered by any contract.

DuPont attempts to overcome this legal impediment by suggesting that the parties had some sort of agreement related to BeneFlex separate from the collective-bargaining agreements⁹⁹ (presumably an oral agreement since DuPont has failed to come forward with any additional written agreement about BeneFlex), and that the changes were “covered by” this separate agreement. But DuPont has presented no evidence of such agreements with the Union that have supposedly been in place since at least 1994. The record simply does not support either

⁹⁶ *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993) (emphasis added).

⁹⁷ JA 17 n.8.

⁹⁸ *See Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 133-34 (D.C. Cir. 2001) (applying waiver rather than contract coverage to changes made after expiration of a contract). *See also Vico Products Co. v. NLRB*, 333 F.3d 198, 208 (D.C. Cir. 2003) (applying waiver doctrine where no collective-bargaining agreement was in effect).

⁹⁹ Br. 34-35 (“DuPont’s authority to make unilateral changes did not arise exclusively from the expired contractual ‘management rights’ clause. . . . The Union’s acceptance of [the Plan language] was always independent of, and in addition to, the collective bargaining agreements.”)

DuPont's claim that it had such agreements with the Union just about benefits, or its claim that these agreements had no expiration date.

Indeed, DuPont's argument contradicts the record evidence and its own stipulations in this case. With respect to the Louisville facility, DuPont stipulated that the Union accepted BeneFlex during negotiations for the March 1994 collective-bargaining agreement.¹⁰⁰ The resulting contract explicitly states that employees will be covered by the BeneFlex Medical Care Plan.¹⁰¹ And the date the collective-bargaining agreement went into effect is the date employees began receiving all BeneFlex benefits.¹⁰² In the Edge Moor case, DuPont stipulated that the parties signed a Memorandum of Understanding about BeneFlex in 1993 that amended the collective-bargaining agreement's benefits section.¹⁰³ In negotiations for a successor contract in Edge Moor in 2000, the parties included language indicating "employees shall also receive benefits as provided by the Company's BeneFlex Benefits Plan."¹⁰⁴ The evidence overwhelmingly indicates that, as the

¹⁰⁰ JA 144 ¶ 4.

¹⁰¹ JA 169.

¹⁰² JA 145 ¶ 7.

¹⁰³ JA 625 ¶ 7.

¹⁰⁴ JA 632 ¶ 25.

Board found,¹⁰⁵ the parties agreed to BeneFlex as part of their collective-bargaining agreements.

DuPont cannot cite to a single piece of record evidence supporting its claim. DuPont basically admits it has no such evidence when it states “Some other agreement and/or arrangement obviously governed the parties’ previous decade of changes to BeneFlex.”¹⁰⁶ All DuPont can point to in support of the existence of an oral agreement is the absence of a reference to the more general BeneFlex Flexible Benefits Plan in the Louisville contracts. But that could just as easily be explained by mutual mistake.¹⁰⁷ At the very least, DuPont must prove the existence of an agreement before the contract coverage doctrine can be applied to it.

Furthermore, DuPont has not cited a single case applying the contract coverage doctrine to an oral agreement. Indeed, it would be extremely difficult to apply the contract coverage principles to an oral argument because, in contract coverage cases, “the resolution of the refusal to bargain charge rests on an

¹⁰⁵ JA 15 (“The parties incorporated the Beneflex Plan . . . into their collective-bargaining agreements.”).

¹⁰⁶ Br. at 32.

¹⁰⁷ *NLRB v. Americana Healthcare Center*, 782 F.2d 941, 945 (11th Cir. 1986) (noting that “mutual inadvertence and mistake are, on the whole record, a far more plausible explanation of the absence of a contract clause dealing with [benefits] than is a conscious choice to leave it out”).

interpretation of the contract at issue.’”¹⁰⁸ DuPont has not come forward with any non-expired contract language to interpret.

Simply put, DuPont’s provision of BeneFlex benefits to unit employees, along with its right to make unilateral changes to those benefits, was a result of its contracts with the Union. The contracts embodying the Union’s agreement have expired, and DuPont’s right to make unilateral changes expired with them. DuPont’s unilateral changes to benefits in 2004 and 2005 could not possibly be “covered by” those expired contracts. When the contracts expired, the *statute*, not the contracts, required DuPont to continue providing the same benefits to unit employees until it met its bargaining obligation.¹⁰⁹

2. The unilateral changes were not justified by past practice

DuPont next contends¹¹⁰ that the changes it made pursuant to the management-rights clause in the Plan documents, as incorporated into the contracts, established a “past practice” under which it was permitted to make unilateral changes after the contracts’ expiration. It is true that an employer can

¹⁰⁸ *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 312 (D.C. Cir. 2003) (quoting *NLRB v. United States Postal Serv.*, 8 F.3d 832, 837 (D.C. Cir. 1993)).

¹⁰⁹ *Litton*, 501 U.S. at 206 (stating that when the contract expires, “terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them.”).

¹¹⁰ Br. 39-47.

explain post-expiration action by demonstrating that it was simply a continuation of past practice.¹¹¹ This is an affirmative defense an employer has the burden of proving.¹¹² The Board reasonably ruled that DuPont failed to meet its burden of proof and that application of the “past practice” doctrine under the circumstances presented here would be inconsistent with long standing precedent and the policy goals of the Act.¹¹³

The evidence shows that the Union agreed to permit DuPont to make changes to benefits without bargaining during the term of its collective-bargaining agreements. And DuPont put the agreements to use, making annual changes to the BeneFlex Plan for many years while collective-bargaining agreements were in effect in each unit. But DuPont failed to show that it made changes outside the contract period to which the Union did not object. This is the factual distinction between DuPont’s changes and the changes in the *Courier-Journal*¹¹⁴ cases that DuPont fails to grasp. The employer in *Courier-Journal* proved that it had made changes to which the union did not object during hiatus periods between

¹¹¹ *Eugene Iovine, Inc.*, 328 NLRB 294, 294-95 n.2 (1999), *enforced*, 1 F. App’x 8 (2d Cir. 2001).

¹¹² *Beverly Health & Rehab. Servs.*, 335 NLRB 635, 636 (2001), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003).

¹¹³ JA 15-16.

¹¹⁴ 342 NLRB 1093 (2004); 342 NLRB 1148 (2004).

contracts.¹¹⁵ But the record here shows that the Union objected every time DuPont made changes after the collective-bargaining agreements expired.

As the Board explains, this “factual distinction is key because it implicates important collective-bargaining principles,” like the rule that a management-rights clause does not survive expiration of a collective-bargaining agreement.¹¹⁶

DuPont’s attempt to discard this limitation on a management-rights clause would infinitely bind a party to any grant of discretion in a collective-bargaining agreement. And it would give an artificial incentive to employees to change the identity of their bargaining representative at contract expiration just so they could benefit from the increased scope of bargaining that any new representative would be entitled to that their existing representative was not.¹¹⁷ The Board reasonably concluded that a ruling in DuPont’s favor would “discourage, rather than promote,

¹¹⁵ 342 NLRB at 1093 (stating employer “has made changes” “every year since July 1, 1991. . . . Some changes were made during the open period or hiatus between contracts. . . . [and] the Union never objected”).

¹¹⁶ JA 16. *See also Beverly Health & Rehab. Serv., Inc. v. NLRB*, 297 F.3d 468, 483 (6th Cir. 2002) (“We affirm the Board’s conclusion that the management-rights clause here did not continue after the termination of the contract.”); *Local 65-B v. NLRB*, 572 F.3d 342, 348 (7th Cir. 2009) (management-rights clause does not survive expiration of contract); *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240 (3d Cir. 1994) (“[T]he management rights clause does not survive the expiration of the CBA.”).

¹¹⁷ *See Wayne County Neighborhood Legal Servs., Inc.*, 333 NLRB 146, 148 n.10 (2001) (noting that arrival of new bargaining representative made prior collective bargaining agreement “null and void”).

collective bargaining” by making a union very reluctant to agree to a management-rights clause in the first place.¹¹⁸ This is exactly the kind of policy determination that is entitled to deference from this Court.¹¹⁹

Nor did DuPont prove that its changes involved limited discretion¹²⁰ or reasonable certainty as to criteria,¹²¹ which are required to prove a past practice defense. Rather, the evidence shows that DuPont made wide-ranging changes that affected medical benefits, legal services benefits, dental benefits, and mental health benefits, among others.¹²² This is why DuPont’s citation to *Capitol Ford*¹²³ does

¹¹⁸ JA 16.

¹¹⁹ *Ceridian Corp. v. NLRB*, 435 F.3d 352, 356 (D.C. Cir. 2006) (“The Supreme Court ‘has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy,’ and that courts therefore must accord its legal rules ‘considerable deference.’”) (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990)).

¹²⁰ *Berkshire Nursing Home*, 345 NLRB 220, 220 n.2 (2005) (rejecting past practice argument where employer failed to show “that the changes were the produce of limited discretion on its part”).

¹²¹ *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999) (rejecting past practice argument where “there was no ‘reasonable certainty’ as to the timing and criteria for a reduction in employee hours; rather the employer’s discretion to decide whether to reduce employee hours ‘appears to be unlimited.’”), *enforced*, 1 F. App’x 8 (2d Cir. 2001).

¹²² JA 844.

¹²³ 343 NLRB 1058 (2004). This case is sometimes referred to by the parties as *Sonic Automotive* or *Friendly Ford*.

not support its position. As the Board noted in the Edge Moor case,¹²⁴ *Capitol Ford* involved limited changes to a single benefit (productivity bonuses). This is in stark contrast to the changes DuPont made here.

DuPont also attempts to rely on *Shell Oil Co.*¹²⁵ However, as the Board noted,¹²⁶ that case has been overruled insofar as it implies that a management-rights clause in a contract survives the contract's expiration.¹²⁷ Despite DuPont's claim to the contrary, there is nothing "artificial" or "irrelevant"¹²⁸ about whether unilateral changes arise inside or outside the terms of a contractual management-rights clause. Rather, the Board's distinction gives meaning to the parties' agreements while at the same time respecting their statutory rights once that agreement expires. And the parties are free to contract around this default rule by explicitly agreeing that a management-rights clause survives expiration of a contract. Because DuPont was unable to convince the Union to agree to such a clause, it was not permitted to make unilateral changes to benefits once the contracts expired.

¹²⁴ JA 37.

¹²⁵ 149 NLRB 283 (1964).

¹²⁶ JA 37 n.18.

¹²⁷ *Beverly Health & Rehab. Serv.*, 335 NLRB 635, 636 n.6 (2001), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003).

¹²⁸ Br. 45.

3. The Union did not waive its right to bargain over changes to BeneFlex

Taking another stab, DuPont claims¹²⁹ the Union waived its right to bargain over changes to the BeneFlex Plan, both expressly and by its past conduct. This Court has stated that “[a] waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter [W]hen a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter.”¹³⁰ For that reason, this Court requires “‘clear and unmistakable’ evidence of waiver” and “construe[s] waivers narrowly.”¹³¹ To find a clear and unmistakable waiver, the evidence must show “that the parties have ‘consciously explored’ or ‘fully discussed the matter on which the union has ‘consciously yielded’ its rights.”¹³²

¹²⁹ Br. 47-50.

¹³⁰ *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357-58 (D.C. Cir. 2008) (quoting *Dep’t of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)).

¹³¹ *Id.*; see also *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 133-34 (D.C. Cir. 2001) (“Board correctly concluded that the Union did not clearly and unmistakably waive its protection against post-expiration unilateral termination of severance benefits.”).

¹³² *Id.* (quoting *Gannett Rochester Newspapers v. NLRB*, 988 F.2d 198, 203 n.2 (D.C. Cir. 1993)); see also *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1245 (3d Cir. 1994); *Presbyterian Univ. Hosp.*, 325 NLRB 443, 443 n.2 (1998), *enforced mem.*, 182 F.3d 904 (3d Cir. 1999); *Buck Creek Coal*, 310 NLRB

DuPont points¹³³ only to the benefits section in the most recent contracts and (again) to the parties “past practice.” There is absolutely nothing in either the 1997 Louisville contract or the 2000 Edge Moor contract suggesting that the Union “consciously explored” or “fully discussed” changes DuPont might make after the expiration of those contracts and “voluntarily relinquished” its right to bargain over such changes. DuPont’s argument to the contrary simply has no support in the record.

Nor does the fact that the Union failed to object to changes made during the term of the contracts pursuant to the management-rights clause in any way suggest a waiver of the right to bargain after that clause expired. The Union had no basis to object during the term of the contract because it has agreed to permit DuPont to make unilateral changes. But once the contracts containing the management-rights clause expired, the Union objected at every opportunity. DuPont’s waiver argument has no merit.

1240 (1993); *United States Can Co.*, 305 NLRB 1127, 1127 (1992), *enforced*, 984 F.2d 864 (7th Cir. 1993); *Control Serv., Inc.*, 303 NLRB 481, 484 (1991), *enforced mem.*, 961 F.2d 1568 (3d Cir. 1992); *Holiday Inn of Victorville*, 284 NLRB 916 (1987).

¹³³ Br. 48-49.

4. The changes at issue here are not “discrete recurring events”

Finally, DuPont contends¹³⁴ that the changes it made to the Edge Moor unit’s benefits were permissible under *Stone Container Corp.*¹³⁵ In that case, the Board held that an employer may implement a proposal regarding a discrete recurring annual event that is scheduled to take place during contract negotiations, so long as it gives the union notice and an adequate opportunity to bargain.¹³⁶ As the Board reasonably found, *Stone Container* provides no defense to DuPont.

As an initial matter, DuPont’s wide-ranging and far reaching changes to employee benefits “cannot reasonably be characterized as a ‘discrete’ event”¹³⁷ that would be permissible under the *Stone Container* exception. Rather, DuPont increased the premiums for medical care coverage; changed the prescription drug benefit; added new coverage levels for medical, dental, and vision; changed the premiums for Dental Option A; increased the premiums for financial planning; and redesigned the catastrophic medical option.¹³⁸ These changes represent major

¹³⁴ Br. 51-59.

¹³⁵ 313 NLRB 336 (1993).

¹³⁶ *Stone Container Corp.*, 313 NLRB at 336.

¹³⁷ JA 38.

¹³⁸ JA 24, 33-34; JA 165 ¶ 66, JA 644 ¶ 59.

adjustments to employee benefits and are in no way similar to the annual bonuses at issue in *Stone Container*.

Furthermore, here, as the Board explained,¹³⁹ DuPont “flatly refused the Union’s request during contract negotiations to bargain over” its proposed changes to employee benefits under the BeneFlex Plan. And unlike the union in *Stone Container*, which “made no specific proposal” and “did not raise the issue again,”¹⁴⁰ the Union here objected to the changes at issue and requested bargaining,¹⁴¹ actively engaged in bargaining over benefits more generally,¹⁴² and made its own benefits proposal when DuPont said it would not continue to provide BeneFlex without an express waiver of the right to bargain over benefits after contract expiration.¹⁴³

D. This Court lacks jurisdiction to consider arguments DuPont first raised in its brief to this Court

Section 10(e) of the Act¹⁴⁴ provides in relevant part that “no objection that has not been urged before the Board . . . shall be considered by the Court,” absent

¹³⁹ JA 17.

¹⁴⁰ 313 NLRB at 336.

¹⁴¹ JA 641 ¶¶ 46, 55, 58.

¹⁴² JA 639-44 ¶¶ 39-58.

¹⁴³ JA 641-43 ¶¶ 48, 50-51, 56.

¹⁴⁴ 29 U.S.C. § 160(e)

extraordinary circumstances. Therefore, as this Court has recognized, a party cannot for the first time raise an objection to a Board order in court.¹⁴⁵ This is because the need for ““orderly procedure and good administration”” requires that ““courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice.””¹⁴⁶

1. DuPont’s belated challenge to the remedy is jurisdictionally barred

The Board’s remedy in both cases requires, if the Union so requests, that DuPont restore benefits as they existed prior to the unlawful unilateral changes.¹⁴⁷ This is the traditional remedy for a Section 8(a)(5) unilateral change violation and one that this Court has enforced many times.¹⁴⁸ DuPont argues, for the first time in its brief to this Court, that the Board’s remedy should be enforced prospectively

¹⁴⁵ *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999) (“[T]he critical question in satisfying section 10(e) is whether the Board received adequate notice of the basis for the objection.”)

¹⁴⁶ *Harvard Indus. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (quoting *United States v. LA Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

¹⁴⁷ JA 18, 27.

¹⁴⁸ *E.g., Scepter, Inc. v. NLRB*, 448 F.3d 388, 389-90 (D.C. Cir. 2006); *see also Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 415 (D.C. Cir. 1996) (“In cases involving a violation of section 8(a)(5) based on a company’s unilateral alteration of existing benefits, this court has found it appropriate ““to order restoration of the *status quo ante* to the extent feasible.””).

only.¹⁴⁹ At no time before the Board in either the Louisville or the Edge Moor case did DuPont assert this objection, despite ample opportunity to do so. And it cites no extraordinary circumstances for its failure to do so. The Court therefore may not consider this argument.

In the Edge Moor case, the judge ruled against DuPont, so DuPont filed exceptions with the Board. In those exceptions, DuPont objected generally to the remedy.¹⁵⁰ But nowhere in its exceptions or accompanying brief did it make the argument it makes here, that the Board's Order should be enforced prospectively only. As this Court has noted, where "a party excepts to the entire remedy, and provides no indication of the basis for its objection, the exception alone provides insufficient notice to the Board of the party's particular argument to satisfy section 10(e)."¹⁵¹ DuPont's objection to the remedy in the Edge Moor case is therefore barred.

In the Louisville case, the judge did not find a violation and therefore did not recommend a remedy. The General Counsel and the Union filed exceptions. But DuPont failed to file cross-exceptions, and it was not relieved of its duty to do so

¹⁴⁹ Br. 60-64.

¹⁵⁰ DuPont's Exceptions at 11 ("The Respondent excepts to the Judge's proposed remedy.").

¹⁵¹ *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 144 (D.C. Cir. 1999).

just because the judge had dismissed the complaint in that case.¹⁵² Nor did DuPont argue in its answering brief that, if the Board finds a violation, its order should only be “applied prospectively.” In addition, when the Board ultimately found that DuPont had, in fact, violated the Act and issued a remedial order, DuPont failed to file a motion for reconsideration to put its objection to the remedy before the Board.¹⁵³ Because DuPont never presented this argument to the Board in the first instance, it may not do so here.

To permit DuPont to present its arguments directly to this Court would be contrary not only to the language of Section 10(e), but would also contravene the “salutary policy” embodied in that provision of “affording the Board opportunity to consider on the merits questions to be urged upon review of its order.”¹⁵⁴ As it now stands, the Court has no Board position to review on DuPont’s prospective/retroactive argument. Accordingly, the Court lacks jurisdiction to

¹⁵² See *NLRB v. RJ Smith Construction Co.*, 545 F.2d 187, 192 (D.C. Cir. 1976) (stating that employer’s argument was foreclosed by 10(e) where it “filed no cross-exceptions to sustain the trial examiner’s result”); *Production Workers Union of Chicago & Vicinity, Local 707 v. NLRB*, 161 F.3d 1047, 1054 (7th Cir. 1998) (court lacks jurisdiction under Section 10(e) to consider arguments that union failed to present to Board, even though judge had dismissed complaint against union).

¹⁵³ *United Food & Commercial Workers Union Local 204 v. NLRB*, 506 F.3d 1078, 1087 (D.C. Cir. 2007) (“Because the union failed to file a motion for reconsideration challenging the Board’s remedies, section 10(e) precludes us from reviewing the union’s claim.”).

¹⁵⁴ *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 256 (1943) (per curiam).

consider the untimely challenges to the Board’s remedy articulated for the first time in DuPont’s appellate brief.¹⁵⁵

In any event, the Board’s Orders do no more than require restoration of the *status quo*, which this Court has approved consistently in unilateral change cases.¹⁵⁶ For example, in *Scepter Ingot Castings, Inc.*,¹⁵⁷ the Board found that an employer unilaterally modified the coverage provided by its medical insurance plan and made the plan contributory. Just like here, the Board ordered the employer to rescind the unilateral change at the Union’s request and make employees whole for any expenses resulting from the change.¹⁵⁸ This Court

¹⁵⁵ See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (party’s failure to present issue to Board “prevents consideration of the question by the courts”).

¹⁵⁶ *Regal Cinemas, Inc.*, 334 NLRB 304, 316-17 (2001) (ordering employer to “rescind the unilateral changes made with respect to the transfer of projectionist unit work” and “offer immediate and full reinstatement to all unit employees” affected by unilateral change), *enforced*, 317 F.3d 300, 303-04 (D.C. Cir. 2003); *Allied Signal Aerospace*, 330 NLRB 1216, 1230 (2000) (ordering employer to “[r]estore the status quo ante as it existed prior to June 6, 1997, and make whole all bargaining unit members who have been denied benefits”), *enforced sub nom Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 128 (D.C. Cir. 2001); *Daily News of Los Angeles*, 315 NLRB 1236, 1243 (1994) (ordering employer to make whole employees for monetary loses from unilateral withholding of annual wage increase), *enforced*, 73 F.3d 406 (D.C. Cir. 1996).

¹⁵⁷ 331 NLRB 1509 (2000).

¹⁵⁸ *Id.* at 1510, 1517.

enforced that order.¹⁵⁹ “[T]he purpose of a remedial order is to restor[e] the economic status quo that would have obtained but for the company’s wrongful [action],”¹⁶⁰ and the Board’s Orders do just that.

To the extent DuPont claims¹⁶¹ it relied to its detriment on the General Counsel’s failure to issue a complaint in a different case, which involved the distribution of healthcare *forms* rather than changes to health *benefits*,¹⁶² DuPont was surely aware that the General Counsel’s decisions do not bind the Board.¹⁶³ Indeed, this Court has noted that unions and employers “act[] at [their] peril” by relying on the legal opinion of the General Counsel’s office, which “is not a rule

¹⁵⁹ *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1056 (D.C. Cir. 2002).

¹⁶⁰ *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 315 (D.C. Cir. 2003) (internal quotes omitted).

¹⁶¹ Br. 61.

¹⁶² JA 352, 354.

¹⁶³ *United Food & Commercial Workers Union Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006) (noting that the General Counsel’s determinations are not orders of the Board); *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 668 (6th Cir. 2005) (“[T]he General Counsel’s ‘final authority’ not to file a complaint on a particular charge does not bind the ALJ or NLRB in a separate but related case”) (quoting *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 185 (2d Cir. 1998)). See also *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1281 (D.C. Cir. 1999) (refusing to infer anything from General Counsel’s decision not to issue a complaint); *O’Dovero v. NLRB*, 193 F.3d 532, 534 (D.C. Cir. 1999) (rejecting argument “that the Board was precluded from making a single employer finding in light of a prior prosecutorial decision not to pursue such a union complaint”).

dispensing authority.”¹⁶⁴ This Court has gone so far as to state that the General Counsel’s opinion of the law is irrelevant to enforcement of the Board’s decisions.¹⁶⁵ DuPont’s reliance on the General Counsel’s dismissal of one unfair labor practice charge in the face of decades of Supreme Court and Board law to the contrary was unreasonable.¹⁶⁶ Requiring DuPont to restore the status quo in this case will not produce “substantial inequitable results.”¹⁶⁷

2. This Court lacks jurisdiction to consider DuPont’s untimely ERISA argument

For the reasons discussed above, this Court lacks jurisdiction to entertain DuPont’s arguments¹⁶⁸ based on ERISA. Nowhere in its exceptions in the Edge Moor case did DuPont so much as mention ERISA. Nor did DuPont file cross-

¹⁶⁴ *Construction, Bldg. Material, Ice & Coal Drivers, Helpers & Inside Employees Union, Local No. 221, v. NLRB*, 899 F.2d 1238, 1243 (D.C. Cir. 1990) (noting that “protective shields for unions or employers are not in [the General Counsel’s] arsenal”).

¹⁶⁵ *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. 2002) (“It is of no moment, therefore, what was the General Counsel’s understanding of the case law before the present decision issued, and the court will take no note of it.”).

¹⁶⁶ *Id.* (rejecting employer’s “rather silly suggestion that the Board’s decision is unreasonable because it conflicts with a memorandum issued by the General Counsel[]”).

¹⁶⁷ *District Lodge 64 v. NLRB*, 949 F.2d 441, 448 (1991).

¹⁶⁸ Br. 36, 47.

exceptions or a motion for reconsideration in the Louisville case raising the ERISA issue. This argument is therefore foreclosed.¹⁶⁹

In any event, DuPont's argument has no merit. DuPont contends that the Board's ruling "conflicts with ERISA policies."¹⁷⁰ However, nothing in ERISA limits or preempts the statutory duty to bargain.¹⁷¹ Indeed, subchapter I of ERISA¹⁷² explicitly states that it should not be "construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States," necessarily including the Act, which preceded ERISA by decades.

In addition, the Supreme Court spoken to this issue:

A company that is a party to a collective-bargaining agreement may have a contractual duty to make contributions to a[n ERISA governed] pension fund during the term of the agreement and, in addition, may have a duty under the National Labor Relations Act (NLRA) to continue making such contributions after the expiration of the contract and while negotiations for a new contract are in process.¹⁷³

¹⁶⁹ *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999) ("[T]he critical question in satisfying section 10(e) is whether the Board received adequate notice of the basis for the objection.")

¹⁷⁰ Br. at 46 n.14.

¹⁷¹ *See Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988).

¹⁷² 29 U.S.C. § 1144(d).

¹⁷³ *Laborers*, 484 U.S. at 541.

The Court further explained that the duty to bargain over changes to health plan benefits under the Act is distinct from ERISA's plan amendment requirements.¹⁷⁴ ERISA and the Act, according to the Court, may peacefully coexist. Not surprisingly, DuPont cannot cite a single case that embraces its proposed triumph of ERISA over the Act's duty to bargain. ERISA, therefore, does not require the elevation of plan documents above DuPont's obligation under the Act to adhere to existing terms and conditions of employment unless and until they are changed through the collective-bargaining process.¹⁷⁵

¹⁷⁴ *See Laborers*, 484 U.S. at 548-49, 552-53.

¹⁷⁵ *Georgia Power*, 325 NLRB 420, 421 (1998), *enforced mem.*, 176 F.3d 494 (11th Cir. 1999); *accord Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1296-98 (6th Cir. 1991).

CONCLUSION

The Board respectfully requests the Court deny the petitions for review and grant its cross-applications for enforcement in full.

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March 2011

**STATUTORY
ADDENDUM**

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act,
29 U.S.C. § 151-69 (2000):

Sec. 7. [Sec. 157] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a). [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [Section 159(a) of this title].

Sec. 8(d). [Sec. 158(d)] [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . .

Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or

district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

Sec. 10(f). [Sec. 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

E.I. DUPONT DE NEMOURS AND COMPANY	*	
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Petitioner/Cross-Respondent	*	No. 10-1300
	*	10-1301
	*	10-1353
	*	10-1355
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	4-CA-33620
	*	
Respondent/Cross-Petitioner	*	
	*	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION	*	
	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,293 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 28th day of March, 2011

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

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2011 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not

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Dated at Washington, DC
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