JD–49–11
Ampthill, VA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

E. I. DU PONT DE NEMOURS AND COMPANY

and Case 5-CA-33461

AMPTHILL RAYON WORKERS, INC., LOCAL 992,
INTERNATIONAL BROTHERHOOD OF DU PONT
WORKERS

Gregory M. Beatty, Esq., for the General Counsel.
Kris D. Meade, Glenn D. Grant and *Jane Foster, Esqs.* (*Crowell & Moring LLP*), of Washington, D.C., for the Respondent.
Kenneth Henley, Esq., of Bala Cynwyd, Pennsylvania, for the Charging Party Union.

DECISION

Statement of the Case

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Richmond, Virginia, on May 23–24, 2011. The charge was filed February 15, 2007, and the complaint issued December 28, 2010. The Ampthill Rayon Workers, Inc., International Brotherhood of DuPont Workers (the Union) alleges that E. I. DuPont de Nemours and Company (the Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally eliminating retirement benefits for new employees without bargaining with the Union. The Company does not deny that it refused to bargain with the Union before it eliminated retirement healthcare and dental benefits for new employees at its Spruance facility in Richmond, Virginia. It does, however, assert that the Union waived its right to bargain over the elimination of such benefits for new employees.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

[1] There is very little dispute as the relevant facts. The parties stipulated to 24 sets of facts spanning the last three decades of their collective-bargaining relationship. (Jt. Exh. 1.) In addition, the parties have long followed a custom and practice of relying on the Company's notes of their collective-bargaining meetings. While the General Counsel challenged the admissibility of the notes at trial, there was no subsequent evidence to refute their accuracy. Accordingly, I credit the Company's notes relating to 73 bargaining meetings as fairly and accurately documenting the facts and circumstances that transpired during the relevant time periods. (R. Exh. 3; Tr. 45–47, 104–132.)

Findings of Fact

I. Jurisdiction

The Company, a corporation, has been engaged in the manufacture of synthetic fibers and related products at its Ampthill, Virginia facility, where it annually sells and ships products, goods, and materials valued in excess of $50,000 directly to points outside the State of Virginia. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Parties

The Company is a Delaware corporation with its principal place of business in Wilmington, Delaware. As of 2006, it employed more than 30,000 employees nationwide, of which more than 4,500 were unionized. This dispute involves the Company's Spruance Fibers Plant (Spruance facility) in Virginia, where it employed more than 1000 hourly workers represented by the Union.[2]

On August 28, 2006, James Borel held the position of Senior Vice President—Human Resources, C.A. Campbell held the position of Human Resources Manager, Anthony Ray held the position of Plant Manager, Rodney Rhodes held the position of Labor Relations Manager for the Spruance Fibers plant, and Dianne Vespucci held the position of Labor Relations Manager at the Niagara facility. All of the aforementioned individuals were supervisors within the meaning of Section 2(11) of the Act and Company agents within the meaning of Section 2(13) of the Act for the duration of time they held the positions described in this paragraph.[3]

The Union represents employees in the Production and Maintenance (P&M) and Clerical, Technical, and Office (CTO) units. It operates through an Executive Committee and two Contract Committees, one for each unit. The Executive Committee meets with Spruance facility management on a regular basis, while the Contract Committees are specifically designated to bargain over changes to the contract. Both entities, however, have been involved in bargaining.[4]

B. The Collective-Bargaining Agreement

The Company and the Union have had a bargaining relationship at the Spruance facility for over 60 years.[5] The P&M contract became effective on September 1, 1999; the CTO

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[2] The Company conducts business in the United States and abroad. In this decision, however, all references to "corporate-wide" are to the Company's operations in the United States. (Jt. Exh. 1 at 1.)

[3] Jt. Exh. 1 at 22.

[4] The Union's Executive and Contract Committees were each involved in the pertinent events and there is no contention that the statements or actions of one were more significant than the other. Accordingly, in most instances, I simply refer to the actions of either committee as the "Union." (Tr. 33–34, 73, 101–102.)

[5] Bruce Harris, a Company employee for over 39 years, provided credible testimony

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contract became effective October 1, 2000.[6] Each contract contains a provision recognizing the Union as the exclusive bargaining agent of covered employees and renews each year unless either party gives notice of intent to terminate it. Both remained in effect as of August 2006. Although the contracts differ in several ways, the pertinent provisions are identical.[7]

C. The Company's Benefit Plans

The Company offers its Spruance facility employees the opportunity to participate in either corporate-wide benefit plans or local benefit plans. The plans at issue are the Company's Medical Care Assistance Program (MEDCAP) and the Dental Assistance Plan (DAP).[8]

1. MEDCAP

Originally adopted on January 1, 1983, MEDCAP is a corporate-wide healthcare benefits plan governed by ERISA.[9] MEDCAP applies to all of the Company's United States employees and former employees, and their eligible dependants who meet the eligibility requirements of MEDCAP, including certain former employees represented by the Union who otherwise meet the MEDCAP eligibility requirements.[10] Those employees covered by the contract comprise just a small fraction of the total number of individuals who receive benefits from the Company's benefit plans.[11]

Article XIX of the MEDCAP Plan Document describes the Company's rights and authority as Plan Administrator.[12] Article XX of the Plan Document addresses the Company's rights to amend or terminate MEDCAP. The MEDCAP Summary Plan Document (SPD) also addresses the Company's right to suspend, modify, or terminate the plan.[13]

Neither MEDCAP nor DAP, its dental counterpart, are referred to in the contract and are not arbitrable under the contract.[14] The benefits received by retirees are virtually identical to

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regarding the custom and practice of the Company and Union over the past four decades. During that time, he served the Union as a Recording Secretary and Contract Committee Chairman before transitioning to Company management and serving as a labor relations manager and site bargainer. (Tr. 99–107.)

[6] Jt. Exhs. 1A and 1B.

[7] The parties referred collectively to the two collective-bargaining agreements, attached as Exhibits A and B to the stipulation, as the "ARWI CBA." (Jt. Exh. 1 at 2; R. Exh. 5(a)–(b), 6(a)–(b), 7(a)–(b)). I refer to them collectively as "the contract."

[8] The Union did not dispute the testimony of Mary Jo Anderson, a company senior counsel at the relevant times, that the Company's longstanding practice of maintaining a single set of benefit plans covering all of its employees and retirees was beneficial to the Company and its employees for economic, administrative, and other reasons. (Tr. 142–145.)

[9] Copies of the MEDCAP Plan Document, dated April 21, 2005, and the MEDCAP Summary Plan Document), effective January 2005, are attached to the Stipulations as Exhs. C and D, respectively. (Jt. Exh. 1 at 6.)

[10] Jt. Exh. 1 at 7.

[11] Jt. Exh. 1 at 3.

[12] Jt. Exh. 1 at 8.

[13] Jt. Exh. 1 at 9.

[14] As in this case, the parties stipulated during an earlier arbitration that neither MEDCAP nor DAP were arbitrable. (Jt. Exh. 1 at 21.) Nevertheless, the Company introduced evidence of an arbitrator's February 15, 2010 ruling that reservation of rights language contained in five

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benefits received by active employees, except that active employees receive dental and medical benefits under BeneFlex, while retirees receive them under MEDCAP and the DAP.[15]

2. DAP

DAP is a company-wide benefit plan, maintained by the Company and governed by ERISA, under which dental benefits are provided to all of the Company's United States employees, retired employees, eligible survivors and dependents, and certain former employees represented by the Union who otherwise meet the eligibility requirements.[16]

Article XIII of the DAP Plan Document authorizes the Company to serve as DAP's administrator or to designate one or more persons to serve as the DAP's administrator and describes the rights and authority of the administrator.[17] Article XIV of the DAP Plan Document addresses the Company's right to amend or discontinue DAP. The DAP Summary Plan Document (SPD) addresses the Company's right to suspend, modify, or terminate the plan.[18]

Prior to implementing DAP on September 1, 1976, the parties bargained over member participation in DAP. On May 13, 1976, the parties agreed to include DAP as an additional item under Article VII, the contract's Industrial Relations Plans and Practices (IRP&P) provision.[19] Employee participation in DAP, however, was subject to the Company's reservation of rights:

> RIGHT TO MODIFY PLAN AND BENEFIT SCHEDULES
> A. The Company reserves the sole right to amend or discontinue this Plan at its discretion by action of the Executive Committee. Any change which has the effect of reducing or terminating benefits hereunder will not be effective until one year following announcement of such change by the Company.
> B. The Company also reserves the sole right at any time and without notice to make general and specific revisions in the benefit schedules in effect at any or all employment locations and any such revision of schedules shall not be construed as a reduction, termination or withdrawal of benefits. The designated benefit schedule at any one employment location shall in no way be dependent on or subject to changes because of the designated benefit schedule, or changes in the designated benefit schedule, at any other employment location.[20]

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other benefit plans—all mentioned in the contract—constituted a clear and unmistakable waiver of the Union's right to bargain over the 2006 changes to those plans. As a result, he found that the Company was entitled under the contract to unilaterally modify those plans. (R. Exh. 12 at 65.) As neither MEDCAP nor DAP were mentioned in the contract, I have not given any weight to the arbitrator's decision regarding those provisions.

[15] Anderson testified that, with the exception of the eligibility criteria, there is virtually no distinction between the benefits structures of BeneFlex, MEDCAP, and DAP. (Tr. 147–149.) As further discussion of the record demonstrates, however, there were numerous changes to retiree health and dental plan benefits, including caps, premiums and coverages.

[16] Copies of the DAP Plan Document, dated April 21, 2005, and its SPD, effective July 2003, are annexed to the Stipulations as Exhs. E and F, respectively. (Jt. Exh. 1 at 10–11.)

[17] Jt. Exh. 1 at 12.

[18] Jt. Exh. 1 at 13.

[19] R. Exh. 3 at 8309, 8311.

[20] R. Exh. 8 at 8.

That reservation of rights provision has remained unchanged since 1976, with the exception of its reference to action by Executive Committee, which was eventually removed.[21] The July 2003 DAP SPD contains a similar provision recognizing the Company's right to suspend, modify, or terminate DAP at any time:

> FUTURE OF THE PLAN
> While the Company intends to continue the benefits and policies described in this booklet, the Company reserves the right to suspend, modify, or terminate this Plan at its discretion at any time.[22]

D. The 1986 Agreement

On September 3 and 4, 1985, the parties started a series of discussions relating to the increasing costs of healthcare coverage.[23] At the time, the contract contained a Hospital, Medical, and Surgical (HMS) coverage provision at Article VIII providing employees with basic hospital and medical-surgical coverage through Blue Cross/Blue Shield of Virginia (BCBS). A separate provision, Article VII, listed the other benefit plans and noted that those benefits were subject to the various plan documents.[24] On October 10, 1985, the Company rolled-out examples of alternative coverages, noting that it "does visualize a health care plan with the same provisions as MEDCAP."[25] Discussions continued on October 18, 1985, with the Company noting that MEDCAP was not being proposed at that meeting.[26]

On November 26, 1985, the Company proposed 30 days written notice of any changes to HMS coverage, subject to bargaining prior to implementation. The Union disagreed with the Company's proposed Article XIV for the P&M contract concerning HMS coverage. While discussing the CT&O contract, the Company Union rejected any MEDCAP proposal, while the Company reiterated that there was no MEDCAP proposal on the table, but that one would be forthcoming.[27]

By February 26, 1986, the Company began unveiling proposals for the Union's members to participate in MEDCAP. Included in the proposal was a reservation rights clause:[28]

> Accordingly, the Company reserves the right to amend any provision of the Aetna Plan (for example, co-pay, "stop-loss", and deductible features) or terminate the Program in its entirety should either course of action be deemed necessary by the Company.[29]

The Union, however, repeatedly expressed concern about the Company's desire to include a reservation of rights provision in the MEDCAP SPD. In objecting to inclusion of a reservation of rights clause in the MEDCAP SPD, the Union stressed that the BCBS plan did not

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[21] Jt. Exh. 1E at 16.
[22] Jt. Exh. 1F at 23.
[23] R. Exh. 3 at 8363-8365, 8367-8368.
[24] R. Exh. 5.
[25] R. Exh. 3 at 8370–8380.
[26] R. Exh. 3 at 8382-8384.
[27] R. Exh. 3 at 8387, 8389, 8391.
[28] Reservation of rights clauses are also commonly referred to in labor-management relations as management rights clauses. (R. Exh. 3 at 8393–8399, 8405–8434.)
[29] Id. at 8434.

contain a similar provision. The Company explained that BCBS was a local plan controlled by Spruance facility management, while MEDCAP was a corporate-wide plan. Accordingly, the Union rejected any proposal revising the HMS provision during the term of the contract and asked for another proposal.[30] The Company responded with a proposal to include an alternative Aetna plan within the HMS provision. Once again, the Company's proposal included a reservation of rights provision allowing it to amend or terminate the plan.[31]

On March 4, 1986, the Union rejected the proposed HMS proposal because of its inclusion of the reservation of rights provision.[32] The parties discussed the issue again on March 12, 1986, but the reservation of rights provision remained the stumbling block to an agreement.[33] The parties discussed the HMS proposal again on March 21, 1986. At this meeting, the Company made another proposal, but the Union rejected the proposal as well because of the Company's insistence on including a reservation of rights provision in exchange for the rights to participate in MEDCAP.[34] On May 14, 1986, the Union once again rejected the Company's proposal for the same reason.[35]

On September 5, 1986, the Union objected to references to the new Aetna plan in the contract. The Company responded that "it would draft two proposals – one with a general reference, the other with a specific reference" to the new Aetna plan. The Union's preference was to omit it entirely, but its second choice was a "general reference" in the IRPP provision at Article VII, with a footnote similar to the one in DAP containing the reservation of rights clause.[36]

After further discussions on September 15 and 26, 1986, the Union agreed to participation in the new Aetna plan (MEDCAP), including the reservation of rights clause contained in the Plan Document:[37]

> The Company reserves the right to amend any provision of the Program or terminate the Program in its entirety should either course of action be deemed necessary by the Company.[38]

On September 15, 1986, the Company suggested removing the HMS provision from the contract. The Union responded that "HMS should be mentioned where everything else is that is involved in Management's Rights (IRP&Ps)." The Company rejected that request and the Union responded that "there is a need for [HMS] to be placed in the Labor Agreement where people recognize Management has a right to change without Union agreement." The Company rejected that proposal on the ground that it did not want the new Aetna Plan (i.e., MEDCAP) listed under

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[30] R. Exh. 3 at 8436-8437, 8451–8452, 8477, 8481.

[31] R. Exh. 3 at 8393–8394, 8398–8399.

[32] R. Exh. 3 at 8437.

[33] R. Exh. 3 at 8450–8452.

[34] R. Exh. 3 at 8476.

[35] There are no notes of the May 14 meeting, but the discussions during that meeting are recounted in the notes for the May 28, 1986 meeting. (R. Exh. 3 at 8480–8482.)

[36] R. Exh. 3 at 8492.

[37] It is undisputed that the reservation of rights clause has not changed since the plan document was adopted. (R. Exh. 3 at 8499–8504.)

[38] Jt. Exh. 1C, p. 23.

Article VII, as that provision's 1-year notice restrictions "would present a bar" to the Company's ability to make necessary changes to medical coverage.[39]

On September 26, 1986, the Union agreed to include new, general language in the HMS articles, rather than the IRPP provisions that referenced an alternative to BCBS coverage. It did not, however, explicitly mention either MEDCAP or the Aetna Plan:[40]

> The Company may make available to employees alternate hospital medical-surgical coverage plans, and any employee may elect such alternate coverage in lieu of the coverage described in the above sections of this Article VIII [or XIV].[41]

E. Benefit Plan Changes Since 1986

1. Union requests for information

In virtually every instance, the Company has provided the Union with prior notice of benefits changes since the latter agreed to participate in MEDCAP in 1986. The Company communicated the information to the Union at Executive or Contract Committee meetings before disseminating it to Spruance facility employees through assorted Company publications and other communications.[42]

In many of those instances, the Union requested information and/or requested bargaining over the changes. The Company responded on numerous occasions by providing the information and agreeing to bargain. The Union frequently requested information when premium increases were announced.[43] In 1988, 1996, 1999, 2000, and 2003, the Union requested and the Company agreed to provide, information relating to announced premium increases in order to research alternative insurers.[44] In 2001 and 2002, the Union requested similar premium rate increase information and the Company did not deny the requests.[45]

There were also periodic requests for information relating to coverage issues. In 1995, the Company agreed to follow up on the Union's concerns regarding a limitation on certain types of coverage at a local hospital.[46] In 1996, the Company responded to a union inquiry relating to outpatient surgery by an in-network gynecologist.[47] In 1998, the Union questioned why the Company switched coverage to Cigna and the Company responded.[48] In 2000, the Union asked the Company if its announced changes to BeneFlex were bargaining or simply the

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[39] R. Exh. 3 at 8499–8503.

[40] R. Exh. 3 at 8504.

[41] R. Exhs. 6(a), p. 15, and 6(b), p. 36.

[42] The General Counsel did not dispute the effectiveness of the various company communications in informing employees of the changes. (Tr. 74, 134, 169–184.)

[43] Irvin credibly testified as to the Union's practice of requesting information, verifying the information the Company provided, and acquiescing to favorable changes. (Tr. 38.)

[44] GC Exh. 47 at 8584; R. Exh. 3 at 8719-8720, 8822-8824, 8840-8841, 8931-8933.

[45] There is no indication that the Company denied these information requests. (R. Exh. 11 at 8847; GC Exh. 14 at 17850-17851; GC Exh. 15 at 15556-15557.)

[46] GC Exh. 4 at 15378.

[47] GC Exh. 5 at 15413.

[48] R. Exh. 3 at 8795.

dissemination of information. The Company responded that "it is here to review the 2001 BeneFlex plan changes."[49]

In some instances, the Company refused to provide employee benefit information and/or bargain on the ground that it would not negotiate over specific changes to its corporate-wide IRP&P plans, including MEDCAP and DAP.

On June 11, 1987, there was a notable exchange on the issue of retiree benefits. At this meeting, the Union asked whether retirees are guaranteed a medical plan when they retire. The Company responded that pensioners are covered and told what insurance they have when retiring. The Company added that it "has reserved the right to change and modify or discontinue the plan if needed." It further proclaimed that "there has been no plan to discontinue medical coverage for pensioners and *does not visualize that ever happening . . . The plan may be changed or, or the pensioner may be covered by a different plan*." (Emphasis added.)[50]

2. Union requests to bargain

In some instances since 1986, the Company acknowledged an obligation to bargain or agreed to the Union's request to bargain over changes. In an interoffice memorandum, dated September 1, 1987, the Company recognized that proposed changes to definitions of dependent coverage in DAP, among several items, "must be bargained with Union(s) before implementation; therefore, discussion must be limited to exempt employees until bargaining is initiated."[51] On September 9, 1987, the Company presented to the Union a "proposal" to change the DAP, which it characterized as "clearing up of the Plan language."[52]

On September 22, 1987, the Company agreed to bargain over proposed BCBS premium increases.[53] In 1992 and 1993, it announced that bargaining over increases to healthcare premiums already occurred or would be taking place.[54] On July 21, 1993, the Union asked "if healthcare premiums would remain the same over the life of the contract. The Company said it reserves the right to modify the plan, and premiums would be changed as necessary yearly."[55]

In 1993, the Union accepted the Company's offer to have its active union members participate in medical and dental plans covered under BeneFlex. All retirees and their survivors remained eligible to participate in, and continued receiving benefits under, MEDCAP and DAP.[56] Medical and dental benefits offered under BeneFlex were virtually identical to those available to union members under MEDCAP and DAP, with the exception that MEDCAP and DAP would continue to cover pensioners and laid-off employees covered by the Company's

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[49] R. Exh. 3 at 8840.

[50] R. Exh. 3 at 8511.

[51] GC Exh. 3 at 15270.

[52] GC Exh. 3 at 15265.

[53] Linda Derr, a former labor relations representative for the Company, conceded that the Company agreed to meet and discuss this issue. (Tr. 249–250; GC Exh. 2 at 15277–15278.)

[54] R. Exh. 4 at 9072–9074.

[55] R. Exh. 3 at 8691.

[56] The testimony of Anderson and Irvin was fairly consistent regarding the events leading to bargaining unit members enrolling in BeneFlex. (Tr. 65–68, 147–149.)

transition program. Moreover, the reservation of rights language contained in MEDCAP and DAP remained unchanged.[57]

Notwithstanding the changeover to BeneFlex, the course of dealing between the parties, however, remained the same. On October 2, 1997, the Union complained that the merger between Aetna and US Healthcare was causing a major health provider to leave the network. The Company explained that the insurers were still negotiating with the provider. The Union responded that the effects of the merger impacted its members and should have been bargained. The Company agreed to investigate the matter.[58] Similarly, on December 18, 1997, while the contract was open, the Company notified the Union of changes of the health and welfare plans. The Union insisted on bargaining over these changes and the Company agreed.[59] On October 13, 1999, the Union suggested consideration of a local health plan for the Spruance facility. The Company agreed to consider any such proposal, but reminded the Union of the advantages of participating in a corporate-wide plan with its larger enrollment.[60]

3. The Company's unilateral changes

Notwithstanding the parties' history of bargaining over the Company's numerous changes to its benefit plans, the Company has implemented MEDCAP and DAP changes every year since 1987. On more than 50 occasions, the Company has announced changes to health care premiums, deductibles, co-pays and annual plan limits, benefit options, terms of coverage, and participant eligibility relating to working spouses and dependents through age 24.[61]

Dealings between the parties were not affected in any noticeable manner by the changeover of actively employed union members to BeneFlex in 1993. As it had ever since the Union agreed to participate in MEDCAP in 1986, the Company continued making unilateral changes to MEDCAP and DAP. Theses included changes to premiums, co-pays and deductibles for retirees, and eligibility criteria under MEDCAP and DAP.[62]

Some of the unilateral changes increased coverage. In 2004, for example, the Company added a network of 58,000 dentists.[63] That same year, the Company announced coverage eligibility in its corporate-wide benefit plans for an additional category of dependents—the same-sex domestic partners of employees.[64] Mostly, however, the Company's unilateral changes tended to reduce or restrict benefits.

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[57] There is no dispute as to the similarity between the provisions in the MEDCAP and BeneFlex plans. (R. Exh. 3 at 8695, 8697–8698; Tr. 69–79.)

[58] R. Exh. 3 at 8737.

[59] GC Exh. 8 at 15456–15457.

[60] R. Exh. 3 at 8822.

[61] The Company introduced a summary chart of records documenting the changes as R. Exh. 11. There is no dispute, however, that the Company made numerous and regular unilateral changes aspects of the benefit plans, including terms of coverage, dependent and spousal eligibility, deductibles, co-pays, and annual caps, since the Union agreed to participate in MEDCAP and DAP in 1993. (Tr. 86–89.).

[62] Irvin conceded this point. (Tr. 70–71, 88–89.)

[63] R. Exh. 3 at 8932.

[64] The Union voiced concern over the limitation of the new eligibility of same-sex partners, while excluding opposite-sex domestic partners. (R. Exh. 3 at 8955–8956.)

On April 12, 1988, the Company reiterated the distinction between local and corporate-wide benefit plans. On that date, the Union requested the Company bargain over schedule changes to DAP. The Company refused, explained that the plant manager could replace a corporate-wide plan with a local plan, and expressed a willingness to consider such a proposal.[65] The Company reiterated the distinction between local and corporate-wide health plans and, when the Union expressed an interest in proposing health plan changes, the Company responded that "it has said in the past that it would not bargain these changes locally."[66]

On October 15, 2002, the Company announced, for the first time, that it would impose an annual limitation, or cap, on its contributions to retiree healthcare; once retirees reached the newly-imposed caps, all additional costs of their medical coverage would be borne by retirees. The Company also announced a change to the way in which it calculated costs for retiree medical coverage. Pursuant to the change, retirees would pay 50 percent of their healthcare costs.[67] In addition, on October 28, the Company announced that retirees would, for the first time, pay a premium for certain types of dental work.[68]

Finally, some changes constituted amounted to a coordination of benefits that neither enhanced nor reduced them. In 1993, the Company expanded medical pre-certification to 14 medical and surgical procedures in order to save employees "unnecessary time and effort, and help eliminate doubt when you're faced with any one of 14 medical or surgical procedures."[69] That same year, since active employees were to receive medical and dental coverage through BeneFlex, the Company proposed, and the Union agreed to delete the HMS provisions in the contract and replace it with a BeneFlex plan provision.[70] They were replaced by a provision incorporating BeneFlex into the IRPP article, effective July 1, 1993, as well as the successor contract, effective February 1, 1995:

> Section 3. In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, employees shall also receive benefits as provided by the Company's BeneFlex Plan, subject to all terms and conditions of said Plan, provided, however, that as long as this Plan is in effect at any other Plant within the Company, it shall not be withdrawn from the employees covered by this Agreement.[71]

F. The 2006 Unilateral Changes to MEDCAP and DAP

At no time prior to 2006 did the Union file a grievance or unfair labor practice regarding any of the MEDCAP or DAP changes. In 2006, without consulting the Union, the Company decided to eliminate participation by new employees in its retiree benefit plans.[72] On August 28,

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[65] R. Exh. 3 at 8569–8570.

[66] GC Exh. 6 at 18155.

[67] R. Exh. 11, Tab 37 at 2443.

[68] Irvin conceded Anderson's point that the premium cost increases were significant. (R. Exh. 3 at 8859; Tr. 75-83, 187-188.)

[69] Anderson reluctantly testified that this change was both positive and insignificant. (R. Exh. 11, Tab 7 at 676; Tr. 211).

[70] R. Exh. 3 at 8693.

[71] R. Exhs. 7(a) at 17129, and 7(b) at 16419.

[72] Anderson credibly explained that the Company made these changes after reviewing the health benefits being offered by competitors. (Tr. 158.)

2006, Rhodes informed the Union of the Company's intention to modify seven benefit plans. The most significant changes were the elimination of MEDCAP and the DAP for new employees hired after January 1, 2007.[73] Irvin requested the plan documents, asserted that the legibility changes to MEDCAP and the DAP were bargainable, and demanded a meeting to bargain over the change. Rhodes agreed to provide the plan documents and responded to several other questions posed by the Union. Notwithstanding Irvin's demands that the Company bargain over the changes, the Company's President announced them to all employees later that day.[74]

When the August 2006 changes were announced, the Company acknowledged its obligation to furnish information relevant to bargaining. The confidential "Union Notification Guidelines" memorandum that was circulated contained the following instruction:

> Union Information Requests
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> Unions may be entitled to requested information in order to bargain. Management negotiators are cautioned to avoid flat refusals to information requests. If the union makes a request for information beyond what has been forwarded to the site, Management negotiators should develop a clear understanding of the request and consult with their assigned PRS consultant.[75]

On November 7, 2006, the Union grieved the Company's unilateral changes to seven benefit plans, including MEDCAP and DAP.[76] The Company denied that grievance on November 30, 2006.[77]

The Company implemented the MEDCAP and DAP eligibility changes on December 20, 2006. These amendments applied corporate-wide to all employees, former employees, and their eligible dependents, including bargaining unit members. The practical effect of this change was to eliminate *any* retirement health and dental coverage for employees hired after January 1, 2007.[78]

LEGAL ANALYSIS

The General Counsel contends that the Company violated Sections 8(a)(5) and (1) of the Act when it unilaterally eliminated future retirement healthcare benefits for new employees without bargaining with the Union on the grounds that: (1) the management-rights provision specifically reserving the right to terminate MEDCAP and/or DAP was not included in the collective-bargaining agreement; (2) the Company had a scattered history of imposing unilateral changes and bargaining with the Union following the ratification of the contract; and (3) even if the Company established a history of making unilateral changes to the MEDCAP/DAP programs, the elimination of these programs without providing some form of alternate coverages constituted a material departure from past practice that violated the Act. The Company denies

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[73] Irvin and Rhodes provided fairly consistent testimony regarding discussions between the parties on this date. (Tr. 34–36, 158, 270; Jt. Exh. 1 at 5, 17–18; GC Exh. 50.)

[74] Jt. Exh. 1 at 23–24 and Exh. 1J.

[75] GC Exh. 36 at 5274.

[76] Jt. Exh. 1 at 14, Exh. G.

[77] Jt. Exh. 1 at 15, Exh. H.

[78] Irvin also noted that a potential coverage gap would arise by eliminating MEDCAP and DAP for employees retiring at the age of 58, the earliest potential age for full retirement, until they qualify for Medicare at the age of 65. (Jt. Exh. 1 at 16, 19–20; Tr. 40–41.)

the allegations and asserts that the bargaining history, as well as the history of imposing unilateral changes to the programs, amount to a clear and unmistakable waiver of the Union's right to bargain over these changes.

The parties focused on the issue of whether the Company was entitled to eliminate MEDCAP and DAP for new employees without bargaining with the Union. The issue, however, is actually much broader—whether the Company is entitled to unilaterally eliminate *all* retiree health care.

Section 8(a)(5) of the Act makes it unlawful for an employer to make unilateral changes to benefits that are a mandatory subject of bargaining without bargaining. *NLRB v.* Katz, 369 U.S. 736 (1962). An employer has a statutory duty to bargain over changes to retiree health care coverage where bargaining unit employees may be entitled to receive future retirement benefits as a term and condition of their employment. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 180 (1971). An employer, therefore, may not make unilateral changes to this subject of bargaining unless the union expresses a clear and unmistakable waiver of its right to bargain. *American Broadcasting Co*., 290 NLRB 86, 88 (1988*); California Pacific Medical Center*, 337 NLRB 910 (2002).

I. Express Waiver

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. For that reason, the courts require 'clear and unmistakable' evidence of waiver and have tended to construe waivers narrowly." *Dep't of the Navy, Marine Corps Logistics Base v. FLRA,* 962 F.2d 48, 57 (D.C.Cir.1992).

The Board has relied upon several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties' intent. See *Johnson-Bateman*, 295 NLRB 180, 184–87 (1989); *American Diamond Tool*, 306 NLRB 570 (1992). The party asserting the waiver bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1984).

Pursuant to the contract, the Union has a right to bargain on behalf of retirees, as well as active employees. It is undisputed that MEDCAP and DAP Plan Documents contained management-rights clauses that made them terminable by the Company. The contract does not, however, mention either plan. Notwithstanding the absence of an express waiver in the contract, the Company contends that the Union waived its right to bargain over these changes in clear and unmistakable terms as evidenced by the bargaining history surrounding the contract and the Company's well-established past practice of unilaterally changing the plan terms.

The Board has been hesitant to imply waivers that are not explicitly mentioned within parties' collective-bargaining agreements. In *Southern Nuclear Operating Co*., 348 NLRB 1344 (2006) enf'd in part, remanded in part 524 F.3d 1350 (D.C. Cir. 2008), an employer unilaterally terminated full health care coverage and altered its life insurance payment policy for retirees. The Court of Appeals rejected the Company's contention that the unions incorporated the benefit plans' reservation of rights clauses into the contract based upon their "course of conduct":

For instance, the Companies suggest that because the unions have copies of the benefit plans and have relied on the benefits provided by those plans, the unions have also incorporated the reservation-of-rights clauses in those plans into the collective-bargaining agreements. Our cases, however, imply that it is only express language in the collective-bargaining agreement that incorporates a reservation-of-rights clause. *Id.* at 1359.

A similar result is found in *Mississippi Power Co.*, 332 NLRB 530 (2000), *enf'd in part*, 284 F.3d 605 (5th Cir. 2002). In that case, a management-rights provision was contained in the employee benefits plan, but not in the collective-bargaining agreement. The Court refused to find a waiver of the union's bargaining rights because the management-rights clause was only in an employer-created document that contained no explicit reference to the union.

The Company contends in its reply brief that *Southern Nuclear* and *Mississippi Power* are inapposite since no evidence was presented in either case that the parties specifically discussed during bargaining the reservation of rights language contained in the benefit plans at issue. Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been "fully discussed" and "consciously explored" during negotiations. *Davies Medical Center*, 303 NLRB 195, 204 (1991). Furthermore, The Company must demonstrate that the Union consciously yielded or clearly and unmistakably waived its interest in the matter. *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982). Failure to mention a mandatory subject of bargaining does not constitute a waiver of the right to bargain; rather, the Board requires "a conscious relinquishment by the union, clearly intended and expressed." *Elizabethtown Water Co*., 234 NLRB 318, 320 (1978), citing *Perkins Machine Co*., 141 NLRB 98, 102 (1963).

In applying the "fully discussed" and "consciously explored" standard in *Davies*, the Board refused to find a waiver of the right to information even though the union had not previously requested information prior to preliminary bargaining sessions. In arriving at that conclusion, the Board noted the absence of evidence establishing that the Union clearly relinquished and, therefore, waived its statutory right to the production of relevant information.

The Board followed a similar standard in *Reece Corp*., 294 NLRB 448 (1989). In that case, it found no waiver because the employer expressed a belief that the contract did not allow it to transfer work without bargaining. See also *General Electric Co*., 296 NLRB 844 (1989) (neither the language of the employer's bargaining notes or its subsequent bargaining history suggested that the Union made a conscious relinquishment that clearly intended and expressly bargained away its statutory right).

The Company proffered extensive bargaining notes at trial detailing the 1985 and 1986 contract negotiations. While the Company correctly notes that the incorporation of a management-rights provision in the contract was discussed at length, the notes did not evidence a conscious relinquishment by the Union that was clearly intended and expressed during negotiations. If anything, the bargaining history documents the Union's continued aversion to incorporating a management-rights provision within the contract. Furthermore, it is far from clear that there was a meeting of the minds as to what the removal of the management-rights clause from the pertinent part of the contract meant. While the Company contends that the provision was excluded from the contract because it did not want to be bound by the 1-year layover provision in Article VII, the bargaining notes do not reveal the Union to have been operating under the same pretenses.

Based on the foregoing, the express language of the contract, as well as the parties' past dealings and bargaining history with respects to the terms and conditions contained therein, fail to reveal the existence of an express waiver by the Union permitting the Company to unilaterally eliminate retiree health coverage.

II. Implied Waiver

Notwithstanding the absence of an express waiver, the Company advances several additional theories demonstrating that the Union waived its objection to the elimination of retiree healthcare—a general waiver based on past practice, the existence of a longstanding practice as the continuation of the status quo, and estoppel. The General Counsel denies the applicability of these theories and relies on the argument that the changes were material and more substantial than any unilateral changes implemented over the past 20 years.

A. Waiver Based on Past Practice

The Company's alternative theory is premised on the concept that its 20-year period of imposing unilateral changes to MEDCAP and DAP terms of coverage constitutes a waiver. There is precedent for the notion that a waiver may be inferred from extrinsic evidence of contract negotiations and/or past practice. *Mt. Clemons General Hospital*, 344 NLRB 450, 460 (2005). In *Litton Microwave Cooking Products v. NLRB,* 868 F.2d 854 (6th Cir. 1989), the Sixth Circuit reversed the Board's decision that an employer violated Section 8(a)(5) "given the explicit reference to layoffs and production methods in the management-rights clause, the history of uncontested work relocation and layoffs, and the unfavorable assessment by the administrative law judge of the credibility of a witness relied upon by the Board." Id. at 858; See also *Kiro, Inc.*, 317 NLRB 1325, 1328 (1995).

Litton is distinguishable, however, because there the employer's past practices of unilateral changes were bolstered by a management-rights clause in the contract that the union official himself admitted had afforded the company the right to do whatever it wanted. *Litton*, 868 F.2d at 858. Furthermore, the Union never challenged the loss of bargaining unit jobs that resulted from the employer's unilateral actions, nor did it request bargaining over the company's relocation of work while the collective-bargaining agreement was in effect. *Id.* Not only was the management-rights clause incorporated into the collective-bargaining agreement in *Litton*, but the Union failed to proffer evidence countering the Company's history of imposing similar unilateral changes without any requests for bargaining or information. The employer, therefore, was able to establish a waiver through a broadly phrased management-rights clause supplemented by a history of uncontested unilateral changes.

Similarly, in *California Pacific Medical Center*, 337 NLRB 910, 914 (2002), the Board found lawful an employer's unilateral action in laying off employees based on an established history of similar actions and an absence of union requests to bargain. Moreover, the applicable collective bargaining agreement contained a management-rights clause found to have provided management with the unfettered right to lay-off employees as necessary.

More recently, in *Mt. Clemons General* Hospital, supra at 460, an employer made unilateral changes to a tax shelter annuity program that downsized the program from five providers to one. The change was not explicitly authorized in the contract, but referenced only in a general waiver clause. As such, the Board found that clause insufficient to constitute an express waiver for specific terms not listed in the contract. Nevertheless, the Board recognized the existence of an implied waiver from the employer's 20-year record of making similar unilateral changes without any requests by the union to bargain over them.

In contrast to *Mt. Clemons, Litton* and *California Pacific*, there is a history here that presents a mixed bag of transactions—unilateral changes without requests to bargain, as well as changes followed by requests for information and/or requests to bargain. The instances in which the Company unilaterally changed benefit terms without requests to bargain outnumber the instances in which the Union requested information or sought to bargain. Nevertheless, under the circumstances, the transactional history makes it less than certain that the Union waived its right to bargain over the elimination of retiree health benefits.

Moreover, neither *Mt. Clemons*, nor *Litton* nor *California Pacific* addressed unilateral changes that substantially deviated from past practices. Both *Mt. Clemons* and *Litton* involved disputes that arose from unilateral changes such as layoffs that the companies implemented frequently prior to the filing of charges. *Mt. Clemons* involved the downsizing of an annuity program, not its total and irrevocable termination. None of these changes strayed considerably from the companies' similar past practices, which they had implemented openly and with the acquiescence of their respective unions.

B. Longstanding Practice as Continuation of the Status Quo

The Company also contends that the 2006 changes were merely part of the status quo of a longstanding practice that spanned a 20-year period of unilateral changes to MEDCAP and DAP. The General Counsel contends, however, that these changes were scattered among numerous information requests over the years that constituted requests for bargaining and counter any semblance of a well-established past practice.

The Board has found that a unilateral change made pursuant to longstanding practice is essentially a continuation of the status quo and not a violation of Section 8(a)(5). *The Courier-Journal*, 342 NLRB 1093, 1095 (2004). In *Courier-Journal*, the employer negotiated a provision in its contract that reserved to the employer "the right to modify or terminate" the health care plan. Over a 10-year period, the employer made unilateral changes in costs and benefits for both union and nonunion employees under the plan. Some of these changes were made while the contract was in effect and others were made during hiatus periods between contracts. After 10 years of such a practice, the employer announced another increase in employee premiums during a hiatus period, to which the union objected. The Board dismissed the union's charge, finding that these changes were consistent with the employer's history of making these changes for the past 10 years without union objection, noting that this finding was grounded not in waiver but "in past practice, and the continuation thereof."

The Board refused to extend the *Courier-Journal* holding to unilateral changes made to benefit plans during hiatus periods between collective-bargaining agreements in *E.I. DuPont de Nemours*, 355 NLRB No. 176, slip. op. (2010). The employer in *DuPont* failed to carry its burden because its asserted past practice was limited to changes made while a contract which included a management-rights clause was in force. Unlike the employer in *Courier-Journal*, who had a history of making changes both while the contract was in force and during hiatus, the employer in *DuPont* could only point to past practice while the contract was in force, and therefore, could not substantiate a claim that its past practices also extended to hiatus periods.

The Company relies heavily on the *Courier-Journal* holding in its post-hearing brief and argues that this case falls squarely within its holding because its 2006 changes "represent nothing more than [the Company's] consistent, 30-year practice of making unilateral changes to

the [DAP] and MEDCAP."[79] The Company further contends that the only reason the Board rejected the employer's past practice argument in *DuPont* was because "DuPont did not offer sufficient evidence to establish a past practice of unilateral changes during periods when a contract authorizing the changes was not in force"[80] In this case, however, the Company engaged in a decades-long practice of corporate-wide unilateral changes that are not contained in the collective-bargaining agreement. Instead, they have been based upon the plans' reservation of rights language that has never expired/been on hiatus and remains in full force. Nevertheless, the Company believes that its actions here fall within the parameters of both holdings.

While the Company asserts that *Courier-Journal* was distinguished in *DuPont*, the General Counsel contends that *DuPont* restricted *Courier Journal* to unilateral changes made to benefit plans during hiatus between collective-bargaining agreements. The Board noted that it was "in tension with previously settled principles concerning waiver." *E.I DuPont* at fn. 5. The Board's language in *DuPont* suggests that it is distinguishable from *Courier-Journal* because the employer had not established a longstanding practice of unilateral changes throughout all phases of the life of the collective-bargaining agreement. The Company correctly observes that the contract has been in effect through the entire course of the Company's unilateral changes to MEDCAP and DAP. Nonetheless, the Company failed to meet its burden in establishing that the Union expressed a clear and unmistakable waiver of its right to bargain. Thus, *Courier-Journal* is ultimately inapposite. The Company's unclear history of implementing unilateral changes to the health plans, interspersed with the Union's requests for information, fails to establish a status quo that meets the requirements of *Courier-Journal*. Furthermore, the Company's unilateral termination of future retirement plans, without offering alternate coverage, cannot be sensibly considered a continuation of the status quo. Although the Company established a history of unilateral changes to health benefits, there is no evidence of the Company ever terminating health coverage for retirees.

C. Equitable Estoppel

The Company also argues that the Union is equitably estopped from demanding to bargain. A union's constant acquiescence to an employer's unilateral action for sustained periods of time can equitably estop a union from demanding bargaining on that subject. *Manitowec Ice Co.*, 344 NLRB 1222 (2005); *Tucker Steel Corp.*, 134 NLRB 323, 333 (1961);. The General Counsel contends, however, that a union's failure to request bargaining on a topic does not constitute a clear and unmistakable waiver of its right to bargain on that topic at a later time. *Brewers and Malsters*, enfd. D.C. Cir. at 45 (even if union waived its right to bargain over prior changes, union has not waived its right to bargain over future changes); *Midwest Power Systems* (not enough to show at most a union's silent acquiescence to certain prior changes in retiree benefits). Unlike the union in *Manitowoc*, which was equitably estopped from bargaining because there was a history of unilateral changes without bargaining requests, information requests, or other objections from the union, the Union here made numerous information requests throughout the years, to which the Company acquiesced. Information requests sent to employers constitute requests for bargaining. *Eldorado*, 335 NLRB 952, 954 (2001).

To the contrary, the Company's assertions, past practices, and manifestations to the Union estop it from unilaterally terminating MEDCAP/DAP without providing an alternative coverage plan. The Company's bargaining notes, customarily shared with the Union, indicate

[79] R. Br. at 41–42.
[80] R. Br. at 43.

that the Company had no intention of terminating the retiree benefit plans, thus causing employees to rely on the Company's representations to their eventual detriment.

On June 11, 1987, the Union raised the subject of medical insurance for retirees, specifically, whether pensioners are guaranteed a medical plan when they retire. The Company responded that pensioners are covered and told what insurance they have when retiring. The Company added that it "has reserved the right to change and modify or discontinue the plan if needed." The Company added that "there has been no plan to discontinue medical coverage for pensioners *and does not visualize that ever happening . . . The plan may be changed or, or the pensioner may be covered by a different plan*." (Emphasis added).[81]

The Company is, therefore, bound by its representations to the Union. There is no mention at this bargaining session of MEDCAP/DAP's management-rights clauses that would allow the program to be terminated. This establishes that the Company itself considered unilateral changes to the status quo insofar as they occurred within the framework of an existing future retirement benefits plan. The bargaining history demonstrates that even the Company was operating under the assumption that a retirement healthcare and dental plan would always exist. The Company's history of imposing unilateral changes to the terms of the coverage is understandable within this framework. However, terminating the entire retiree healthcare and dental program far exceeds the expectations of the parties based on a 30-year bargaining record.

D. Material Departure from Past Practice

The Company's reliance on a 20-year period of unilateral changes to MEDCAP and DAP is also undermined by the materiality of the 2006 changes. An employer violates Section 8(a)(5) if the unilateral change at issue constitutes a material departure from well-established past practice. *Caterpillar, Inc*., 355 NLRB No. 91, slip op. (2010). In *Caterpillar*, the Board found that an employer's unilateral implementation of a generic-first prescription drugs program violated Section 8(a)(5). The employer contended that it had a longstanding practice of unilaterally implementing changes to its health care plan and that implementation of the generic first policy was a continuation of this practice. The Board first found that the Company failed to show "that the practice occurred 'with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." The Board elaborated:

> In addition, even assuming regularity and frequency, there was no *practice*. Other than the fact that they each altered the Respondent's prescription-drug plan, there is no thread of similarity running through and linking the several types of change at issue here. The three types of past change—preauthorization requirements, drug quantity limits, step therapies—are each dissimilar; and the Respondent does not contend that "generic first" falls into any one of these categories of past practice. And it does not: "generic first" is not a preauthorization requirement; it has nothing to do with drug-quantity limits; and Labor Relations Consultant Stevens expressly acknowledged that it is not a step therapy.

The Board then proceeded to explain that "even assuming that the past changes were sufficiently similar among themselves to constitute a "practice," the implementation of "generic first" represented a material departure from that past practice. The past changes were limited in

[81] R. Exh. 3 at 8511.

scope, involving only certain drugs or families of drugs. “Generic first,” by contrast, involved *all* brand-name drugs that have generic equivalents. Moreover, and significantly, unlike “generic first,” the past changes did not alter express terms of the Group Insurance Plans.”

Finally, the Board concluded: “[m]aking a series of disparate changes without bargaining does not establish a “past practice” excusing bargaining over future changes. Rather, it shows merely that, on several past occasions, the Union waived its right to bargain. It is well settled, however, that a “union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.” Id. at slip. op. 2–3. (quoting *Owens-Corning Fiberglas*, 282 NLRB 609 (1987)).

The Company has failed to establish that the Union waived its right to bargain based on its bargaining history and past practice. Furthermore, based on the *Caterpillar* holding, the elimination of MEDCAP/DAP constituted a material departure from any past practices that DuPont may have established. Imposing unilateral changes to premium rates and the scope of coverage is substantially different from terminating a plan in its entirety, especially when the Union has operated under a reasonable assumption for over 20 years that the plan would not be terminated. DuPont’s actions are therefore distinguishable from the employers in *Mt. Clemons General Hospital, Litton*, and *Courier-Journal* because the unilateral changes at issue in those cases were within the bounds of similar past practices and did not amount to a material departure. In none of those cases was a healthcare program terminated in its entirety without a back-up proposal or replacement program for current employees. The downsizing of a health benefits program differs substantially from the complete elimination of healthcare program for future retirees, especially when the union and employees have been lead to believe that some form of health insurance would be available to them in the future. The Company has failed to carry its burden in establishing an implied waiver through its bargaining history or past practice, and its elimination of MEDCAP and DAP without providing any alternative healthcare and dental plan coverages for future retirees constitutes a material departure from past practice.

For the foregoing reasons, Respondent engaged in an unfair labor practice in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act.

CONCLUSIONS OF LAW

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

2. The Charging Party, Ampthill Rayon Workers, Inc., International Brotherhood of DuPont Workers (the Union) is a labor organization within the meaning of Section 2(5) of the Act and is the recognized collective-bargaining representative of a bargaining unit composed of the production, maintenance, clerical, technical, and office employees employed by the Company at its Spruance facility in Ampthill, Virginia.

3. On or about December 20, 2006, the Company violated Section 8(a)(5) and (1) by failing to bargain upon request by the Union and unilaterally terminating retirement healthcare and dental benefits for all unit employees hired after January 1, 2007.

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Company has violated Section 8(a)(5) of the Act by failing to bargain with the Union concerning the termination of retirement healthcare and dental benefits for all unit employees hired after January 1, 2007, we shall order the Company to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act, including the posting of an appropriate notice to employees. Specifically, we shall order the Company to rescind, for the bargaining unit employees, the change in its retiree healthcare and dental program, implemented December 20, 2006, terminating MEDCAP and DAP for such employees. The Company shall, upon demand by the Union, bargain in good faith regarding with respect to any Company proposal to completely eliminate retirement healthcare and dental benefits for bargaining unit employees hired after January 1, 2007.[82]

In the event that this Remedy is not adhered to, bargaining unit employees hired after January 1, 2007, over time, will be adversely affected by the lack of retirement healthcare and dental benefits. In that case, the Company shall make whole its bargaining unit employees who have retired for any loss of healthcare or dental benefits suffered as the result of the Company's unlawful termination of retiree health and dental benefits for employees hired after January 1, 2007. Payments for lost benefits are to be computed in the manner set forth set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

ORDER

The Company, E. I. DuPont de Nemours and Company, Ampthill, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally announcing and terminating employees' retirement health and dental benefits.

(b) Making material, substantial, and significant changes to retirement health and dental benefits of unit employees without first notifying the Union and affording it an opportunity to bargain concerning such changes and their effects.

(c) 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) Rescind the unilateral material change to retirement healthcare and dental plans implemented on December 20, 2006, as it relates to the elimination of all retirement healthcare

[82] Given an extensive history that includes unilateral changes by the Company to certain aspects of employees' retirement healthcare and dental coverage (premiums, deductibles, co-pays, annual caps, and dependent and spousal eligibility), the remedy is limited solely to the material change by the Company in terminating retirement healthcare and dental coverage for employees hired after January 1, 2007.

and dental coverage for all unit employees and former unit employees hired after January 1, 2007, restore the unit employees' retirement health and dental benefits to the terms that existed prior to December 20, 2006, and maintain those terms in effect until the parties have bargained and agreed to material changes.

(b) Make any unit employees and former unit employees whole by reimbursing them, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), for any loss of benefits suffered as a result of the unilateral implemented changes in benefits.

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

(d) Within 14 days after service by the Region, post at its Ampthill, Virginia facility copies of the attached notice marked "Appendix."[83] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company 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 Company has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees hired at any time after January 1, 2007.

(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 Company has taken to comply.

Dated, Washington, D.C. August 22, 2011

_____

Michael A. Rosas
Administrative Law Judge

[83] 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."

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT unilaterally implement material, substantial, and significant changes to our employees' retiree healthcare program without providing the Union notice and an opportunity to bargain.

WE WILL rescind the unilateral material change to retirement healthcare and dental plans implemented on December 20, 2006, as it relates to the elimination of all retirement healthcare and dental coverage for all bargaining unit employees and former unit employees hired after January 1, 2007, restore the unit employees' eligibility for retirement health and dental benefits, specifically, the Medical Care Assistance Program (MEDCAP) and the Dental Assistance Plan (DAP), to the terms that currently exist with respect to unit employees hired on or before January 1, 2007.

WE WILL, if requested by the Union, bargain in good faith over any material change in the eligibility of employees or former employees hired after January 1, 2007, for retirement healthcare and dental benefits and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make whole, with interest, any employee hired after January 1, 2007, who loses retirement healthcare and dental benefits as a result of our unlawful termination of healthcare and dental coverage for such employees on December 20, 2006.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

E. I. DUPONT DE NEMOURS AND COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak

confidentially to any agent with the Board's Resident Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1099 14th Street, NW
Suite 6300
Washington, D.C. 20570
Hours: 8:15 a.m. to 4:45 p.m.
202-208-3000

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 202-208-3000