

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

)	
)	
E. I. DUPONT DE NEMOURS AND COMPANY)	
)	
AND)	Case No. 5-CA-33461
)	
AMPTHILL RAYON WORKERS, INC.,)	
INTERNATIONAL BROTHERHOOD OF)	
DU PONT WORKERS)	
)	

**EXCEPTIONS OF RESPONDENT E. I. DUPONT DE NEMOURS AND COMPANY TO
THE DECISION OF ADMINISTRATIVE LAW JUDGE MICHAEL A. ROSAS**

Pursuant to the Rules and Regulations of the National Labor Relations Board, as amended, Respondent, E.I. du Pont de Nemours and Company (“DuPont” or the “Company”), by the undersigned counsel, respectfully files the following Exceptions to the Decision and Order of Administrative Law Judge Michael A. Rosas in the above-captioned case. DuPont is simultaneously filing with the Board a Brief in support of these Exceptions:

Exception 1: Respondent excepts to the Judge’s finding that, “[T]he Company offers its Spruance facility employees the opportunity to participate in either corporate-wide benefit plans or local benefit plans.” ALJD¹ 3:8-9. This finding is without record support.

Exception 2: Respondent excepts to the Judge’s finding that the Dental Assistance Plan (the “Dental Plan” or “DAP”) provides dental benefits to “all of the Company’s United States employees.” ALJD 4:6-8. This finding is without record support.

¹ References to the Decision of Administrative Law Judge Michael A. Rosas will be designated by “ALJD,” followed by page and line numbers.

Exception 3: Respondent excepts to the Judge’s conclusion not to “give[] any weight to the arbitrator’s decision” that the Union waived its right to bargain over certain benefit plan changes. ALJD 4:40-41. This conclusion is contrary to controlling law.

Exception 4: Respondent excepts to the Judge’s failure to give sufficient weight to his finding that the Union stated 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.” ALJD 6:34-36.

Exception 5: Respondent excepts to the Judge’s failure to give sufficient weight to his finding that the Company did not want to list the Aetna [Medical Care Assistance Program (“MEDCAP”)] plan under Article VII because of that provision’s 1-year notice restriction. ALJD 6:37-7:2.

Exception 6: Respondent excepts to the Judge’s finding that in “many . . . instances, the Union . . . requested bargaining over the changes.” ALJD 7:22-23. This finding is without record support.

Exception 7: Respondent excepts to the Judge’s finding that “[t]he Company responded on numerous occasions by . . . agreeing to bargain.” ALJD 7:23-24. This finding is without record support.

Exception 8: Respondent excepts to the Judge’s finding that “the Company did not deny the requests” for premium rate increase information in 2001 and 2002. ALJD 7:28. This finding is without record support.

Exception 9: Respondent excepts to the Judge’s finding that “the Company refused to provide employee benefit information” related to IRP&P plans, including MEDCAP and the Dental Plan. ALJD 8:4-6; ALJD 7:23-25. This finding is without record support.

Exception 10: Respondent excepts to the Judge’s conclusion that “[i]n some instances since 1986, the Company acknowledged an obligation to bargain or agreed to the Union’s request to bargain over changes.” ALJD 8:18-19. This conclusion is without record support.

Exception 11: Respondent excepts to the Judge’s implication that the Company’s bargaining obligations for changes to the local, previously-offered Blue Cross Blue Shield (“BCBS”) plan are the same as the Company’s obligations as to MEDCAP. ALJD 8:26-27. This implication is contrary to record evidence. (Resp. Exhs. 5a, 5b, 3 Tab 20, p. 11).²

Exception 12: Respondent excepts to the Judge’s implication that the healthcare premiums the Company agreed to bargain in 1992 and 1993 were MEDCAP premiums. ALJD 8:27-28. This implication is contrary to record evidence. (Resp. Exh. 4, tabs 3-4).

Exception 13: Respondent excepts to the Judge’s failure to give sufficient weight to the Company’s statement that “it reserves the right to modify the plan, and premiums would be changed as necessary yearly.” ALJD 8:27-31.

Exception 14: Respondent excepts to the Judge’s implication that the Company’s agreement to investigate the merger between Aetna and US Healthcare constitutes bargaining. ALJD 9:5-9. This implication is contrary to record evidence and contrary to controlling law. (Resp. Exh. 3 tab 56 p. 4).

² Joint Exhibits will be referred to as (“Jt. Exh.”), Respondent’s Exhibits will be referred to as (“Resp. Exh.”), and Counsel for the Acting General Counsel’s exhibits will be referred to as (“GC Exh.”). References to the hearing transcript will be denoted as “Tr.,” and references to specific witness testimony will be denoted by the last name of the witness and page number of the transcript where the testimony appears (e.g., “Irvin, 31”).

Exception 15: Respondent excepts to the Judge’s finding that in 1997 the “Union insisted on bargaining over [changes to the health and welfare plans] and the Company agreed.” ALJD 9:9-12. This finding is without record support.

Exception 16: Respondent excepts to the Judge’s conclusion that the parties had a “history of bargaining over the Company’s numerous changes to its benefit plans.” ALJD 9:18-19. This conclusion is contrary to record evidence. (*e.g.*, Irvin, 38; 88-89; Derr, 236-238; Rhodes, 259-262).

Exception 17: Respondent excepts to the Judge’s failure to give sufficient weight to his finding that “[o]n 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.” ALJD 9:20-22.

Exception 18: Respondent excepts to the Judge’s failure to consider the fact that the Company did not bargain with the Union regarding any of the changes it announced and then implemented to MEDCAP or the Dental Plan. ALJD 9:20-22.

Exception 19: Respondent excepts to the Judge’s failure to consider properly the context provided by the Union Notification Guidelines when finding that “the Company acknowledged its obligation to furnish information relevant to bargaining” and that “Unions may be entitled to requested information in order to bargain.” ALJD 11:9-19.

Exception 20: Respondent excepts to the Judge’s finding that the practical effect of the change to MEDCAP and Dental Plan eligibility provisions “was to eliminate *any* retirement health and dental coverage for employees hired after January 1, 2007.” ALJD 11:27-29 (emphasis in original). This finding is without record support.

Exception 21: Respondent excepts to the Judge’s conclusion that the the issues before him included whether the Company’s decision not to “provid[e] some form of alternative coverages constituted a material departure from past practice that violated the Act.” ALJD 11:40-41. This conclusion is without record support and contrary to controlling law.

Exception 22: Respondent excepts to the Judge’s conclusion that the issue before him was “whether the Company is entitled to unilaterally eliminate *all* retiree health care.” ALJD 12:7-8 (emphasis in original). This conclusion is without record support and contrary to controlling law.

Exception 23: Respondent excepts to the Judge’s implication that the Company eliminated “*all* retiree health care.” ALJD 12:7-8 (emphasis in original). This implication is without record support.

Exception 24: Respondent excepts to the Judge’s conclusion that the Board does not consider bilateral arrangements, other than collective bargaining agreements, in determining whether a clear and unmistakable waiver exists. ALJD 12:30-32. This conclusion is contrary to controlling law.

Exception 25: Respondent excepts to the Judge’s conclusion that the Union has a right to bargain on behalf of retirees “[p]ursuant to the contract.” ALJD 12:36. This conclusion is without record support and is contrary to controlling law.

Exception 26: Respondent excepts to the Judge’s finding that the “MEDCAP and DAP Plan Documents contained management-rights clauses that made them terminable by the Company.” ALJD 12:37-38. This finding is incomplete because the Judge failed to acknowledge the Company’s right to modify the plans.

Exception 27: Respondent excepts to the Judge’s failure to consider properly that the parties’ past practice evidenced the parties’ understanding that the Union had explicitly waived its right to bargain. ALJD 12:40-42.

Exception 28: Respondent excepts to the Judge’s conclusion that *Southern Nuclear Operating Co.*, 348 NLRB 1344 (2006) enf’d in part, remanded in part 524 F.3d 1350 (D.C. Cir. 2008), applies here, as the parties in that case did not consciously explore the reservation of rights language or waiver. ALJD 12:45-13:8. This conclusion is contrary to controlling law.

Exception 29: Respondent excepts to the Judge’s conclusion that *Mississippi Power Co.*, 332 NLRB 530 (2000), enf’d in part, 284 F.3d 605 (5th Cir. 2002), applies here, as the parties in that case did not consciously explore the reservation of rights language or waiver. ALJD 13:8-12. This conclusion is contrary to controlling law.

Exception 30: Respondent excepts to the Judge’s finding that “the notes did not evidence a conscious relinquishment by the Union that was clearly intended and expressed during negotiations,” in light of the Judge’s earlier finding that “the Union agreed to participation in the new Aetna Plan (MEDCAP), including the reservation of rights clause contained in the Plan Document” and that the reservation of rights clause “has not changed since the plan document was adopted.” ALJD 13:42-44; 6:23-24, 49-50. This finding is contrary to record evidence and is contrary to controlling law. (Resp. Exh. 3 tab 19 p. 3, tab 20 pp. 10-11, tab 23 p. 2, and tab 24, p. 1).

Exception 31: Respondent excepts to the Judge’s finding that “the bargaining history documents the Union’s continued aversion to incorporating a management-rights provision within the contract.” ALJD 13:44-45. This finding is without record support.

Exception 32: Respondent excepts to the Judge’s conclusion that “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.” ALJD 13:45-47. This conclusion is without record support.

Exception 33: Respondent excepts to the Judge’s conclusion that “the bargaining notes do not reveal the Union” to have agreed to remove the health care provision from the contract because the Company did not want to be bound by the 1-year notice provision in Article VII. ALJD 13:49-50. This conclusion is contrary to record evidence. (Resp. Exh. 3 tab 23 p. 2 and tab 24, p. 1; Jt. Exhs. 1(a) p. 18 and 1(b) p. 20).

Exception 34: Respondent excepts to the Judge’s conclusion that language of the contract, the parties’ past dealings, and the bargaining history “fail to reveal the existence of an express waiver by the Union permitting the Company to unilaterally eliminate retiree health coverage.” ALJD 14:1-4. This conclusion is contrary to record evidence and contrary to controlling law. (*See, e.g.*, Resp. Exh. 3 tab 19 p. 3, tab 20 pp. 10-11, tab 23 p. 2, and tab 24, p. 1; Resp. Exh. 11)

Exception 35: Respondent excepts to the Judge’s finding that the Company “unilaterally eliminate[d] retiree health coverage.” ALJD 14:4. This finding is without record support.

Exception 36: Respondent excepts to the Judge’s conclusion that there was an “absence of an express waiver.” ALJD 14:8. This conclusion is contrary to record evidence and contrary to controlling law. (*See, e.g.*, Resp. Exh. 3 tab 19 p. 3, tab 20 pp. 10-11, tab 23 p. 2, and tab 24, p. 1).

Exception 37: Respondent excepts to the Judge’s conclusion that “there is a history here that presents a mixed bag of transactions,” including “changes followed by requests for

information and/or requests to bargain.” ALJD 15:2-4. This conclusion is contrary to record evidence. (Resp. Exh. 11; Irvin, 38; 88-89; Derr, 236-238; Rhodes, 259-262).

Exception 38: Respondent excepts to the Judge’s conclusion that “the transactional history makes it less than certain that the Union waived its right to bargain over the elimination of retiree health benefits.” ALJD 15:6-8. This conclusion is contrary to record evidence and contrary to controlling law. (*See, e.g.*, Resp. Exh. 3 tab 19 p. 3, tab 20 pp. 10-11, tab 23 p. 2, and tab 24, p. 1; Resp. Exh. 11; Irvin, 38; 88-89; Derr, 236-238; Rhodes, 259-262).

Exception 39: Respondent excepts to the Judge’s application of *Courier-Journal*, 342 NLRB 1093 (2004) in *E.I. DuPont de Nemours*, 355 NLRB No. 176, slip. op. (2010). ALJD 15:38-46. The Judge’s conclusion is contrary to controlling law.

Exception 40: Respondent excepts to the Judge’s conclusion that “the Company failed to meet its burden in establishing that the Union expressed a clear and unmistakable waiver of its right to bargain.” ALJD 16:19-20. This conclusion is contrary to record evidence and contrary to controlling law. (*See, e.g.*, Resp. Exh. 3 tab 19 p. 3, tab 20 pp. 10-11, tab 23 p. 2, and tab 24, p. 1; Resp. Exh. 11; Irvin, 38; 88-89).

Exception 41: Respondent excepts to the Judge’s conclusion that “*Courier-Journal* is ultimately inapposite” to the issues before him. ALJD 16:20-21. This conclusion is contrary to controlling law.

Exception 42: Respondent excepts to the Judge’s finding that the record provided an “unclear history of implementing unilateral changes to the health plans, interspersed with the Union’s requests for information.” ALJD 16:21-22. This finding is contrary to record evidence. (Resp. Exh. 11; Irvin, 38; 88-89).

Exception 43: Respondent excepts to the Judge’s conclusion the record “fails to establish a status quo that meets the requirements of *Courier-Journal*.” ALJD 16:21-23. This conclusion is contrary to controlling law.

Exception 44: Respondent excepts to the Judge’s finding that “the Company[] unilateral[ly] terminat[ed] . . . future retirement plans.” ALJD 16:23-24. This finding is without record support.

Exception 45: Respondent excepts to the Judge’s conclusion that “the Company’s unilateral termination of future retirement plans, without offering alternate coverage, cannot be sensibly considered a continuation of the status quo.” ALJD 16:23-25. This conclusion is without record support and contrary to controlling law.

Exception 46: Respondent excepts to the Judge’s finding that the Company “terminat[ed] health coverage for retirees.” ALJD 16:26-27. This finding is without record support.

Exception 47: Respondent excepts to the Judge’s implication that the Company’s change to the MEDCAP eligibility requirements was so different in nature from all of the Company’s prior unilateral changes that the Company was obligated to bargain over those changes. ALJD 16:25-27. This implication is contrary to record evidence and contrary to controlling law. (Resp. Exh. 11, Tabs 1, 7, 8, 10, 12, 13, 14, 18, 19, 22, 23, 24, 26, 28, 30, 33, 34, 37, 38, 41, 43, 44, 46).

Exception 48: Respondent excepts to the Judge’s failure to consider properly the Company’s prior unilateral changes that involved eligibility requirements and other changes similar in nature to the 2006 changes to MEDCAP and the Dental Plan. ALJD 16:25-27.

Exception 49: Respondent excepts to the Judge’s conclusion that “[i]nformation requests sent to employers constitute requests for bargaining.” ALJD 16:43-45. This conclusion is contrary to controlling law.

Exception 50: Respondent excepts to the Judge’s conclusion that “the Company’s assertions, past practices, and manifestations to the Union estop it from unilaterally terminating MEDCAP/DAP without providing an alternative coverage plan.” ALJD 16:46-48. This conclusion is without record support and contrary to controlling law.

Exception 51: Respondent excepts to the Judge’s finding that the “Company’s bargaining notes . . . indicate that the Company had no intention of terminating the retiree benefit plans.” ALJD 16:48-17:1. This finding is without record support.

Exception 52: Respondent excepts to the Judge’s finding that the Company represented that it intended to never terminate MEDCAP or the Dental Plan. ALJD 16:48-17:2. This finding is without record support.

Exception 53: Respondent excepts to the Judge’s finding that the bargaining notes contained representations by the Company that the Company intended to never terminate MEDCAP or the Dental Plan and that such statements caused employees to rely on such statements. ALJD 16:48-17:2. This finding is without record support.

Exception 54: Respondent excepts to the Judge’s finding that the bargaining history contained “representations” in 1987 that the Company intended to never terminate MEDCAP or the Dental Plan. ALJD 17:4-12. This finding is without record support.

Exception 55: Respondent excepts to the Judge’s conclusion that the Company is “bound by its representations to the Union.” ALJD 17:12. This conclusion is without record support and contrary to controlling law.

Exception 56: Respondent excepts to the Judge’s implication that the absence of a specific reference to the reservation of rights clause in the June 11, 1997 bargaining notes prevents Respondent from exercising its rights pursuant to the reservation of rights clause. ALJD 17:12-14. This implication is without record support and contrary to controlling law.

Exception 57: Respondent excepts to the Judge’s conclusion 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.” ALJD 17:14-16. This conclusion is without record support.

Exception 58: Respondent excepts to the Judge’s conclusion that “[t]he bargaining history demonstrates that even the Company was operating under the assumption that a retirement healthcare and dental plan would always exist.” ALJD 17:16-21. This conclusion is without record support.

Exception 59: Respondent excepts to the Judge’s conclusion that the “Company’s history of imposing unilateral changes to the terms of the coverage” is “understandable” only when the changes that are made provide for future retirement benefits. ALJD 17:16-18. This conclusion is without record support and contrary to controlling law.

Exception 60: Respondent excepts to the Judge’s conclusion that “terminating the entire retiree healthcare and dental program far exceeds the expectations of the parties based on a 30-year bargaining record.” ALJD 17:19-21. This conclusion is without record support.

Exception 61: Respondent excepts to the Judge’s finding that the changes the Company made to MEDCAP and the Dental plan were to “terminat[e] the entire retiree healthcare and dental program.” ALJD 17:19-20. This finding is without record support.

Exception 62: Respondent excepts to the Judge’s conclusion that “[t]he 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.” ALJD 17:25-26. This conclusion is contrary to record evidence and contrary to controlling law. (Resp. Exh. 11; Irvin 78, 84-88).

Exception 63: Respondent excepts to the Judge’s conclusion that “[t]he Company has failed to establish that the Union waived its right to bargain based on its bargaining history and past practice.” ALJD 18:12-13. This conclusion is contrary to record evidence and contrary to controlling law. (e.g., Resp. Exh. 11, Irvin, 38; 88-89; Derr, 236-238; Rhodes, 259-262).

Exception 64: Respondent excepts to the Judge’s finding that the Company “eliminat[ed] . . . MEDCAP/DAP.” ALJD 18:13-15. This finding is without record support.

Exception 65: Respondent excepts to the Judge’s conclusion that “the elimination of MEDCAP/DAP constituted a material departure from any past practices that DuPont may have established.” ALJD 18:13-15. This conclusion is contrary to record evidence and contrary to controlling law. (Resp. Exh. 11; Irvin 78, 84-88).

Exception 66: Respondent excepts to the Judge’s reliance on *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. (2010). ALJD 17:28-18:2; 18:13.

Exception 67: Respondent excepts to the Judge’s conclusion that “[i]mposing unilateral changes to premium rates and the scope of coverage is substantially different from terminating a plan in its entirety.” ALJD 18:15-17. This conclusion is without record support and contrary to controlling law.

Exception 68: Respondent excepts to the Judge’s implication that the Company led the Union to “operat[e] under a reasonable assumption for over 20 years that the plan would not be terminated.” ALJD 18:17-18. This implication is without record support.

Exception 69: Respondent excepts to the Judge’s implication that the Company “terminated” MEDCAP and the Dental Plan. ALJD 18:17-18. This implication is without record support.

Exception 70: Respondent excepts to the Judge’s conclusion that “DuPont’s actions are . . . 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.” ALJD 18:18-21. This conclusion is contrary to record evidence and contrary to controlling law. (Resp. Exh. 11; Irvin 78, 84-88).

Exception 71: Respondent excepts to the Judge’s conclusion that “[t]he downsizing of a health benefits program differs substantially from the complete elimination of healthcare program for future retirees.” ALJD 18:22-25. This conclusion is contrary to controlling law.

Exception 72: Respondent excepts to the Judge’s implication that the Company led the “union and employees . . . to believe that some form of health insurance would be available to them in the future.” ALJD 18:24-25. This implication is without record support.

Exception 73: Respondent excepts to the Judge’s conclusion that “[t]he Company has failed to carry its burden in establishing an implied waiver through its bargaining history or past practice.” ALJD 18:25-26. This conclusion is contrary to record evidence and contrary to controlling law. (e.g., Resp. Exh. 11, Irvin, 38; 88-89; Derr, 236-238; Rhodes, 259-262).

Exception 74: Respondent excepts to the Judge’s implication that the Company “eliminat[ed] . . . MEDCAP and DAP.” ALJD 18:27-28. This implication is without record support.

Exception 75: Respondent excepts to the Judge’s conclusion that the Company’s “elimination of MEDCAP and DAP without providing any alternative healthcare and dental plan

coverages for future retirees constitutes a material departure from past practice.” ALJD 18:27-28. This conclusion is contrary to record evidence and contrary to controlling law. (Resp. Exh. 11, Tabs 1, 7, 8, 10, 12, 13, 14, 18, 19, 22, 23, 24, 26, 28, 30, 33, 34, 37, 38, 41, 43, 44, 46).

Exception 76: Respondent excepts to the Judge’s conclusion that “Respondent engaged in an unfair labor practice in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act.” ALJD 18:30-31. This conclusion is contrary to controlling law.

Exception 77: Respondent excepts to Paragraph 3 of the Judge’s Conclusion of Law. ALJD 18:44-46. This Paragraph is contrary to record evidence and contrary to controlling law.

Exception 78: Respondent excepts to Paragraph 4 of the Judge’s Conclusion of Law to the extent it concludes that the Company committed an unfair labor practice. ALJD 18:48-49.

Exception 79: Respondent excepts to the Judge’s proposed remedy in its entirety. ALJD 19:3-22.

Exception 80: Respondent further excepts to the Judge’s proposed remedy to the extent that it rescinds the change in the Company’s “retiree healthcare and dental program, implemented December 20, 2006, terminating MEDCAP and DAP for such employees.” ALJD 19:5-10.

Exception 81: Respondent further excepts to the Judge’s proposed remedy to the extent it would require the Company to “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.” ALJD 19:16-19.

Exception 82: Respondent excepts to the Judge’s implication that the change Respondent made to MEDCAP and the Dental Plan was termination of those plans. ALJD 19:8-10. This implication is without record support.

Exception 83: Respondent excepts to the Judge’s order in its entirety. ALJD 19:30-20:30.

Exception 84: Respondent excepts to that portion of the Judge’s order that indicates that DuPont cannot modify or terminate MEDCAP or the Dental Plan without first obtaining the Union’s agreement. ALJD 19:45-20:4. This conclusion is contrary to controlling law.

Exception 85: Respondent excepts to that portion of the Judge’s order that indicates that employees hired after January 1, 2007 could be eligible for MEDCAP and Dental Plan benefits as part of a “make whole” remedy. ALJD 20:6-9. This conclusion is without record support.

Respectfully submitted,

/s/ Kris D. Meade

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

Counsel for E.I. DuPont de Nemours and Company

October 14, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 14th day of October 2011, I caused a true and accurate copy of DuPont's Exceptions to Decision of Administrative Law Judge Michael F. Rosas and Brief In Support thereof to be served by electronic mail on the following parties:

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

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

/s/ Glenn D. Grant
Glenn D. Grant