

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

**E. I. DU PONT DE NEMOURS AND COMPANY  
and  
AMPTHILL RAYON WORKERS, INC., LOCAL 992,  
INTERNATIONAL BROTHERHOOD OF DU PONT  
WORKERS**

**Case 05-CA-033461**

**ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL**

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**ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL**

**I. OVERVIEW**

This case involves Respondent's violations of Section 8(a)(1) and (5) of the National Labor Relations Act by unilaterally eliminating future retirement benefits for new employees without bargaining with the Ampthill Rayon Workers, Inc., (the Union). There is no dispute that E.I. Du Pont De Nemours and Company (DuPont or the Company or the Respondent) refused to bargain with the Union before it eliminated retirement healthcare and dental benefits for new employees at its Spruance facility in Richmond, Virginia. The Union requested bargaining over this change and future retirement benefits are a mandatory subject of bargaining. Accordingly, Judge Rosas properly decided found that Respondent's elimination of retiree health and dental care for new employees was a violation of Section 8(a)(5) of the Act. This Answering Brief will establish that the Respondent's arguments in its Brief in Support of Exceptions (the

Brief) do not show that the Union clearly and unmistakably waived its right to bargain over the elimination of retirement healthcare and dental care for new employees.

Accordingly, the judge's decision should be adopted.<sup>1</sup>

## **II. FACTS**

### **A. Background**

The Respondent is a Company with over 30,000 employees. (J 1 at Stipulation 1).<sup>2</sup> The Union represents approximately 1300 employees at the Company's Spruance facility located in Richmond, Virginia. (Tr. 33). At Spruance, the Company manufactures Nomex fiber and paper, Tyvek, and Kevlar fiber. (Tr. 32). The Union represents employees in two different units: Production and Maintenance (P&M), and Clerical, Technical, and Office (CT&O). (Tr. 33; J 1 at Stipulation 2). The Company and Union have two different collective-bargaining agreements covering both of these units. (J1 at Stipulation 2). The P&M contract became effective September 1, 1999 and the CTO contract became effective October 1, 2000. (Id.). The Union has an Executive Committee and two Contract Committees, one Contract Committee for each respective unit. The Executive Committee meets with Spruance management twice a month to go over day-to-day affairs and administer the contract. (Tr. 34). The Contract Committee meets when a contract is being negotiated or modified. (Tr.33-34).

DuPont maintains 18 benefit plans for its employees. (Tr. 144). At issue in this case are the Medical Care Assistance Program, or MEDCAP, and the Dental Assistance Plan, or DAP. (J 1 at Stipulations 6 and 10). MEDCAP provides healthcare benefits to

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<sup>1</sup> Subject to the Acting General Counsel's limited cross-exceptions.

<sup>2</sup> Citations to the transcript will appear as "Tr. [page numbers]" and citations to the exhibits will appear as the party abbreviation and exhibit number (e.g., "GC[exhibit number]," "R[exhibit number]", or "J[exhibit number]").

retirees and the DAP provides dental care to retirees. (Tr. 37). All parties have agreed that neither plan is part of the CBAs. (J 1 at Stipulation 21). The benefits received by retirees are virtually identical to benefits received by active employees, except that active employees receive dental and medical benefits under Beneflex, and retirees receive them under MEDCAP and the DAP. (Tr. 149).

**1. August 28, 2006 DuPont announces sweeping changes, including changes to MEDCAP and DAP**

In 2006, the Company engaged in a "genuine restructuring" of its benefit plans. (Tr. 158). (See GC 50 at D005262, instructing managers on how to organize the communications campaign with their supervisors ("You may need to call others in, back from vacation, etc., to get the job done.")). On August 28, 2006, the Union was called to a meeting with the Company. (Tr. 34). Donnie Irvin, Treasurer of the Union, Chairman of the Executive Committee and Chairman of the Grievance Committee, attended this meeting, along with other members of the Union's Executive Committee. (Id.). Rodney Rhodes, labor relations manager at Spruance, was there for the Company, along with Wayne Dickerson. (Id.). Also present were representatives of the International Brotherhood of Electrical Workers.<sup>3</sup> (Tr.35). Rhodes announced that there was going to be a corporate-wide announcement about benefit plan changes and he was going to make a PowerPoint presentation to the unions about it. (Id.). This announcement consisted of many benefit plan changes, including the elimination of MEDCAP and the DAP for new employees hired after January 1, 2007. (J1, Stipulations 5, 17, 18). After seeing the presentation, the Union immediately told Rhodes that this was bargainable and that a meeting with the Contract Committee needed to be set up. (Tr.35). Irvin also asked for

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<sup>3</sup> The Union does not bargain in the same meetings with the IBEW. (Tr.35).

the plan documents. (Id.). Rhodes said that he would schedule a meeting and get copies of the plan documents when they became available to him. (Tr.36). The Union asked other questions, none of which Rhodes refused to answer. (Id.).

**2. Union files a grievance, continues to ask for information, and the Company makes the change without bargaining**

The Union continued to ask for the plan documents at subsequent Executive Committee meetings. (Id.). On November 7, 2006, the Union filed a grievance over the changes announced on August 28, 2006, including the changes concerning MEDCAP and the DAP. (J1, Stipulation 14, Exh. G). Among other things, the grievance requested bargaining over the changes. (J1, Exh. G). In December 2006, the Company implemented the change, and consequently, employees hired after January 1, 2007 did not receive healthcare benefits under MEDCAP or dental benefits under the DAP. The Company did not bargain with the Union before implementing the change. (J1 at Stipulation 19). Irvin testified about the significance of this change regarding MEDCAP and the DAP:

I think it's very significant. With the retirement plan you can retire from DuPont at age 58. With the inability to qualify for Medicare until you're 65, that's a big gap between 58 and 65. So up until now, all of our employees when they retire are able to bridge that gap. Our future retirees will not have that benefit of bridging the gap between the time that they leave active employment until Medicare.

(Tr. 40-41).

**3. Over the years, DuPont has raised premiums for the plans, increased coverage, decreased coverage, and changed eligibility standards**

Over the years, the Company has made different changes to employee benefits that have affected MEDCAP and the DAP. Here are the examples highlighted by the Company during the trial and in their Brief.

The Company made changes to the premiums for the plans almost every year since 1993. (Tr. 89). On December 31, 1992, the Company sent a letter to employees telling them that the Company would be using an 80/20 cost sharing formula for premiums under the plan, and would be moving to a 50/50 split for future costs. (Tr. 182; R 2 at DUP009080).<sup>4</sup> In September 1993, the Company changed the plans so that a retiree who took early retirement would pay higher premiums under the plans. (Tr. 179; R 11, Tab 12 at D000713).

On January 1, 1998, the Company raised premiums for the plans. (R 11 at Tab 18). On January 1, 2001, the Company raised premiums under the plans. (Tr. 185; R 11 at Tab 30 at DUP001 058). In 2001, the Company modified the plans to eliminate the requirement that dependent children "live with the employee in a regular parent-child relationship." (Tr.193; R 11, Tab 31). On January 1, 2002, the Company raised premiums under the plans. (Tr. 186; R 11, Tab 34, at DUP001134). Also in 2002, the Company began charging a deductible for prescription drugs. (Tr. 189; R 11, Tab 49 at DUP002155). Beginning in January, 2003, the Company began splitting retirees off from active employees in calculating premium increases. (Tr. 187; R 11, Tab 37 at DUP002445). The Company also imposed caps on retiree costs that year. (Id. at DUP002451). The Company did not expect that this would have any effect on retirees for at least four years, (Tr. 188), and the Company was prescient because DuPont has

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<sup>4</sup> See R4, Tab 6, which states that the Respondent recognized it had a bargaining obligation over the details of this cost sharing split.

never implemented this change. (Tr. 189).<sup>5</sup> In 2004, the Company modified the plans so that dependent children over the age of 19 and less than 25 had to be a full-time student to receive benefits, in response to a change in tax laws.<sup>6</sup> (Tr. 192; R 11, Tab 44). In 2004, the Company increased premiums for retirees. (Tr. 85; R 3, Tab 69 at last page). In 2005, the Company modified the plan so that same-sex partners would be eligible for benefits under the plans. (Tr. 191; R 11, Tab 47).<sup>7</sup> Almost every year starting in the 1990s, the Company required that spouses of employees receive benefits under the spouse's insurance plan, if there was one, and if that premium was below a certain threshold. (Tr. 195; R 11, Tab 27). Many times the Company raised that threshold amount. In 2005, the Company began charging retirees a premium for the cost of dental restorative work. (Tr. 80; R 3, Tab 68 at 5). The Company also increased premiums for retirees that year. (Tr. 82). The Company raised premiums for the plans in 2006 (Tr. 266).

#### **4. Union sometimes expressly requested bargaining over some of these changes**

Some of the Company's own documents reflect that bargaining took place over these changes. For example, on more than one occasion the Company announced premium increases for healthcare to employees while saying "[b]argaining has been completed with the ARWI and the IBEW on the 1992 BC/BS Major Medical premiums." (R 4, Tab 3; see also *id.* at Tab 4 ("Bargaining has been completed with the ARWI and IBEW on the 1993 BC/BS Major Medical premiums. . . ."), and Tab 5, announcing

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<sup>5</sup> The fact this cap has never been implemented gives important context to the Respondent's claim, at 29 of the Brief, this was a change that "had an obvious, significant and detrimental impact on Union members' future retirement benefits."

<sup>6</sup> Again, there is no evidence this change had any impact on any employee at Spruance at all.

<sup>7</sup> This change did not decrease or eliminate any benefits and there is no evidence that it had any effect on the employees at Spruance. (Tr.206).

upcoming 1994 changes ("There are no hard and fast details yet, and once details become available, they will be subject to bargaining a Spruance."). Sometimes the Union insisted on information being heard in the Contract Committee, where the Union preferred to bargain on what it considered a contractual issue.<sup>8</sup> On December 18, 1997, the Company presented changes of the health and welfare plans to the Union and the Union insisted on bargaining on them in the Contract Committee because the contract was open at the time. (GC 8 at DUP0015456). The Company agreed to meet in the Contract Committee. (Id. at DUP0015457). At an Executive Committee meeting on September 22, 1987, the Union had insisted that the Company present its Blue Cross/Blue Shield increases to the Contract Committee because they were bargainable. (GC 2 at 4). The Company agreed to present this issue to the Contract Committee. According to Linda Derr, a former labor relations manager, just because the Company agreed to meet in Contract Committee and was not contesting the Union's position, this did not mean that the Company was agreeing to the Union's position. (Tr.249-250).

Other exchanges between the Company and Union also exemplified typical bargaining sessions, such as the Union objecting to a situation that affected the employees' terms and conditions of employment and the Company responding that it would look into the matter. On October 2, 1997, at an Executive Committee meeting, the Union complained about the effect of the merger of Aetna and US Healthcare. (R 3, Tab 56 at DUP008737). The Union stated that Family Physicians of Chester was planning on leaving the network after the merger. (Id.). Management responded that Family Physicians was still negotiating with Aetna/US Healthcare. (Id.). The Union responded

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<sup>8</sup> Although MEDCAP and the DAP were not in the contract, benefit changes were almost always announced as a change to Beneflex benefits, which were in the contract.

that since this practice was leaving because of the merger, and this would have a major impact on the employees, then the merger should have been bargained. (Id.).

Management said it was continuing to discuss this situation with the carrier, it would look into the situation, and that it had already communicated the merger to the Union when it happened. (Id.)<sup>9</sup> At an Executive Committee meeting on September 7, 1995, the Union stated its concern that John Randolph Hospital was "not approved for psychiatric care" when it was approved for other care. (GC4 at DUP0015378). The notes reflect that "[m]anagement said it will investigate the Union's concern." (Id.). In another instance in 1996, management responded to a Union question about outpatient surgery performed by an in-network gynecologist. (GC 5 at DUP0015413). On September 22, 1998, the Union asked the Company why it had chosen CIGNA as an insurance carrier. (R 3, Tab 61 at DUP008795). Although former labor relations manager Linda Derr testified at the hearing that the Company had no obligation to bargain over this matter, in 1998 the Company answered the question. (Tr. 255; Id.). On October 13, 1999, at an Executive Committee meeting discussing changes to Beneflex for 2000, the Union asked how plan rates were set and the Company answered that question as well. (R 3, Tab 64 at DUP008823). Then the Union expressly requested bargaining on the subject and the Company refused because of the Beneflex plan language. (Id.). On October 12, 2000, at an Executive Committee meeting, the Union asked the Company if the Company's announcement of changes to Beneflex was bargaining or just telling them information. (R 3, Tab 65 at DUP008840). The Company responded that it was not bargaining. (Id.).

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<sup>9</sup> It is unclear, but this may be an implicit admission by the Company that it would have had an obligation to bargain over the effects of the merger on healthcare.

**5. Union frequently asked for information when Company announced changes in order to determine whether to bargain and there is no evidence the Company ever refused to give it**

The Union also engaged in other typical behavior for a collective-bargaining representative concerning a mandatory subject of bargaining: it frequently asked for information at meetings in which benefit changes were discussed. As Irvin testified, "[t]ypically we ask for more information. We ask for plan documents or language to verify the facts that the Company's telling us. And if the change is justifiable, we simply accept it." (Tr. 38).

There are several examples of the Union requesting information in the record. For example, at a September 15, 1988 Contract Committee meeting, the Company announced changes to medical premiums, and the Union handed to the Company a document entitled "Questions/Data Required," which was a survey the Union wanted the Company to fill out so that the Union could research other insurance carriers. (GC 47 at 9 DUP008584). The minutes say that the Company would consider the request. (Id.). In fact, the Union made requests for data on subjects over which the Company, at the hearing, insisted it had no duty to bargain. Derr testified that the Company had no obligation to bargain about cost increases. (Tr. 252). On August 20, 1996, the Union requested "a copy of the figures used to compile the health care cost for 1997 so the Union can analyze the increased cost." (R 3, Tab 54 at DUP008720). Management responded that "it will determine what information is available, but the data will be of no value unless the individual reviewing the data is trained in the insurance business." (Id.). On October 12, 2000, the Union asked for comparison data of 2000 and 2001 premiums, which the Company said it would provide. (R 3, Tab 65 at DUP008841). On October

11, 2001, the Union also gave a two-page information request to the Company concerning healthcare costs which would have allowed the Union to "evaluate/confirm the accuracy of the cost increase and verify what DuPont is saying about our health care plan." (R 11, Tab 66 at DUP008847). There is no indication that the Company refused to give the Union this information. (Id.; R 11, Tab 66 at DUP008847). On October 15, 2002, the Union requested that it wanted to "see and know the process used for the figures for 2003 on how DuPont decided these premiums." (GC 14 at DUP0017850). At the same meeting, the Union requested "the estimate for insurance costs for next year, the actual paid for retirees in 2001, the costs to date in 2002, and how much money was saved." (Id.). There is no mention in the minutes that the Company refused to give this information. (Id.). On October 15, 2003, at an Executive Committee meeting, the Union asked the Company for comparison Company data after the Company told the Union that healthcare increases were better than comparable companies. (R 3, Tab 69 at DUP008931). The Company said it would try to get the data to the Union. (Id.).

Importantly, when the Union requested information that was not relevant to bargainable issues, the Company refused to give it and told the Union so. For example, the minutes from the July 21, 1997 Contract Committee meeting contain the following notes:

The Union said Management has refused to give the Union certain financial information concerning the businesses at the site. The Union said it is willing to sign a confidentiality agreement and is again requesting this financial information.

Management said it has told the Union in a previous meeting that Company production and financial information is not relevant to the items being bargained; and since ability to pay is not an issue to these negotiations, Management is not willing to provide the type of financial information the Union has requested.

(GC6 at DUP0018153).

The Company's spokesman at this meeting was Derr. (GC6 first page (meeting attendees)).

When the August 2006 changes were announced, the Company recognized that information relevant to bargaining obligations must be furnished. The confidential "Union Notification Guidelines" memo that was circulated contains the following:

**Union Information Requests**

Unions may be entitled to requested information in order to bargain. Management negotiators are cautioned to avoid flat refusals to union 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

(GC 36 at DUP005274).

**6. Many of the changes made to the plans were positive, or at least were communicated to the employees and the employees' representatives as positive**

One change highlighted by the Company in an attempt to show a practice of unilateral changes to benefits was in 1993, expanding medical pre-certification to 14 medical and surgical procedures. (R 11, inside summary). However, when communicated to the employees this change was noted as quite beneficial, as it "may save you unnecessary time and effort, and help eliminate doubt when you're faced with anyone of 14 medical or surgical procedures." (R 11, Tab 7 at D000676). DuPont routinely told the employees how much better they were faring than employees at other companies. Medical care increases in 2001 were communicated to the employees as a relative gain - "[t]his trend compares favorably with the 8-12% increases reported by many health insurers," and "our 2001 premiums will continue to be low relative to most other large companies." (R 11, Tab 30 at D001058). On April 4, 2002, when the parties were discussing health care costs, the Company insisted to the Union that the Company's

total benefit package was "pretty good." (GC 14 at DUP0017850). In 2003, 2004 increases were communicated to employees as a favorable outcome: "Compared to the double-digit increase medical plan cost increases reported nationally, *this is great news.*" (R 11, Tab 41 at D001287)(emphasis added).<sup>10</sup>

Some changes were obviously beneficial. For example, in 2004 the Company added a network of 58,000 dentists. (R 3, Tab 69 at DUP008932). The Union told the Company that "overall it is not displeased with this year's changes and this is not as bad as it thought it would be." (Id.).

Although DuPont made many minor changes to its benefit plans, it had never eliminated MEDCAP and the DAP for new employees before 2006.

Both MEDCAP and the DAP contain reservation of rights language, as found by the judge. See ALJD 3-4. There is an illustrative example in the bargaining notes on how the parties interpreted reservation of rights language. On September 9, 1987, the Company presented to the Union a "proposal" to change the DAP, which apparently was just a "clearing up of the Plan language." (GC 3 at 3). The DAP Plan document does not discuss whether the Company has an obligation to bargain over any changes to the Plan. (R 8 at DUP008260 -Article XIII, Section A). However, the Company's internal notes following this September 9, 1987 meeting state that the DAP changes "must be bargained with Union(s) before implementation; therefore, discussion must be limited to exempt employees until bargaining is initiated." (GC 2 at DUP0015270).<sup>11</sup>

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<sup>10</sup> The Company intended that employees rely on the truthfulness of what was stated in Plain Talk. (Tr.212).

<sup>11</sup> This internal note does not appear in R 3, Tab 29, which is the same meeting minutes offered by the Company.

There is no dispute that DuPont did not bargain with the Union before it eliminated MEDCAP and the DAP for new employees. (J1, Stipulation 19).

### III. ANALYSIS

#### **A. Board Law Requires DuPont To Bargain Over Future Retirement Benefits Or Provide Evidence Of Clear And Unmistakable Waiver Of Union's Right To Bargain Over Elimination Of MEDCAP And The DAP**

Before engaging the Respondent's Brief directly, it will be useful to expound on important Board principles concerning waiver.

A collective-bargaining representative has a statutory duty to bargain over future retirement benefits. *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180, 92 S. Ct. 383, 398, 30 L. Ed. 2d 341 (1971) ("To be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well established statutory subject of bargaining."). An employer violates Section 8(a)(5) of the Act when it makes unilateral changes to benefits that are a mandatory subject of bargaining without bargaining. *NLRB v. Katz*, 369 US 736 (1962). A collective-bargaining representative may waive a statutory right to bargain; however, this waiver must be clear and unmistakable. *Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693, 710, fn. 12 103 S. Ct. 1467, 1478, 75 L. Ed. 2d 387 (1983) ("The Courts of Appeals have agreed that the waiver of a protected right must be expressed clearly and unmistakably."). The party asserting waiver bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810, fn. 2 (1984).

If a party asserting waiver contends that the waiver was effected through bargaining history, it must show that the issue was "fully discussed" and "consciously explored." *Davies Medical Center*, 303 NLRB 195 (1991) (finding no waiver of right to

information even though Union did not always previously ask for information because waiver subject was not "fully discussed" and "consciously explored"); *Reece Corp.*, 294 NLRB 448,451 (1989) (bargaining history can only establish a waiver if "fully discussed" and "consciously explored" or "consciously yielded"); *General Electric Co.*, 296 NLRB 844, 857 (1989) ("Additionally, Respondent has not demonstrated that the Union expressly, at the bargaining table, made a conscious relinquishment, clearly intending and expressly bargaining away its statutory right [to bargain over subcontracting].").

Moreover, the Board and the courts have recognized 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 Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45 (D.C. Cir. 2005) (quoting *Verizon New York v. NLRB*, 360 F.3d 206, 209 (D.C. Cir. 2004), quoting *Owens-Corning Fiberglass*, 282 NLRB 609) ("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") (finding no waiver where employer claimed that union had known for a long time that Company used surveillance cameras). It is not enough to show, "[a]t most ... the Union's silent acquiescence to certain prior changes in retiree benefits." *Midwest Power Systems, Inc.*, 323 NLRB 404, 407 (1997), enforcement denied on other grounds, remanded 159 F.3d 636 (D.C. Cir. 1998) (unpub.).

The Board has applied these standards in several cases where it found that an employer had violated Section 8(a)(5) of the Act by making a unilateral change to future retirement benefits. In *Mississippi Power Co.*, 332 NLRB 530, 531-32 (2000), enforcement granted in part and remanded, 284 F.3d 605 (5th Cir. 2002), the Board found a violation where the Company unilaterally changed future retirement benefits without

bargaining with the union. In that case, the Board found no waiver from the medical plan document, "an employer-created document" that was "in no way an 'explicit' statement by the Union about any subject, much less a permanent waiver of the Union's right to bargain over the future retirement benefits of active workers." *Id.* at 531. Further, the Board was unmoved by the Company's bargaining waiver argument, holding that the union's failure to request bargaining over prior changes did not "betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past." *Id.* at 532 (citing *Exxon Research & Engineering Co.*, 317 NLRB 675, 685-686 (1995), *enf. denied* on other grounds 89 F.3d 228 (5th Cir. 1996)).<sup>12</sup> In *Southern Nuclear Operating Co.*, 348 NLRB 1344 (2006), enforced in part, remanded in part, 524 F.3d 1350 (D.C. Circuit 2008), the Board adopted the judge's finding that the union did not waive its right to bargain over changes to future retirement benefits because past acquiescence to unilateral changes "does not irrevocably waive its right to bargain over such changes in the future," *id.* at 1352, and also because plan documents containing reservation of rights language were not part of the collective-bargaining agreement and thus not binding on the union's statutory right to bargain. *Id.* at 1354. On appeal, the D.C. Circuit rejected the company's assertion that the reservation of rights language in the benefit plan documents, though not part of the collective-bargaining agreement, were binding on the union:

[The companies] contend that their collective-bargaining agreements with the unions incorporated the benefit plans' reservation-of-rights clauses on the basis of the unions' 'course of conduct.' For instance, the Companies

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<sup>12</sup> The judge's discussion of the facts in that case makes clear that several times in prior years, the Company simply announced to the union that changes were coming and the union did not object to the changes. *Id.* at 537 ("Frequently the Union simply did not object to the proposed changes.").

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.

*Southern Nuclear Operating Co. v. N.L.R.B.*, 524 F.3d 1350,1358-59 (D.C. Cir. 2008).

More recently, in *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. (2010), the Board found that the Company violated Section 8(a)(5) when it unilaterally implemented a generic-first prescription drugs program without bargaining with the union. In that case, the Board found that the Company failed to establish that it had a past practice of implementing changes to its prescription drug program. *Id.* at 3. Importantly, the Board found that even if there had been a "practice," the change at issue "represented a material departure from that past practice." *Id.* In that case, prior changes were made to certain families of generic prescription drugs, but the change at issue there affected all generic drugs. *Id.* Accordingly, the change was not "limited in scope" as the prior changes. *Id.* Finally, the Board reiterated its long-held waiver analysis, that "[i]t is well settled ... 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." (quoting *Owens-Corning*, *supra*).

The Respondent also relies on the *Courier-Journal* cases, 342 NLRB 1093 (2004), and 342 NLRB 1148 (2004), in which the Board held that a past practice of making unilateral changes to benefit plans might privilege the employer to continue to make similar changes without bargaining with the employees' collective-bargaining representative. The Board revisited *Courier-Journal* in *E.I. DuPont De Nemours*, 355 NLRB No. 176, slip op. (2010). In *E.I. DuPont*, the Board restricted *Courier Journal* to unilateral changes made to benefit plans during a hiatus between CBAs and noted that it

was "in tension with previously settled principles" concerning waiver as noted above. *Id.* at fn. 5. Further, *E.I. DuPont* distinguished *Courier-Journal* on its facts, finding that the record in *E.I. DuPont* did not show that there was any history of making changes during the hiatus between CBAs. *Id.*, slip op. at 2.<sup>13</sup>

The Board has also stated that there is no duty to furnish information on subjects over which there is no duty to bargain. *Embarq Corp.*, 356 NLRB No. 125, slip op. at 17 (Mar. 31, 2011);<sup>14</sup> see also *BC Indus., Inc.*, 307 NLRB 1275 fn. 2 (1992) (finding no duty to furnish information about partial closure "[b]ecause Respondent BCI had no statutory obligation to bargain about the partial closure decision"). An information request sent to an employer constitutes a request for bargaining. *Eldorado, Inc.*, 335 NLRB 952, 954 (2001).

### **B. Dupont Failed To Bargain Over Future Retirement Benefits And Violated The Act**

In this case, DuPont violated Section 8(a)(5) of the Act by failing to bargain over future retirement benefits for new employees. There is no dispute that DuPont eliminated MEDCAP and DAP benefits for employees hired after January 1, 2007. (J1, Stipulations 5, 17, 18). The record shows that the Union requested bargaining over these changes immediately after being told that the Company intended to implement them. (Tr.35).

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<sup>13</sup> *Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005), is also inapposite and appears to be *sui generis*. In that case, a Board majority found the union was estopped from objecting to unilateral changes to a profit-sharing plan because at recent negotiations the subject of modifying the plan was raised and nothing was added to the parties' contract. Further, there was a history of unilateral changes with no requests for bargaining, no information requests from the union, and no other objections from the union. In this case, there is an abundance of evidence of requests to bargain from the Union, information requests positively responded to by the Company, and no immediately prior negotiations on the subject of the elimination of MEDCAP and the DAP for new employees. Accordingly, this case is inapposite.

<sup>14</sup> "[T]he "decision" to close the Las Vegas call center was not a mandatory subject of bargaining. The Respondent's refusal to bargain over the closure" decision" was not unlawful. It, therefore, logically follows that the Respondent was not legally required to comply with the Union's information request, to the extent that it dealt with the decision" to close. The Board has so held in a number of cases. See *BC Industries*, 307 NLRB 1275 (1992), citing *Cowles Communications*, 172 NLRB 1909 (1968)."

There is no dispute that the Union also requested bargaining when it filed a grievance over the changes. (J1, Stipulation 14 and attached Exhibit G). Further, there is also no-- (ijispute that DuPont eliminated these benefits unilaterally without bargaining with the Union. (Id. at Stipulation 19). Accordingly, the Respondent violated Section 8(a)(5) by eliminating MEDCAP and DAP benefits for new employees. *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 180,92 S. Ct. 383, 398, 30 L. Ed. 2d 341 (1971) ("To be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.").

Because the Acting General Counsel has proven the violation of the Act, the only issue left to be decided is whether the Respondent has carried its burden of showing that the Union clearly and unmistakably waived its right to bargain over the elimination of MEDCAP and the DAP for new employees. The following analysis shows that the reservation of rights language in the MEDCAP and DAP plan documents is not part of the collective-bargaining agreements, there was never a conscious exploration of the elimination of MEDCAP and the DAP or that the elimination of those plans was "fully discussed" concerning any of the prior changes. *Davies Medical Center*, 303 NLRB 195 (1991). The litany of minor, sometimes positive, changes to these plans in no way constitutes a waiver of the Union's right to bargain over the elimination of them for new employees. Indeed, there is substantial evidence that the parties did engage in bargaining over many of these changes. Accordingly, the record demonstrates that the Respondent has failed to carry its burden in proving that the Union waived its statutory right to bargain over the elimination of MEDCAP and the DAP for new employees.

Board law is clear that even if the Union waived its right to bargain over prior changes, the Union has not waived its right to bargain over future changes. This is long-standing Board precedent. *Brewers and Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45 (D.C. Cir. 2005) (quoting *Verizon New York V. NLRB*, 360 F.3d 206, 209 (D.C. Cir. 2004), quoting *Owens-Corning Fiberglass*, 282 NLRB 609) ("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"). The Board has also explicitly held so in prior cases concerning future retirement benefits. *Mississippi Power*, supra (finding no waiver where union had acquiesced in prior changes); *Midwest Power*, supra.

Additionally, these changes, mostly cost increases, never concerned the elimination of MEDCAP and the DAP for new employees. Thus, the parties never began to discuss the issue of eliminating these programs for new employees, let alone "consciously explore" or "fully discuss" them as required for a waiver. *Davies Medical Center*, 303 NLRB 195 (1991). Accordingly, the Union's alleged acquiescence to any prior change does not constitute a waiver under Board law.

#### **IV. REBUTTAL OF RESPONDENT'S BRIEF**

##### **A. 25 Year-Old Negotiations Over Defunct Contract Do Not Constitute A Waiver – Answer to Respondent's Brief pp. 12-24**

Despite the fact that MEDCAP and the DAP are not in the contract, DuPont asserts that their reservation of rights language controls this case because in 1986 the parties had negotiated the use of MEDCAP by Union-represented employees, and that the Union agreed then that the employees would receive MEDCAP benefits subject to the reservation of rights provision. This assertion lacks merit because, as seen in the Acting General Counsel's Brief in Support of Limited Cross-Exceptions, the Respondent's own

evidence shows the parties were not negotiating MEDCAP in 1986, and further that the contractual provision at issue then has now expired, and it is not even clear that the Union agreed to be bound to a reservation of rights provision.

**1. The parties never negotiated the use of MEDCAP and its reservation of rights provision**

This issue is addressed in Acting General Counsel's Brief in Support of Limited Cross-Exceptions.

**2. The healthcare provision the parties negotiated in 1986 no longer exists**

The healthcare provision that the parties did negotiate in 1986 no longer exists. As shown above, the provision the parties were negotiating was Article XIV in the P&M contract and Article VIII in the CT&O contract, "Hospital and Medical-Surgical Coverage." (R 3, Tab 18 at DUP00008398). These provisions no longer exist. (See J1, Exhibits A and B). To the extent that those provisions incorporated reservations of rights language in plan documents, the question is moot because those sections no longer exist. Healthcare coverage for active employees is now contained in Article VII of both contracts under Beneflex. (Id.). As is mentioned above, MEDCAP and DAP are not in the contract. Accordingly, whatever provision was negotiated in 1986 has been superseded by the current contract.

**3. Record evidence does not clearly show that defunct collective-bargaining provision the Union agreed to in 1986 contained reservation of rights**

The record further shows that, although the parties discussed the reservation of rights provision in the Aetna plan they were negotiating in 1986, it is not clear that the contract bound the Union to that provision. As noted above, the Union continually stated

its lack of agreement during negotiations with a management rights provision. (R 3, Tab 19 at DUP008437, Tab 20 at DUP008451-52, Tab 21 at DUP008476, and Tab 22 at DUP008481). When the parties appeared to have come to an agreement in September 1986, the parties continued to negotiate where the HMS section would go. The Union argued that the HMS provision should go in Article VII where the other benefit plans were expressly subject to a management rights provision. (R 3, Tab 23 at DUP008492, Tab 24 at DUP008502; see also R 6(b) at 16 ("All existing privileges ... "subject to the provisions of such Plans")). The Company did not want HMS to appear there because it did not want to be bound by other provisions of Article VII, including the one-year notice provision before a change could be made. (R 3, Tab 24 at DUP008499). Importantly, the final agreement, Article XIV in the P&M contract, contains only an oblique reference to the Aetna plan, stating that "[t]he COMPANY may make available to employees alternate hospital and medical-surgical coverage plans." (R6(b) at 36). Further, this clause, unlike Article VII, contains no express incorporation of the Plan documents. Therefore, given the Union's disagreement with the management rights provision as stated several times during negotiations, the parties' ability to reference incorporation of reservation of rights in other parts of the contract (Article VII), the evidence arguably suggests that the Union did not agree to be bound by the Aetna plan's reservation of rights provision. The burden of proof is on the Respondent to show a clear and unmistakable waiver, and these facts, which are far from clear, preclude any such finding. Accordingly, to the extent the Board wishes to entertain DuPont's assertions concerning these negotiations, the evidence does not show the Union agreed to be bound to a reservation of rights provision.

**4. The judge correctly found that the Respondent represented to the Union that MEDCAP would never be eliminated – Answer to Respondent’s Brief pp. 25-28**

As the judge correctly noted, the Respondent told the Union in 1987 that it had no plans to discontinue the retiree medical plan, that it might change the plan or that retirees may have a different plan. (ALJD17:8-10). Accordingly, the Union has every right to bargain over the elimination of retiree health care for new employees and the Respondent should be estopped from refusing to bargain.

The Respondent’s first argument, that it has eliminated nothing, is semantic wordplay. The Respondent is correct that it has only modified an eligibility formula. However, the Respondent has modified that formula so that all employees hired after January 1, 2007 will receive no retiree health or dental care. Either the Respondent has eliminated retiree health and dental care for new employees, or it has defined it out of existence. Either way, employees hired after January 1, 2007 will receive no retirement health or dental care from the Respondent. This must be bargained.

The Respondent’s second argument, that future retirees should not have and could not have relied on this representation, also misses the point. The reliance was on the part of the Union, not employees or future employees, because the Union as the collective-bargaining representative now knew that these benefits, even if modified, would not be taken away. To the extent that the Respondent argues that the clear plan language should have put the Union on notice of the reservation of rights, this is an argument that the Union should not have believed what the Respondent clearly told them.<sup>15</sup>

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<sup>15</sup> None of the cases cited by the Respondent, which are not Board cases, have the same kind of affirmative representation that the benefit would continue, or if modified, be continued under a different plan. Accordingly, those cases are inapposite.

**5. Prior changes were minor and did not constitute a waiver under *Caterpillar* – Answer to Respondent’s Brief pp. 29-31**

As stated above, there can be no waiver in this case based on the Union's alleged acquiescence to prior changes. However, even if such a waiver were possible, the changes in this case are of a different kind from prior ones, such that the Union's alleged prior acquiescence was not sufficient to waive its right to bargain over these changes. Again, a review of the changes discussed above shows that the vast majority of them are simply premium increases, or other increases in cost that employees were going to have to pay. Additionally, there were some changes in eligibility standards. However, there was never an elimination of the program for new employees, as in this case. Further, there was no testimony that the changes in eligibility standards had any effect on any employee at Spruance. Indeed, the same-sex partner issue did not even cut benefits, but rather liberalized them.<sup>16</sup>

The Board's recent decision in *Caterpillar*, supra, is dispositive of this issue. The Board found that the prescription drug change at issue there was "a material departure" from prior changes and thus required bargaining. *Catepillar*, 355 NLRB, slip op. at 3. In this case, DuPont may have raised premiums and altered some eligibility formulas, but after each change new employees were still going to have healthcare and dental care in retirement. That is no longer true. As Irvin credibly testified, new employees will now have no healthcare or dental care from age 58 to 65 when Medicare begins. (Tr. 40-41). This is a momentous change. The 2006 change was a "material departure" from anything done in the past, and so there is no past practice of eliminating MEDCAP and the DAP.

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<sup>16</sup> Union resistance to this particular change focused on the failure to liberalize the benefits even further. See R 3, Tab 70 at DUP008955-56.

Accordingly, the past changes do not constitute a waiver of the Union's right to bargain over the elimination of MEDCAP and the DAP for new employees.<sup>17</sup>

This analysis also demonstrates why *Courier-Journal* is distinguishable. As the Board has explained, that case turned on finding a past practice of similar unilateral changes. *E.I. DuPont*, 355 NLRB, slip op. at 2. The elimination of future retirement benefits here is a "material departure" from the alleged past practice, and thus the past practice cannot privilege the Company's unilateral elimination of MEDCAP and the DAP for new employees. Accordingly, *Courier-Journal* is inapposite to the issue here.

**6. MEDCAP And DAP Are Not In The Contract And Their  
Reservation Of Rights Language Has No Effect On Union's Right  
To Bargain – Answer to Respondent's Brief pp. 31-32**

The Respondent's argument, that the parties fully discussed and the Union agreed to a reservation of rights clause in 1986 and that therefore the Union is bound to that reservation of rights language, skirts the most fundamental issue in this case: no such language exists in the CBAs in this case. The Respondent admits this point, at 13 of the Brief, saying that "the Union's express waiver is not found in the parties' collective-bargaining agreement," and that an "express waiver" is instead found in other extrinsic evidence. However, the Union is not bound to the plan documents and is not signatory to them. As the parties stipulated, "[n]either MEDCAP nor the Dental Plan is referred to in the ARWI CBA and are not arbitrable under the ARWI CBA." (J1, Stipulation 21). The P&M and CT&O CBAs are attached to the exhibits and they reflect this fact, that these two plans are not part of the CBA. (See Exhibits A and B to Stipulation 21 in J1).

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<sup>17</sup> For an illustrative example of how Judge Goldman handled a very similar case where the employer was alleged to have unlawfully eliminated retirement benefits, see *FirstEnergy Generation Corp.*, 2010 WL 3982209, Div. of Judges, Sep. 17, 2010, 06-CA-036631 (including a discussion of the dispositive role of *Caterpillar*).

Further, the parties understood how to bind themselves to plan documents as both of the CBAs have an Article VII, Industrial Relations Plans and Practices which say that employee benefits are "subject to the provisions of such Plans." (Id.). In both of these CBAs, the plans incorporated by this reference are listed, and, as the parties have stipulated, MEDCAP and the DAP are not listed there.

As noted above, the Board and the D.C. Circuit have held that plan documents containing reservation of rights language do not bind unions when the plan documents are not part of the collective-bargaining agreement. *Southern Nuclear*, supra, at 1358-59. This is so even though employees may receive benefits under those plans, like the employees here. Id. *Southern Nuclear* is very clear – “it is only express language in the collective bargaining agreement that incorporates a reservation-of-rights clause.” Id. Accordingly, the Union is not bound to the reservation of rights provision in the MEDCAP and DAP plan documents. Therefore, the reservation of rights language does not constitute a clear and unmistakable waiver. *Southern Nuclear*, supra.

The Respondent’s attempt to distinguish *Southern Nuclear* and *Mississippi Power*, 332 NLRB 530, 531-32 (2000), enfd. in part, 284 F.2d 605 (5<sup>th</sup> Cir. 2002) is not persuasive. The Respondent argues that the reservation of rights language in the MEDCAP and DAP plan documents are part of an agreement, an unwritten quid pro quo lasting since 1986. However, these cases turn on the finding that there was no agreement, to which the union was a signatory, indicating that the plan documents were incorporated into that agreement. Similarly, in this case the parties have a contract, and MEDCAP and the DAP are nowhere in it. Accordingly, *Southern Nuclear* and *Mississippi Power* are directly on point and the MEDCAP and DAP plan documents do not bind the Union.

**7. Despite existence of reservation rights language that actually was in the contract, DuPont still recognized that it had to bargain over changes – Answer to Respondent’s Brief pp. 33-36**

DuPont asserted continually at trial that the reservation of rights language in the MEDCAP and DAP plan documents allowed it to make changes without bargaining. However, it has acted contrary to this position. On September 9, 1987, the Company announced changes to the DAP that amounted to a mere "clearing up of the Plan language." (GC 3 at 3). Despite the existence of the DAP reservation of rights language expressly incorporated by Article VII at the time, DuPont's own internal documents stated that these changes "must be bargained with Union(s) before implementation." (GC 2 at DUP0015270). Again, when DuPont announced premium increases in 1991, it told employees that "[b]argaining has been completed with the ARWI and IBEW on the 1992 BC/BS Major Medical premiums." (R 4, Tab 3). When it made a similar announcement in 1992, DuPont stated "[b]argaining has been completed with the ARWI and IBEW on the 1993 BC/BS Major Medical premiums." (Id., Tab 4). On January 6, 1993, the Company announced that in 1994 it would start implementing some changes and direct the Company's focus on containing healthcare costs, as enunciated in Chairman Woolard's letter at the end of 1992. (R 4, Tab 6 at DUP009075). However, that same announcement on January 6 also states "[t]here are no hard and fast details yet, and, once details become available, they will be subject to bargaining at Spruance." (Id.).<sup>18</sup> Other times, the Union expressed to the Company its desire to bargain over changes. (GC 8 at DUP0015456-57 (Union insisting on right to bargain December 1997, and DuPont agreed it would give Union the information in Contract Committee».) This also happened in

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<sup>18</sup> This letter from Chairman Woolard disposes of the Respondent's argument in fn. 18 of its Brief that Woolard was only referring to Blue Cross/Blue Shield. Woolard is clearly referring to the larger changes coming up, including Beneflex.

1999 when the Union requested bargaining over plan rates. (R 3, Tab 64 at DUP008823). Additionally, the Union would not have asked the Company in 2000 if the Company's announcement of changes to Beneflex was bargaining or just telling them information if the Union did not believe that it had a right to bargain over the changes. (R 3, Tab 65 at DUP008840).

At the risk of stating the obvious, there can be no waiver of a right to bargain based on bargaining history if the history shows that bargaining was requested over prior changes. The record shows numerous examples where bargaining over prior changes did take place.

Further, the record shows that the Union and DuPont engaged in effects bargaining over changes. This happened in 1997 when the Union complained about the effect of the merger of Aetna and USHealthcare on Family Physicians of Chester. (R 3, Tab 56 at DUP008737). Management's agreement to look into the Union's complaint effectively amounts to bargaining, as the Company would not have engaged in this activity if it had no duty to bargain. Irvin's testimony also supports this contention as he credibly testified that during one set of changes the Union complained about the effect on the number of physicians available to employees, and DuPont went back and added more doctors to the plan. (Tr. 40, referring to DuPont adding more doctors to the plan after the Union complained of the effect of switching from Cigna to Aetna). Thus, it is clear that the Union frequently demanded bargaining over plan changes and did engage in effects

bargaining. For this reason alone, there can be no finding of clear and unmistakable waiver of the right to bargain over the elimination of MEDCAP and the DAP for new employees.<sup>19</sup>

**8. Union made information requests which were never refused –  
Answer to Respondent’s Brief pp. 37-40**

As shown above, the Board has stated that there is no duty to furnish information to a union when the union has no duty to bargain over the subject of that information. *Embarq Corp.*, supra; *BC Indus.*, supra; see also *Miami Rivet of Puerto Rico*, 318 NLRB 769, 771 (1995) (finding no obligation to furnish information concerning tax exemptions and notification to government officials about a layoff because not relevant or necessary for effects bargaining). The Board has also held that an information request constitutes a request for bargaining. *Eldorado, Inc.*, 335 NLRB 952 (2001).

In light of these cases, the frequent information requests that the Union made when plan changes were announced suggests there was a great deal of bargaining occurring. The record contains numerous examples of information requests, which Irvin testified were necessary for the Union to determine how it would respond to the change. (Tr. 38). Although the Company asserts it has no duty to bargain over insurance carriers, there is no evidence that it refused to give the Union information in 1988 that the Union admittedly wanted to use to research other insurance carriers. (GC 47 at DUP008584). Similarly, DuPont said it would look into the Union's assertions concerning the non-approval of John Randolph Hospital for psychiatric care. (GC4 at DUP0015378). In

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<sup>19</sup> Irvin’s testimony that some of these changes were significant and substantial does not undermine this analysis. Irvin also testified that the Union understood when it was getting a relatively good deal. (Tr. 38). One of the changes Irvin said was substantial concerned lifetime caps, which a Company witness testified were never even implemented. (Tr. 189). Additionally, Irvin did not say in any way that he thought increasing the cost of MEDCAP and the DAP most years was the same thing as eliminating them for new employees.

another instance in 1996, management responded to a Union question about outpatient surgery performed by an in-network gynecologist. (GC 5 at DUP0015413). Other requests for information that the record does not show were refused include "a copy of the figures used to compile the health care cost for 1997 so the union can analyze the increased cost," (R 3, Tab 54 at DUP008720) (management said it would find out what was available), comparison data of 2000 and 2001 premiums, which the Company said it would provide, (R 3, Tab 65 at DUP008841), a two-page information request concerning healthcare costs to "evaluate/confirm the accuracy of the cost increase and verify what DuPont is saying about our health care plan," (R 11, Tab 66 at DUP008847), "the process used for the figures for 2003 on how DuPont decided these premiums," (GC 14 at DUP0017850), "the estimate for insurance costs for next year, the actual paid for retirees in 2001, the costs to date in 2002, and how much money was saved," (Id.), and comparison Company data for 2003 after the Company told the Union that healthcare increases were better than comparable companies, (R 3, Tab 69 at DUP008931). Undeniably, these information requests went to the heart of the decision to raise premiums and change carriers. As Irvin testified, these information requests informed the Union's consideration of whether to challenge the Company's decisions. DuPont's witnesses testified there was no obligation to bargain over these decisions to raise employees' healthcare costs. (Tr. 252). DuPont's witnesses testified that they had no obligation to bargain over a change in carriers, either. (Tr.255). Yet, there are no refusals of the Company to provide this information. Importantly, when the Union requested production and financial information, which the Company told the Union was not relevant, the Company refused to give it and told the Union so. (GC6 at

DUP0018153). These information requests, complied with by DuPont, show that "the union was seeking to fulfill its role as the collective-bargaining representative of the employees." *Eldorado*, 335 NLRB at 954. Accordingly, they also show that there is no clear and unmistakable waiver here.

The cases cited by the Respondent in its Brief, at 37, are distinguishable. In *Ingham Regional Medical Center*, 342 NLRB 1259, 1262 (2004), and in *Western Summit Flexible Packaging*, 310 NLRB 45 (1993), the Board did not find a clear and unmistakable waiver despite the acquiescence of an employer to a union's information request. Rather, in *Ingham*, the Board expressly did not reach the issue of waiver, and found that the management rights clause in the contract demonstrated that there was no duty to bargain over subcontracting. In this case, there is no management rights or reservation of rights in the contract between the parties concerning MEDCAP or the DAP. Similarly, in *Western*, the letter from the union requesting information was found by itself to be the waiver of bargaining by its very wording. Again, this has no application to this case.<sup>20</sup>

**9. Board law supports judge's finding that Respondent had an obligation to bargain with the Union – Answer to Respondent's Brief pp. 41-47**

Cases cited by the Respondent for its contention that its history of prior premium increases and other changes justifies its actions in this case are all distinguishable. *California Pacific Med. Ctr.*, 337 NLRB 910, 914 (2002), does not stand for the proposition that a union waives its right to bargain over a subject if it continuously acquiesces to similar changes. Instead, the Board found that the contractual language

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<sup>20</sup> *Budd Co.*, 348 NLRB 1223 (2006), does not support the Respondent's parenthetical – "despite Union's requests for information and the company's cooperation with such requests, management rights clause reflected waiver of the Union's right to bargain over new safety rules."

itself in the parties' management rights clause, under either the Board's standard of clear and unmistakable waiver, or the contract coverage standard, privileged the company's actions and precluded a finding of an unfair labor practice. (Id. at 12 910, fn. 1). *Litton Microwave Cooking Products v. NLRB*, 868 F.2d 854, 858 (6th Cir. 1989), expressly held that the management rights clause of the collective-bargaining agreement allowed the company to engage in the actions at issue there (and bolstered its conclusion with the observation that the union had a history of acquiescing to the same conduct). There is no management rights clause here to interpret; the plans at issue are not in the contract. *Uforma/Shelby Business Forms v. NLRB*, 111 F.3d 1284, 1291 (6th Cir. 1997), cited for the proposition that "previous acquiescence suggests that the union acknowledged the right of the employer to act without notice or bargaining," is a Sixth Circuit decision and not Board law. Further, the underlying Board decision found that the employer had violated the Act. Furthermore, that case also concerned the interpretation of contractual language and whether a zipper clause in the collective-bargaining agreement constituted a clear and unmistakable waiver. 111 F.3d at 1291; 320 NLRB 71, 72 (1995). In this case, there is no zipper clause at issue, and no contractual language to interpret.<sup>21</sup>

Finally, the Respondent's reliance on the *Courier-Journal* line of cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004), is misplaced. In *Courier-Journal*, the Board found that the employer had established that it had a past practice of making changes to healthcare premiums even when there was no governing management rights

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<sup>21</sup> The Respondent also cites *Mount Clemens General Hospital*, 344 NLRB 450 (2005) for its waiver argument. However, the Board stated in that case that "the only exception before the Board is the General Counsel's exception to the judge's failure to conform his recommended Order and notice to his finding that the Respondent violated Sec. 8(a)(5) and (1) by refusing to furnish to the Union Joy Johnson's personnel file, the names and positions of interns and externs, and the number of general beds that were added to specialized hospital units." Id. at fn. 2. Accordingly, due to the lack of exceptions, the Board never reviewed the judge's analysis of *Courier-Journal*. Additionally, that case also contained analysis of whether a waiver existed in management rights language. Id. at 460.

clause in effect. *Courier- Journal*, 342 NLRB at 1094. The Respondent contends, at 43-47 of its Brief, that it also has established that it has a past practice of making changes to its healthcare plans even though the collective-bargaining agreement did not contain a reservation of rights clause, and therefore it may safely eliminate MEDCAP and the DAP for new employees in keeping with that practice. The Respondent's contention lacks merit. First, as noted above, the Union did demand bargaining on a number of occasions (expressly and through the use of information requests), and the Company admitted that it bargained on a number of occasions. Second, many of the changes in this case were positive for the employees, as noted above. Third, there is no past practice of eliminating MEDCAP and the DAP for new employees.

The assumption behind the Company's position is that all changes to healthcare are substantially the same – change is a change regardless of its nature and scope. However, this contention is overwhelmed by *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. (2010). In that case, the Board found unlawful the employer's implementation of a "generic first" program, even though the employer had previously made changes to its prescription drug plan, including instituting preauthorization requirements, drug quantity limits and step therapies. (*Id.* at 2). The Board found that there was no established past practice, but then found that even if there was, the employer's changes were a "material departure" from the prior changes, which had only affected "certain drugs or families of drugs." (*Id.*). Thus, *Caterpillar* disposed of the very argument the Respondent rests its case on here – that a history of small changes privileges an employer to make large changes without bargaining. In this case, assuming there is a past practice, the

Respondent has deviated from it by entirely eliminating retirement healthcare and dental care, rather than increasing its costs periodically and altering eligibility formulas.

**10. The judge's remedial order is correct**

The Respondent contends that it is improper for the judge to recommend that MEDCAP and DAP benefits be restored to new employees because these benefits are dependent on the employees being pensioners, and the Respondent lawfully changed its Pension Plan such that these employees will never be pensioners anymore. First, this argument should be left to compliance. Second, this is irrelevant because the issue here is retiree health care, which is a mandatory subject of bargaining. The Respondent may not lawfully eliminate retiree health and dental care for new employees without bargaining with the Union, regardless of what plan those benefits fall under.

**11. DuPont's position is inconsistent with its own actions at the bargaining table**

The point made above that DuPont insists it had no duty to bargain over certain issues but then regularly acquiesced to the Union's information requests underscores the Company's own inconsistent behavior at the bargaining table. Further evidence of this was given by Derr when she testified about the Union's occasional insistence that certain information only be heard in the Contract Committee. As stated above, the Contract Committee met to discuss changes to the contract and sometimes the Union insisted that certain information be heard there, as opposed to the Executive Committee. Derr testified that she readily gave in on this point. However, Derr testified that DuPont was not agreeing with the Union's position that the information had to be given to the Contract Committee. See Tr. 248-250.

These two examples show the inconsistency of DuPont's position. DuPont wants to hold the Union to a standard it cannot meet itself. DuPont asserts that because the Union never filed an unfair labor practice or expressly requested bargaining each time, that the Union must have waived its right to bargain over changes. However, when the Company acquiesced to the Union's demand to hear information in the Contract Committee, there was no waiver of rights. When the Company acquiesced to information requests for data that the Company claims the Union had no right to (based on no duty to bargain), it again has not waived any rights. Quite simply, DuPont cannot have it both ways. If DuPont hasn't waived in either of these situations, then neither has the Union.

**12. Union strategically made decision to go along with many changes because benefit plans were still excellent and costs were going up**

Irvin testified credibly that the Union knew that healthcare costs were always going up. (Tr. 38). This is not a controversial point. A cursory review of Respondent's Exhibit 11 shows a constant reminder to employees that healthcare costs were increasing. Thus, healthcare premium increases that affected MEDCAP and the DAP were also not surprising. Irvin credibly testified that "most of the time we felt like that the increases are consistent with what's going on nationally and it's not an unreasonable request." (Tr. 38). Further, DuPont's benefits, even after the cost increases, still compared favorably to other employers, both nationally and locally. (GC 14 at DUP0017850; R 11, Tab 30 at DUP001058; Tr. 41). Accordingly, the Union's decision to not file unfair labor practice charges or demand bargaining over premium increases reflected a strategic decision that anything gained in bargaining would not be better than what had been presented. Additionally, there was no reason for the Union to file an unfair labor practice charge over changes that improved the employees' benefits. As shown above, a 1993 change

that expanded medical pre-certification to 14 medical and surgical procedures would have the effect of "sav[ing] you unnecessary time and effort, and help eliminate doubt when you're faced with anyone of 14 medical or surgical procedures." (R 11, Tab 7 at D000676). Other changes were noted for the fact that they "compare[d] favorably" with healthcare increases at other companies. (R 11, Tab 30 at D001058). In bargaining, the Union recognized that many changes were not bad for the employees, relatively speaking (GC 14 at DUP0017850) (total benefit package was "pretty good)." In 2003, 2004 increases were communicated to employees as a favorable outcome: "Compared to the double-digit increase medical plan cost increases reported nationally, *this is great news.*" (R 11, Tab 41 at D001287)(emphasis added). Other changes simply added benefits (in 2004 the Company added a network of 58,000 dentists, see R 3, Tab 69 at DUP008932).

The following is a list of changes compiled from the summary in R3 which were positive for the employees:<sup>22</sup>

- 1987 provided two new HMO offerings
- 1987 expanded MEDCAP to include in vitro fertilization
- 1988 100% reimbursement of accidental injuries treated in a doctor's office
- 1993 expansion of the pre-certification program, as explained above
- 1994 new preventive care benefits
- 1997 new 100% coverage for mammograms
- 1998 eliminated annual payment limit for non-network outpatient mental health benefits
- 1999 Reduced deductibles
- 2000 implantology became covered under DAP
- 2001 removed requirement that dependent children live with employee in parent/child relationship
- 2001 amended subrogation of claims process
- 2001 covered colonoscopies and PSA blood test screens
- 2004 new DAP feature, Preferred Dentist Program
- 2006 added new medical-only option under MEDCAP

Accordingly, it would be manifestly unjust to find that the Union had clearly and unmistakably waived its right to bargain over the elimination of MEDCAP and the DAP

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<sup>22</sup> Other changes are simply neutral or on their face difficult to determine the impact on employees.

for new employees because it acquiesced to the addition of more and better benefits for the employees.

## V. CONCLUSION

For all these reasons, the record supports the judge's finding that the Respondent violated Section 8(a)(5) of the Act when it eliminated MEDCAP and the DAP for new employees. The facts supporting this finding were essentially stipulated to by the parties. The record introduced by the Respondent in an attempt to prove the Union clearly and unmistakably waived its right to bargain over this change is factually and legally inadequate. Accordingly, the Respondent should be ordered to rescind these unlawful changes and bargain with the Union.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that this Answering Brief of Counsel for the Acting General Counsel was electronically filed on October 31, 2011, and, on that same day, copies were electronically served on the following individuals by email:

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