UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 25-CA-092145

Raytheon Network Centric Systems,

and

United Steel, Paper and Forestry,
Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers
International Union, AFL-CIO, CLC.

RESPONDENT RAYTHEON NETWORK CENTRIC SYSTEM'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND REQUEST FOR ORAL ARGUMENT

Respondent, Raytheon Network Centric Systems ("Raytheon" or "Respondent"), pursuant to Rule 102.46 of the National Labor Relations Board's ("NLRB" or "Board") rules, files the following Exceptions to the decision of Administrative Law Judge ("ALJ") Eric M. Fine, dated November 19, 2013.[1]

1. Respondent excepts to the ALJ's reliance upon and the relevance of the fact Raytheon made changes to its benefits plan for bargaining unit employees during a hiatus period between contracts when determining that no valid maintenance of the status quo, based upon past practice, had occurred. (ALJD p. 3, lines 45-47).

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[1] Citations to the Administrative Law Judge's decision will be referenced as "ALJD" followed by the appropriate page and line numbers.

2. Respondent excepts to the ALJ's misinterpretation of *Courier-Journal*, 243 NLRB 1093 (2004); *Beverly Health & Rehab. Servs.*, 346 NLRB 1319 (2006); and *Capitol Ford*, 343 NLRB 1058 (2004).[2] The ALJ should have found those cases analogous to the facts in the instant matter and held that Raytheon's unilateral changes to insurance benefits in 2012 was a continuation of the dynamic status quo. (ALJD p. 21, lines 1-52; p. 22, lines 1-35).

3. Respondent excepts to the ALJ's determination that the language found in the plan documents allowing Raytheon to change benefits "from time to time" or "at any time" is relevant to Raytheon's maintenance of the status quo and past practice of providing open enrollment to all employees on a yearly basis, during a specified period in October. (ALJD p. 12 lines 31-45; p. 13, lines 1-2 and 28-35).

4. Respondent excepts to the ALJ's interpretation of *Courier-Journal*, 243 NLRB 1093 (2004), to the extent the ALJ finds that the Board in *Courier-Journal* relied upon the fact that because the changes previously occurred in both hiatus periods between contracts and during contract periods they were legal in that context. (ALJD p. 17, lines 35-39).

5. Respondent excepts to the ALJ's opinion to the extent it reiterates the Board's holding in *Courier-Journal*, but does not address the Board's finding that "a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo - not a violation of Section 8(a)(5)." Specifically, in *Courier-Journal*, the Board found "the significant aspect of this case is that the

[2] References to cases relied upon by the ALJ use the case names as written in the ALJ's decision.

Union acquiesced in a past practice under which premiums and benefits for unit employees were tied to those of nonunit employees" and held that their decision was not grounded in waiver, but in past practice. (ALJD p. 17-18, lines 51-14).

6. Respondent excepts to the ALJ's determination that there is an "underlying inconsistency" in allowing an employer unilaterally to implement changes to terms and conditions of employment during negotiations to maintain the status quo, but at the same time finding that the employer cannot lawfully bargain to impasse and implement that same proposal. (ALJD p. 19, fn. 6).

7. Respondent excepts to the ALJ's determination that the Board's internal findings and conclusions in *Courier-Journal* are inconsistent with the Supreme Court's conclusions in *NLRB v. Katz,* 369 US 736 (1962). (ALJD p. 19, fn. 6).

8. Respondent excepts to the extent the ALJ found the changes to Raytheon's medical plan, year over year, were not "similar in scope," as outlined in *E.I. DuPont de Nemours v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012). (ALJD p. 21, lines 6-10).

9. Respondent excepts to the ALJ's reliance on the Board's decision in *E.I. DuPont de Nemours and Company*, 355 NLRB 1084 and 355 NLRB 1096 (2010) (ALJD, p. 14, lines 16-49 and p. 15, lines 1-41). The Board's decision in *DuPont* is inconsistent with Board law and should be overruled.

10. Respondent excepts to the ALJ's reliance upon *NLRB v. Katz*, 369 US 736 (1962). The ALJ should have found the case to be distinguishable from the

facts in the instant matter in so much as Raytheon's provision of open enrollment for the selection of yearly health benefits "was in line with the company's long-standing practice…[and was] merely a continuation of the status quo." *Katz*, 369 US at 747. (ALJD p. 28, lines 9-11, 13-23).

11. Respondent excepts to the ALJ's decision to the extent it relies upon a finding that the management rights clause of the collective bargaining agreement ("CBA") does not survive the expiration of the CBA, as Raytheon's decision to utilize open enrollment is based upon established past practice, not the management rights clause of the CBA. (*See e.g.* ALJD p. 27, lines 7-50; p. 28, lines 1-7).

12. Respondent excepts to the ALJ's finding, without regard to whether the management rights clause survived expiration of the CBA, that Raytheon was not privileged to make changes to the medical plan, even if its conduct was consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the CBA. (ALJD p. 22, lines 9-13).

13. Respondent excepts to the ALJ's finding that the level of discretion in the *DuPont* case, *i.e.*, discretion circumscribed by the fact that changes were limited to the annual enrollment period, and by past practice required to be the same as those implemented for non-bargaining unit employees, was not found in this case. (ALJD p. 22, lines 26-30).

14. Respondent excepts to the ALJ's determination that Raytheon violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("Act") when it unilaterally instituted changes to bargaining unit health care coverage because the

right to do so was contingent upon the management rights clause of the expired CBA. (ALJD p. 27, lines 7-10).

15. Respondent excepts to the ALJ's determination that Raytheon's right to make changes during the term of an existing CBA was nothing more than a creature of the CBA. (ALJD p. 27, lines 23-25).

16. Respondent excepts to the ALJ's determination that practices that take place during the term of a CBA cannot establish a practice that must be continued post-expiration. (ALJD p. 27, lines 28-37)

17. Respondent excepts to the ALJ's determination that there was no clear and unmistakable waiver of the USW's right to bargain over health care benefits. (ALJD p. 27, lines 48-52; p. 28, lines 1-2).

18. Respondent excepts to the ALJ's determination that Raytheon's implementation of benefits, through open enrollment, was not a preservation of the status quo or a practice that independently survived expiration of the CBA. (ALJD p. 28, lines 9-11).

19. Respondent excepts to the ALJ's reliance upon *McClatchy Newspapers*, 321 NLRB 1389 (1996). The ALJ should have found the case to be distinguishable from the facts in the instant matter. (ALJD p. 28, lines 24-39).

20. Respondent excepts to the ALJ's determination that Board precedent recognizes no distinction between established bargaining units and new units in analyzing whether an employer may act unilaterally, under a past practice, to maintain the dynamic status quo. (ALJD p. 28, fn. 7).

21. Respondent excepts to the ALJ's determination that the limitation that bargaining unit employees at the Fort Wayne facility be offered health care benefits on the same basis as is offered to Raytheon's other 65,000 employees, including 5,000 other union employees and all of the non-unit employees at the Ft. Wayne facility, from year to year, does not constitute discernible criteria that creates a dynamic status quo and survives expiration of the CBA. (ALJD p. 22, lines 37-44 and p. 32, lines 29-33).

22. Respondent excepts to the ALJ's reliance upon *Eugene Iovine, Inc.*, 328 NLRB 294 (1999). The ALJ should have found the case to be distinguishable from the facts in the instant matter and specifically found that under the facts here, there was a reasonable certainty as to the timing and criteria for the changes in benefits. Specifically, the past practice of making changes to benefits only during open enrollment, in October each year and with substantially similar changes, year over year. (ALJD p. 29, lines 2-23).

23. Respondent excepts to the ALJ's determination that the past practice in question required "reasonable certainty" under *Eugene Iovine*, 328 NLRB 294 (1999). (ALJD p. 29, lines 1-8; p. 30, lines 18-20). Raytheon excepts to the ALJ's incorporation of a heightened standard, heretofore not utilized in general past practice analysis.

24. Respondent excepts to the ALJ's reliance upon *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997). The ALJ should have found the case to be distinguishable from the facts in the instant matter. (ALJD p. 30, lines 3-14).

25. Respondent excepts to the ALJ's reliance upon *Garret Flexible Products*, 276 NLRB 704 (1985). The ALJ should have found the case to be distinguishable from the facts in the instant matter. (ALJD p. 30, lines 3-14).

26. Respondent excepts to the ALJ's determination that Raytheon has not proven a past practice that establishes with reasonable certainty, the timing or criteria related to the changes in insurance benefits. (ALJD p. 30, lines 19-21).

27. Respondent excepts to the ALJ's finding that Raytheon bore the burden to prove the parties' practice survived contract expiration. (ALJD p. 30, lines 19-21). *See Finley Hospital*, 359 NLRB No. 9, *slip op.* at 4 (2012) (the burden of proof is on the party seeking to change the *status quo*).

28. Respondent excepts to the ALJ's newly conceived "ad hoc" standard to determine whether a previous practice is too discretionary to establish a past practice or continuation of the *status quo*. Raytheon's 2013 changes to the medical plan were substantially similar in scope to changes made in previous years. (ALJD p. 31, lines 35-40).

29. Respondent excepts to the ALJ's finding that the "contractual limitation that the bargaining unit employees be offered health care and these other benefits, on the same basis as is offered to salaried employees at the Ft. Wayne, Indiana location from year to year" does not constitute a discernible *status quo* that survives expiration of the CBA. (ALDJ p. 32, lines 29-33).

30. Respondent excepts to the ALJ's determination that Raytheon could do "anything it wants in terms of these [medical] benefits" (ALJD p. 32, lines 33-34)

and further excepts to the ALJ's failure to note the significance of record facts showing the bargaining unit employees' benefits were tied to 65,000 other Raytheon employees and directly linked to the other employees in the Ft. Wayne plant (ALJD p. 32, lines 29-33), limiting Raytheon's ability to do "anything it wants."

31. Respondent excepts to the ALJ's determination that tying bargaining unit employees' benefits to those of non-bargaining unit employees removes them from represented status and undermines the union (ALJD p. 32, lines 39-40), particularly since benefits had been tied together for 12 years based on the Company and Union's agreement to tie them together.

32. Respondent excepts to the ALJ's determination that repeated union acquiescence to an employer's changes in benefit plans cannot constitute a waiver of the Union's right to bargain over the changes. (ALJD p. 33, lines 3-6).

33. Respondent excepts to the ALJ's determination that changes made during the term of the CBA and its predecessor agreements were made on an ad hoc and unpredictable basis, and therefore do not create a status quo or past practice that survives expiration of the CBA. (ALJD p. 33, lines 30-35).

34. Respondent excepts to the ALJ's determination that Raytheon's announcement of nationally formulated changes to the medical plan directly to bargaining unit employees, including union representatives, evidenced a fixed intent to implement those changes regardless of any position taken by the Union. (ALJD p. 33, lines 27-30; p. 34, lines 25-28). In bargaining, the Union never presented any alternative to Raytheon's national plan.

35. Respondent excepts to the ALJ's attempt to distinguish *Finley Hospital*, 359 NLRB No. 9 (2012). The ALJ should have found the case to be analogous with the facts in the instant matter in so much as the unilateral implementation of a discrete event, with parameters concerning the scope of the changes, represented a maintenance of the dynamic status quo in both cases. (ALJD p. 34, fn. 9).

36. Respondent excepts to the ALJ's determination that the changes to the health and welfare benefit plans made by Raytheon were nothing more than a fait accompli. (ALJD p. 34, lines 16-21). The parties bargained for months related to health insurance; and, the Union never presented any alternative proposal to Raytheon's national plan.

37. Respondent excepts to the ALJ's determination that Raytheon's changes to the medical plan were ad hoc in nature and not part of a discrete repetitive event, and therefore did not come within the *Stone Container Corp.,* 313 NLRB 336 (1993), exception allowing Raytheon to implement the changes prior to an overall impasse in bargaining. (ALJD p. 35, lines 11-13).

38. Respondent excepts to the ALJ's conclusion that there was no exigency or business necessity for Raytheon to have the Fort Wayne bargaining unit employees go through open enrollment in October 2012, like Raytheon's other 65,000 employees.

39. Respondent excepts to the ALJ's determination that Raytheon insisted on absenting the Union from the bargaining process, constituting conduct inimical

to the bargaining process. (ALJD p. 36, lines 25-27). The record shows the parties discussed and bargained over the "pass through" language and continued acceptance of open enrollment on multiple occasions. The record also shows the Union offered no alternative proposal to Raytheon's national plan.

40. Respondent excepts to the ALJ's finding that the General Counsel does not seek to have Respondent modify the benefit plan. (ALJD p. 37, lines 15-20). By requiring Respondent not to implement the changes implemented for the rest of Raytheon's 65,000 employees, Raytheon necessarily has to create a new plan limited to the 35 employees in Fort Wayne.

41. Respondent excepts to the ALJ's determination that the benefit plan did not continue to exist and control the parties' relationship for benefits purposes notwithstanding the expiration of the CBA. (ALJD p. 37, lines 20-23).

42. Respondent excepts to the ALJ's conclusions of law as erroneous and unsupported in fact and law. (ALJD p. 37, lines 28-50).

43. Respondent excepts to the ALJ's decision to the extent it did not give proper weight to the public policy issues favoring unilateral implementation in this case. (ALJD p. 37, 29-48).

44. Respondent excepts to the ALJ's finding that, while Raytheon's benefit "plan based on a national average of costs may serve employees with high salaries or living in higher cost of living areas well, it may serve to the detriment of other groups of lower paid employees . . . ." (ALJD p. 36, 39-46). The record evidence establishes that the average age of the 35-employee Fort Wayne bargaining unit is

59, and that the Fort Wayne unit employees had significant health care claims. Thus, if they were not covered by Raytheon's national plan, it would cost significantly more to provide them the benefits they receive with Raytheon's plan.

45. Respondent excepts to the ALJ's determination that the Employee Retirement Income Security Act ("ERISA") and the promotion of plan uniformity pertaining to national benefit plans are not at issue in this case. (ALJD p. 36, lines 49-51; p. 37, lines 14-20).

46. Respondent excepts to the ALJ's failure to accommodate the Act with ERISA. (ALJD, pp. 36-37, lines 49-25).

47. Respondent excepts to the ALJ's determination that Raytheon has not raised any valid defense to its statutory duty to bargain and therefore violated Sections 8(a)(1) and (5) of the Act. (ALJD p. 37, lines 23-25).

48. Respondent excepts to the ALJ's determination that Respondent violated the Act by preserving the status quo in relation to open enrollment and health and welfare benefits during bargaining for a successor contract in that the ALJ's findings misinterpret/misapply legal principles to the facts on the record in the instant matter. (*See, e.g.,* ALJD p. 37, lines 43-48).

49. Respondent excepts to the ALJ's remedy and order to the extent it finds Respondent committed violations of the Act. (ALJD p. 38. lines 4-44; p. 39, lines 1-23).

50. Respondent excepts to the ALJ's and the Acting General Counsel's reliance upon cases that were decided by the Board during periods in which the

Board did not have a proper statutorily-required quorum, including *Alan Ritchey Inc.*, 359 NLRB No. 40 (2012); *WKYC-TV Inc.*, 359 NLRB No. 30 (2012); *Omaha World-Herald*, 357 NLRB No. 156 (2011); and *E.I. du Pont de Nemours and Company*, 355 NLRB 1084 and 355 NLRB 1096 (2010). Respondent generally excepts to the ALJ's and the Acting General Counsel's reliance upon any other cases decided between April 5, 2010 and August 3, 2013 when the Board did not have a proper statutorily-required quorum as outlined in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) and *New Vista Nursing and Rehabilitation v. NLRB*, 719 F.3d 203 (3rd Cir. 2013).

REQUEST FOR ORAL ARGUMENT

As discussed fully in Respondent's Brief in Support of Exceptions to ALJ's Decision, this case presents significant questions of law that arise frequently in cases before the Board. The central issue in this case concerns employer maintenance of the dynamic *status quo* following expiration of a collective bargaining agreement where the employer has an established past practice of changing health and welfare benefits annually. The Administrative Law Judge's conclusions in this case and his appeal to overturn current Board precedent on such an important issue make oral argument in this matter especially prescient, given systemic issues in health care that will cause cases such as these to become even more prevalent in the future.

Because of the significance of the issues presented in this case and the inconsistent results in prior, similar cases resulting in criticism from reviewing

courts, including the D.C. Circuit in the recent *DuPont* case, and confusion for the Board's administrative law judges, Respondent respectfully submits that oral argument is appropriate and will assist the Board's decision in this case.

WHEREFORE, for the reasons stated above and in Respondent's brief in support filed contemporaneously, Respondent requests that the Board grant its request for oral argument, reverse the ALJ's decision, and dismiss the complaint in its entirety.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

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Dated: December 17, 2013

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Respondent Raytheon Network Centric System's Exceptions to Administrative Law Judge's Decision* has been served by electronic mail, this 17th day of December, 2013, upon:

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