

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

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E. I. DU PONT DE NEMOURS AND COMPANY )	
AND )	Case No. 5-CA-90984
AMPTHILL RAYON WORKERS, INC., )	
LOCAL 992, INTERNATIONAL )	
BROTHERHOOD OF D PONT WORKERS )	Case No. 9-CA-91793
FREON CRAFTSMAN UNION, LOCAL 788, )	
INTERNATIONAL BROTHERHOOD OF )	
DUPONT WORKERS )	Case No. 26-CA-92629
INTERNATIONAL BROTHERHOOD OF )	
DUPONT WORKERS (IBDW), LOCAL 593, )	
OLD HICKORY EMPLOYEES COUNCIL )	
_____ )	

**ANSWERING BRIEF OF RESPONDENT E. I. DU PONT DE NEMOURS & COMPANY**

In his limited cross-exceptions, Counsel for the General Counsel claims that Judge Rosas erred by finding that, prior to this case, the Louisville Unions had only filed one unfair labor practice charge challenging DuPont’s right to change its Dental Assistance Plan (“DAP”) and Medical Care Assistance Program (“MEDCAP”) unilaterally. (Cross-Exceptions of Counsel for the General Counsel, No. 3). In support of his exceptions, Counsel for the General Counsel argues that the DAP and MEDCAP are essentially the same as DuPont’s BeneFlex Flexible Benefits Plan (“BeneFlex”), and therefore any charges filed by the Louisville Unions prior to 2007 challenging DuPont’s right to change BeneFlex unilaterally also involved the Company’s right to change retiree benefits under the DAP and MEDCAP. As explained below, this argument belies a fundamental misunderstanding of DuPont’s position, the relationship between the DAP, MEDCAP and BeneFlex, and the history associated with the charges filed by the Louisville Unions.

## I. SUMMARY OF RELEVANT FACTS

### A. The DAP, MEDCAP and BenFlex Plans

There is no dispute that the DAP, MEDCAP and BeneFlex are separate employee benefit plans. (See Jt. Exh 4, ¶¶ 15-19). The DAP was created in 1976 to provide dental benefits to active DuPont and retirees nationwide. (*Id.* ¶¶ 15-16). A predecessor to the Freon Craftsman Union at the Louisville Plant agreed to have Union members participate in the DAP in 1976, and the DAP was added to the parties' collective bargaining agreement. (*Id.* 17, 63-64; *see also* Jt. Exh. 6(d)).<sup>1</sup>

DuPont created MEDCAP in 1983 to provide medical benefits to both its active employees and retirees nationwide. (*Id.*, ¶ 19). In 1984, DuPont offered Union members at the Louisville Plant the opportunity to participate in MEDCAP, subject to the terms of the MEDCAP Plan, and the Union accepted that offer. (*Id.* 75). MEDCAP was added to the Louisville collective bargaining agreement in 1985. (See Jt. Exh. 30E, at 28).

In 1991, DuPont created BeneFlex to provide benefits for active employees, and offered its unions the opportunity to have their members participate in the BeneFlex, subject to terms of the BeneFlex plan itself. (Jt. Exh. 4, ¶¶ 21-22). The NCU agreed to have its members participate in BeneFlex starting in 1995. (Resp. Exh 29, ¶ 7). Once the parties agreed to BeneFlex, active Union-represented employees began receiving medical and dental benefits under BeneFlex and were no longer eligible to receive benefits under the separate DAP and MEDCAP plans. (Jt. Exh. 4, ¶¶ 23-24). Union-represented employees who retired from the Louisville Plant continued to receive benefits under the separate DAP and MEDCAP plans after BeneFlex was adopted. (*Id.*)

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<sup>1</sup> Neoprene Craftmens Union ("NCU") represented workers at DuPont's Louisville Plant for 50 years, until it affiliated with PACE in 2002. In 2005, PACE merged with the United Steel Workers of America ("USW"). In 2010, Louisville employees voted to disaffiliate with the USW and form the Freon Craftsman Union ("FCU"). The NCU, USW and FCU will be referred to collectively herein as the Louisville Unions.

The parties modified the Louisville collective bargaining agreement to include BeneFlex and remove all references to the DAP and MEDCAP in 1994. (*Id.* ¶ 22). Neither the DAP nor MEDCAP have been referenced in any of the Union contracts at the Louisville Plant for years.

**B. Notice of DAP and MEDCAP Changes**

Although the DAP, MEDCAP and BeneFlex are separate and distinct plans, the DAP and MEDCAP benefit structure mirrors that set forth in BeneFlex. (Jt. Exh. 4, ¶ 23). When DuPont has made changes to benefits under BeneFlex for active employees, it has typically implemented those changes with respect to the DAP and/or MEDCAP as well. (*Id.*). The Louisville Unions and members of the bargaining unit at the Louisville Plant, and elsewhere, have been aware that the changes DuPont announced to BeneFlex affecting active employees, such as changes in premiums, co-pays, deductibles, and covered procedures, were also implemented as to retirees and their dependents under the DAP and/or MEDCAP. As Counsel for the General Counsel notes, DuPont introduced evidence showing the announcement of certain BeneFlex changes, which provided the Louisville Unions notice of changes to the DAP or MEDCAP as well. (Counsel for the General Counsel Brief (“GC Brief”), at 2-3).

While most of the changes to BeneFlex were also implemented with respect to the DAP and/or MEDCAP, the undisputed record shows that DuPont announced and implement several changes that were unique to the DAP and/or MEDCAP, like the 2013 Changes at issue here. For example, in 2002, DuPont announced caps to the Company’s future contributions to retiree health care coverage under MEDCAP. (See Jt. Exh. 26, Tabs 11 & 12, Jt. Exh. 33, Tab 6; Kelsey 502-504). Similarly, in 2004, DuPont lowered the caps for retiree drug coverage under Medicare Part D. (Jt. Exh. 26, Tabs 16-18; Jt. Exh. 33, Tabs 9 & 10). These MEDCAP changes had no impact on benefits under BeneFlex because they involved retirees only.

**C. The Louisville Unions' Challenges to Past BeneFlex Changes**

During the hearing, Counsel for the General Counsel introduced into evidence certain unfair labor practice charges filed by the USW during the period 2002-2005. (GC Exh. 51A-F) Those unfair labor practice charges state, on their face, that they relate only to alleged unilateral changes to benefits for active employees. Nevertheless, Counsel for the General Counsel argues that the USW's charges also challenged the Company's right to modify retiree benefits under MEDCAP and the DAP unilaterally. (Tr. 254-55, 444, 448-49). In response, the Company introduced into evidence the stipulations into which the parties entered with respect to the unfair labor practice charges introduced by Counsel for the General Counsel. (*See* Resp. Exh. 29). The parties' stipulations make it abundantly clear that the USW's charges (GC Exh. 51A-F) related solely to BeneFlex and did not involve a challenge to DuPont's right to make changes to retiree benefits under the DAP or MEDCAP. (*Id.*)

**II. THE UNION'S UNFAIR LABOR PRACTICE CHARGES INVOLVING PRIOR BENEFIT CHANGES DO NOT INVOLVE THE DAP OR MEDCAP**

In his brief, Counsel for the General Counsel contends that DuPont has adopted a new theory concerning the relationship between the DAP, MEDCAP and BeneFlex and should be estopped from arguing that General Counsel Exhibits 51A-F did not pertain to changes to the DAP and MEDCAP. Counsel for General Counsel has conflated two separate issues – the Union's notice of changes to the DAP and MEDCAP and the Union's decision to file unfair labor practice charges over such changes. As explained below, there is nothing new or remotely inconsistent about DuPont's position in this case with regard to the relationship between MEDCAP and the DAP on the one hand and BeneFlex on the other.

As an initial matter, DuPont has always agreed, and the undisputed record shows, that the unilateral changes that DuPont has implemented with respect to BeneFlex were also implemented

with respect to the DAP and/or MEDCAP. The record likewise shows that the Louisville Unions have known that announced changes to BeneFlex would also be implemented with respect to the DAP and MEDCAP. Accordingly, when DuPont announced annual changes to premiums, deductibles and co-pays to BeneFlex, the Louisville Unions were clearly on notice that those changes would also be implemented with respect to the DAP and MEDCAP.

Although changes announced to BeneFlex put the Louisville Unions on notice that parallel changes would also be made to the DAP and/or MEDCAP, the undisputed record shows that the DAP, MEDCAP and BeneFlex are separate benefits plans. And there is no dispute that the DAP and MEDCAP on the one hand, and BeneFlex on the other, cover entirely different populations – retirees versus active employees. Indeed, as noted above, DuPont has made numerous changes to retiree benefits under MEDCAP and the DAP that were not implemented with respect to BeneFlex, precisely because BeneFlex only provides coverage to active DuPont employees.

While the Louisville Unions certainly had the ability to challenge the multitude of unilateral changes that DuPont announced and implemented with respect to the DAP and MEDCAP prior to 2007, the undisputed record shows they did not do so. As noted above, the unfair labor charges introduced by Counsel for the General Counsel allege, on their face, that DuPont violated Sections 8(a)(5) and (1) by making unilateral changes to employee benefits. There is no reference in the charges to retiree benefits, much less a reference to the DAP or MEDCAP.

Any conceivable doubt about the scope of the USW's charges is negated by the stipulations entered into by the parties (*i.e.*, the USW, DuPont and Counsel for the General Counsel). The stipulations are focused solely upon changes to medical benefits for active employees under BeneFlex. (*See* Resp. Exh. 29). Spanning 25 pages, the stipulations discuss DuPont's history of

making unilateral changes to medical benefits for active employees under BeneFlex year after year. (*Id.*) While the stipulations specifically mention BeneFlex by name, repeatedly, they contain no reference to the DAP or MEDCAP, or even to retiree benefits generally. (*Id.*)

Additionally, the stipulations entered into by the parties formed the factual basis for the Board's decision in *E.I. DuPont de Nemours (Louisville Works)*, 355 NLRB No. 176 (August 2010). A review of that decision shows that the Board was focused entirely on DuPont's right to make changes to BeneFlex unilaterally. As with the USW's charges and the parties' stipulations, there is no mention of the DAP, MEDCAP or retiree benefits generally anywhere in the Board's decision. Moreover, much of the Board's analysis in that case focused on whether DuPont had adduced evidence of unilateral changes during contract "hiatus" periods when the Louisville contract referencing BeneFlex was not in force. The Board's analysis would certainly have been different if the case also involved changes to the DAP and MEDCAP, as the undisputed evidence shows that DuPont made unilateral changes to those plans every year, including after 1997 when all references to the DAP and MEDCAP were removed from the Louisville contract. In short, the USW's charge, the parties' stipulations, and the Board's decision all show conclusively that the USW, for whatever reason, elected not to challenge the Company's changes to retiree benefits under the DAP and MEDCAP when it filed and pursued the charges involving BeneFlex changes during the period 2002-2005.

The Union's charges, the parties' stipulations and the Board's decision are also consistent with the testimony elicited from FCU President Gregory Lowman. Mr. Lowman admitted that the charges filed by the USW prior to 2007 did not involve MEDCAP or the DAP. (Lowman, 307-309). He further admitted that since 1994, when he first became a Union officer, the USW's 2007 unfair labor practice charge (challenging DuPont's change to MEDCAP and DAP eligibility) was

the only charge the Louisville Unions had ever filed contesting DuPont's right to make changes to its retiree medical and dental plans. (Lowman, 324-25).

Notwithstanding Counsel for the General Counsel's claims to the contrary, the testimony provided by DuPont witness Brenda Kelsey is fully consistent with DuPont's position. Ms. Kelsey testified that the USW's 2007 charge related to the changes DuPont announced with respect to the DAP, MEDCAP and BeneFlex in August 2006. (See GC Brief at 3-4; Kelsey, 507-508).

Consistent with Ms. Kelsey's testimony, the undisputed evidence shows that: (1) the changes announced in August 2006 affected DAP, MEDCAP and BeneFlex, and (2) the USW's 2007 charge challenged the changes as to all three plans. (See Jt. Exh. 1G, GC 1(a)). The allegations relating to BeneFlex were deferred to arbitration and ultimately decided against the Union by arbitrator Ira Jaffe. (See Resp. Exh. 12). The allegations involving the changes to the DAP and MEDCAP are the subject of Case No. 5-CA-33461, which was decided by Judge Rosas and is currently pending before the Board.

In short, and despite Counsel for the General Counsel's protestations to the contrary, there is nothing remotely new or inconsistent with DuPont's position that: (1) changes implemented to BeneFlex were also implemented with respect to the DAP and/or MEDCAP; (2) the Louisville Unions knew and were fully on notice that changes announced to BeneFlex were also implemented with respect to the DAP and/or MEDCAP; and (3) the Louisville Unions, for whatever reason, elected not to file any grievances or unfair labor practice charges challenging DuPont's right to make changes to retiree benefits under the DAP or MEDCAP at any time prior to 2007. Simply put, the unfair labor practice charges offered by Counsel for the General Counsel did not involve DuPont's right to make changes to the DAP or MEDCAP.

**CONCLUSION**

The Complaint should be dismissed for the reasons set forth above and in DuPont's opening brief.

Respectfully submitted,

*/s/ Kris D. Meade*

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February 24, 2013

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this the 24th day of February 2014, I caused a true and accurate copy of the forgoing to be served by electronic mail on the following parties:

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*/s/ Glenn D. Grant*

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