

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

E. I. DUPONT DE NEMOURS AND COMPANY)	
)	
AND)	Case No. 5-CA-90984
)	
AMPTHILL RAYON WORKERS, INC.,)	
LOCAL 992, INTERNATIONAL)	
BROTHERHOOD OF DU 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)	

**REPLY BRIEF OF RESPONDENT E. I. DUPONT DE NEMOURS AND COMPANY IN
FURTHER SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF JUDGE ROSAS**

Counsel for the General Counsel’s Answering Brief mischaracterizes record evidence, resorts to hyperbole, and distorts controlling Board law, all in an attempt to avoid the consequences of the Unions’ clear and unmistakable waivers. Those waivers are reflected by almost 30 years of consistent past practice in which DuPont modified the Dental Assistance Plan (“DAP”) and Medical Care Assistance Program (“MEDCAP”) unilaterally, without ever seeking the Unions’ agreement and without objection by the Unions. In addition to confirming the Unions’ waivers, the parties’ consistent past practice, itself, establishes the *status quo* that provides DuPont the right to modify the DAP and MEDCAP unilaterally. Accordingly, DuPont did not violate the Act by implementing the 2013 Changes at issue here.

A. The General Counsel Ignores the Long-Standing *Quid Pro Quo* That Is the Basis for Union Member Participation in the DAP and MEDCAP

Counsel for the General Counsel argues that the Unions at Richmond, Louisville and Nashville never waived their right to bargain over future changes to the DAP or MEDCAP. That argument is refuted by the fact that: (1) he cannot identify the basis upon which Union members at Spruance, Louisville, and Nashville participate in the DAP and MEDCAP; (2) he cannot rebut the overwhelming evidence that the Unions' agreement to the DAP and MEDCAP reservation of rights language was the "price of admission" for their members' participation in the plans; and (3) there is no evidence that the parties' original agreement regarding Union participation in the corporate-wide plans has ever changed.

The record reveals that Union members at all three locations were permitted to participate in the DAP, on the same basis as all other DuPont employees, only upon the express condition that their Unions agree to the reservation of rights provision in the DAP.¹ (Jt. Exh. 4, ¶¶ 17-18). The Unions' waivers were further codified by including the DAP in the Industrial Relations Plans and Practices ("IRP&P") provision of the parties' contracts. (Jt. Exh. 4, ¶¶ 17-18, 63-74; Jt. Exhs. 6(a)-(d)).

Union member participation in MEDCAP was likewise conditioned on the Unions' waiver of their right to bargain over future MEDCAP changes. Indeed, Judge Rosas found that the Unions at Richmond, Louisville and Nashville, all "agreed to participation in MEDCAP

¹ At Richmond, Judge Rosas found "the parties bargained over [Local 992 members'] participation in the DAP, and employee participation *was subject to the Company's reservation of rights*". (ALJD Case No. 5-CA-33461, at 4, 6). Likewise, the parties stipulated that at Louisville and Nashville, DuPont "offered union-represented employees the opportunity to participate in the [DAP] on the same basis as non-union employees, *subject to the terms of the Plan Document itself*." (Jt. Exh. 4, ¶ 17).

“subject to the terms of the Plan MEDCAP Plan Documents,” including the reservation of clause. (See ALJD 6:28-30; ALJD Case No. 5-CA-33461, at 4, 6).

The contractual treatment of MEDCAP at all three locations further confirms the waivers. Contrary to Counsel for the General Counsel’s assertions, there is nothing remotely inconsistent about DuPont’s argument in this regard. (See Counsel for the General Counsel’s Brief (“GC Br.”) at 26). As the record evidence plainly shows, the Union at Richmond sought to include MEDCAP in the IRP&P provision of the parties’ contract:

The Union asked if the alternative insurance plan could be mentioned under the Industrial Relations Plans and Practices with a footnote like the Dental Plan. The logic for that being it contained a Management’s Rights Clause in it, “and could be listed along with all of the other plans of which the Company has control.”

(Resp. Exh.3, Tab 23, p. 2). DuPont rejected that proposal because the IRP&P provision would have imposed an unacceptable 1-year advance notice requirement for future MEDCAP changes. As result, instead of including MEDCAP in the IRP&P provision, the parties modified the Health Medical Surgical (“HMS”) provision to include a general reference to MEDCAP as an “alternate plan” to the then-existing Blue Cross Blue Shield medical plan without specifically mentioning MEDCAP by name.

Based on that decision, Counsel for the General Counsel argues there was no waiver, irrespective of the parties’ agreement and bargaining history, simply because the MEDCAP plan documents were not specifically identified in the Richmond contract. (GC Br. at 25). That position is contrary to law.² “The [National Labor Relations] Act, it is to be remembered, does

² Counsel for the General Counsel’s position is also undercut by the contemporaneous meeting minutes cited above, which were credited by Judge Rosas. (ALJD at 6:20-21).

not require contracts between employer and the union to be in any particular form, or that they be reduced to writing." *NLRB v. Scientific Nutrition Corp.*, 180 F.2d 447, 449 (9th Cir. 1950); *see also John Wiley & Sons v. Livingston*, 376 U.S. 543, 550-51 (1964).

Counsel for the General Counsel's position as to the Union's waiver at Richmond is particularly striking in light of his position with respect to the Unions' waivers at Louisville and Nashville. At Richmond, he claims there was no waiver because the MEDCAP plan documents were not referenced in the parties' contract. (GC Br. at 22). Yet he claims there were no Union waivers at Louisville and Nashville, even though the plan documents were specifically referenced in the parties' contracts there. (*Id.*, at 26). Following acceptance of MEDCAP by the Unions at Louisville and Nashville, the parties' contracts were modified to make clear that Union members could participate in MEDCAP, but only subject to "*the terms and provisions of Summary Plan Description (SPD)*" which has always contained a reservation of rights provision. (*See* Jt. Exh. 4, ¶ 19; Jt. Exh. 27).³

Most telling, Counsel for the General Counsel (and Judge Rosas) cannot to point to a shred of evidence – and none exists – to show that the parties' *quid pro quo* agreement (and the Unions' agreement to the DAP and MEDCAP reservation of rights language) was negated or changed in any fashion when the references to the DAP and MEDCAP were removed from the parties' contracts at Richmond, Louisville and Nashville. Rather, the undisputed record shows that the references to the DAP and MEDCAP were deleted in the mid-1990s, purely as an administrative matter, when the Unions at all three locations agreed to have active employees

³ Notably, the parties agreed to include MEDCAP in the HMS provision of the Louisville and Nashville contracts, not in the IRP&P provision. As a result, DuPont did not need to concern itself with providing 1-year notice prior to making MEDCAP changes.

receive medical and dental coverage under the BeneFlex Flexible Benefit Plan. (Jt. Exh. 4, ¶ 22). There is no evidence to suggest that parties' agreement as to medical and dental coverage for retirees changed in any respect after the references to the DAP and MEDCAP were removed from the labor contracts. In short, since the mid-1990s, Union members at all three locations have had no CBA-based right to participate in either the DAP or MEDCAP. Given Judge Rosas' findings as to the Union's initial participation in the DAP and MEDCAP and given the absence of any evidence that the original *quid pro quo* agreements reached decades ago were changed, the Board should find the waivers still exist.

B. Counsel for the General Counsel Has Grossly Mischaracterized the Nature of Prior Unilateral Changes to the DAP and MEDCAP and the Unions' Reactions to Those Changes, While Minimizing the Import of The Changes

1. DuPont Has Consistently and Repeatedly Implemented Significant Changes to DAP and MEDCAP That Confirm the Existence of the Unions' Waivers

Counsel for the General Counsel argues “even if the Union[s] waive[d] [their] right to bargain over prior changes” that does not mean they waived their right to bargain over future changes. (GC Br. at 27). This argument misconstrues DuPont's position – i.e., that the past practice confirms the Unions' waivers. When the Unions agreed to allow DuPont to make changes to the DAP and MEDCAP in exchange for allowing Union members to participate in the plans along with all other DuPont employees, those waivers were not linked to any specific type of future changes. Moreover, Counsel for the General Counsel concedes an “established past practice of [DuPont] making changes to the plans” (*Id.*, at 27), which is fully consistent with the parties' *quid pro quo* agreement.

To avoid the obvious import of that established past practice, both as to the existence of the waivers and as to what constitutes the *status quo*, Counsel for the General Counsel

mischaracterizes many of the unilaterally-imposed changes to the DAP and MEDCAP as “minor,” and ignores other significant changes altogether. He first suggests that DuPont’s multitude of unilateral increases to DAP and MEDCAP premiums, deductibles, and co-pays were “minor changes” that do not reflect Union waivers, despite the Unions’ consistent failure to object to them. (*Id.* at 19). Of course, the General Counsel has taken precisely the opposite position in numerous cases in which he has prosecuted unfair labor practice charges involving unilateral changes to health care premiums, deductibles and/or co-pays. *See, e.g., Des Moines Cold Storage*, 358 NLRB No. 58 (2012) (finding employer violated the Act when it announced and implemented a change to employee health insurance premiums).

Counsel for the General Counsel – like ALJ Rosas – next ignores record evidence of other prior changes that are directly analogous to the 2013 Changes: DuPont’s implementation of caps on its contribution to retiree health care. In 2002, the Company capped its contributions to future retiree health care under MEDCAP at \$4,000 per Medicare-Eligible retiree and \$9,000 for non-Medicare retiree. (*See* Jt. Exh. 26, Tabs 11 & 12, Jt. Exh. 33, Tab 6; Kelsey 502-504). After those limits were reached, all future increases to medical costs would be borne entirely by retirees. None of the Unions challenged DuPont’s’ right to make the 2002 MEDCAP changes. In 2004, DuPont modified MEDCAP again to lower its contribution cap for MERs, also without objection or challenge by the Unions. (Jt. Exh. 26, Tabs 16-18; Jt. Exh. 33, Tabs 9 & 10). Counsel for the General Counsel ignores entirely these significant, unilaterally-imposed caps when blithely claiming that the \$1,400 cap on contributions imposed by the 2013 Changes is an unprecedented “game changer” and a change that is different in kind and scope from prior changes. (GC Br. at 29).

2. Counsel for the General Counsel Mischaracterizes the Unions' Lack of Objection to the Multitude of Prior DAP and MEDCAP Changes

DuPont has implemented numerous, typically-disadvantageous changes to the DAP and MEDCAP every year since 1986. None of the Unions filed a grievance or an unfair labor practice charge objecting to any of the changes at any time prior to 2007. Counsel for the General Counsel's (and Judge Rosas') only response to this 20-year period of conscious acceptance of changes by the Unions is to assert that the Unions "bargained" over the some of the changes by seeking information about them. (GC Br., at 36-39). Of course, neither Counsel for the General Counsel nor Judge Rosas can point to a single instance in which DuPont ever refrained from implementing an announced change to the DAP or MEDCAP at Richmond, Nashville or Louisville in response a Union information request. That record speaks for itself.

Counsel for the General Counsel concedes, as he must, that DuPont "never sought agreement" with any of the Unions before announcing or implementing prior changes to the DAP and MEDCAP. (GC Br. at 43). But the evidence reveals more: that DuPont specifically and repeatedly told the Unions that it was not willing to bargain over changes to the DAP and MEDCAP.⁴ In 1994, an attorney for the Union at Nashville specifically questioned DuPont's right to change MEDCAP premiums unilaterally at a time when the parties were bargaining for a new contract. (Jt. Exh. 25, Tab 25, at p. 1-2). In response, the Company told the Union's counsel, in the presence of several Union officers, that:

⁴⁴ While Counsel for the General Counsel claims in various place that DuPont "bargained" with the Unions over changes to DAP and MEDCAP (GC Br. 36-39), he contradicts that assertion by conceding that "DuPont set premiums for MERs' coverage" prior to the 2013 Changes. (*Id.* at 31).

[T]he Company had] reserved the right to amend any provision of the Company plan, MEDCAP, that were deemed necessary. The recent changes in deductibles, stop-loss, and premiums were examples of such changes.

(*Id.* at p. 2). DuPont provided the Union’s counsel with a copy of the MEDCAP plan language so he could “verify these Company rights.” (*Id.*; *see also* Bergthold, 370). Following that exchange, the Union never again raised any question about the Company’s right to change MEDCAP or the DAP unilaterally, until it filed its charge in this case.

Finally, Counsel for the General Counsel’s position is contrary to Board law, which confirms that the parties’ course of dealing or “past practice” can demonstrate the existence of a clear and unmistakable waiver. *California Pacific Medical Ctr.*, 337 NLRB 910, 914 (2002); (“A clear and unmistakable waiver may be inferred from past practice”); *Mt. Clemons General Hosp.*, 344 NLRB 450, 460 (2005) (“the courts and the Board have held that a waiver also may be inferred from extrinsic evidence of the contract negotiations and/or past practice”). If the Board were to rule that the past practice in this case – consisting of more than 20 years of annual, disadvantageous unilateral changes that were not challenged by the Unions – does not reflect Union waivers of the right to bargain over MEDCAP and DAP changes, then DuPont respectfully submits that there can never be a case in which past practice can demonstrate the existence of a waiver, and the Board will have abandoned decades of extent Board law.

C. The General Counsel Has Mischaracterized the Nature and Impact of the 2013 Changes

The mountain of past practice evidence adduced by the Company not only confirms the existence of the parties’ *quid pro quo* agreement and Union waivers, but also establishes a dynamic *status quo*. *Courier-Journal*, 342 NLRB 1093, 1094 (2004) (citing *Katz* 369 U.S. at 743); *National Gypsum Co.*, 359 NLRB No. 116, slip op. at 5 (2013) (recognizing that the *status*

quo may be determined by the parties' contract and/or by *past practice* and may be "dynamic"). The 2013 Changes are fully consistent with that dynamic *status quo*.

To avoid the implications of the established past practice, Counsel for the General Counsel mischaracterizes the nature and effect of the 2013 Changes by arguing that they constitute a material departure from prior changes. For example, he claims that the changes constitute a "wholesale elimination of coverage for MERs." (GC Br. at 21, 2). That assertion is plainly false. MERs continue to receive medical and dental coverage under the DAP and MEDCAP, just as they had prior to the 2013 Changes; they simply have more coverage options available following the changes and obtain that coverage through a different vehicle.

Counsel for the General Counsel engages in further hyperbole when he claims that, prior to the 2013 Changes, "the Unions could bargain with Respondent about premiums," but DuPont has now "removed from the bargaining table forever . . . future retiree medical and dental coverage." (*Id.*, at 31). First, as demonstrated above, DuPont has never "bargained" with the Unions over DAP or MEDCAP premiums; thus, the 2013 Changes had no impact whatsoever on the Unions' ability to control or influence dental and medical premiums for MERS under the DAP and MEDCAP. Second, the 2013 Changes did not remove the mandatory subject of retiree health care from the bargaining table. While DuPont has never been willing to bargain with the Unions over DAP and MEDCAP changes, it has repeatedly informed the Unions that it is willing to bargain over proposals for site-specific alternatives to the DAP and MEDCAP. That position did not change with the 2013 Changes. If the Unions propose alternative, site-specific retiree medical and dental coverage, DuPont will bargain over that mandatory subject. None of the Unions made such a proposal following the announcement of the 2013 Changes.

Counsel for the General Counsel also claims that “[t]here is no longer any cost-sharing with employees concerning their MER health and dental benefits” as a result of the 2013 Changes. (GC Br. at 40). This assertion is also incorrect. DuPont contributes \$1,400 per MER for secondary medical and dental coverage, and any unused portion of that contribution is rolled over for use in future years.

Finally, Counsel for the General Counsel claims that the 2013 Changes are materially different from prior unilateral changes because there is “no guarantee that the new plan [will] be as good as the old DuPont plan,” and “[c]urrent employees do not know what their benefits will be when they become MERs.” (*Id.* at 4, 32). That is not a change to the *status quo*. The DAP and MEDCAP have continually evolved to account for changing market conditions, and employees have never had a guarantee that one year’s version of the DAP or MEDCAP will be as good as the prior year’s. Similarly, active employees have never known what their future DAP and MEDCAP benefits would be upon reaching retirement status.

In short, DuPont urges the Board to carefully parse Counsel for the General Counsel’s Answering Brief to distinguish record evidence from hyperbole and mischaracterization and urges the Board to sustain DuPont’s exceptions.

Respectfully submitted,

/s/ Kris D. Meade

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 10th day of March 2014, I caused a true and accurate copy of DuPont's Reply Brief in Response to General Counsel's Answering Brief to be served by electronic mail on the following parties:

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