

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

**E.I DuPONT de NEMOURS & CO., INC**

**Case 03-CA-096616**

**and**

**UNITED STEELWORKERS, INTERNATIONAL  
UNION and its LOCAL, 6992**

**GENERAL COUNSEL’S BRIEF TO THE BOARD**

**I. STATEMENT OF THE CASE**

A Complaint and Notice of Hearing issued on March 21, 2013, based on a charge filed in Case 03-CA-096616 by United Steelworkers, Local 6992 (“Union”), alleging that E.I. DuPont de Nemours & Co., Inc. (“Respondent”) violated Section 8(a)(1) and (5) of the National Labor Relations Act (“Act”) by making changes to the BeneFlex Flexible Benefits Plan (“Beneflex”). Respondent filed an Answer to the Complaint on April 4, 2013. A hearing before an administrative law judge was initially scheduled for June 5, 2013, but was postponed on two occasions. By Order dated July 29, 2013, the hearing was postponed indefinitely because the parties agreed to waive a hearing in front of an administrative law judge and submit the case directly to the Board on a stipulation of facts. On December 27, 2013, the parties submitted a Joint Motion to Transfer Proceeding to the Board, Stipulation of Facts and Statement of Issue to

the Board, seeking findings of fact, conclusions of law and an Order. (Jt Ex. 20, 21, 22, 23, 24, 25).<sup>1</sup>

The Complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by implementing changes to Beneflex effective January 1, 2013, without affording the Union an opportunity to bargain over the changes or the effects of those changes, and without bargaining with the Union to a good-faith impasse regarding those changes. Respondent acknowledges that it made the changes to Beneflex without bargaining over the changes or the effects of the changes with the Union. (Jt. Ex. 21; Stip. Para. 44).

The parties, in the Statement of the Issue, agree that the sole issue to be decided by the Board is whether Respondent had a duty to bargain with the Union over changes to Beneflex effective January 1, 2013 prior to the implementation.

## **II. FACTS**

Respondent operates more than two dozen facilities throughout the United States, including a plant in Tonawanda, New York, where it manufactures Tedlar and Corian products (“Yerkes facility”). The Union and its predecessors have represented the hourly production, maintenance, plant clerical and analyst employees at the Yerkes facility (“Unit”) for more than 60 years. There are approximately 348 members in the Unit. (Stip. Para. 1, 3, 4).

### **A. The parties’ relevant contractual history**

Respondent and the Union have a longstanding collective-bargaining relationship, including collective-bargaining agreements in effect from 1977 until December 7, 1993 (“1977

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<sup>1</sup> Throughout this brief the following references will be used: Jt Ex. \_\_ for Joint exhibits (at page number); Stip. Para. \_\_ for paragraphs in the Stipulation of Facts).

Agreement”)<sup>2</sup>, from April 12, 2008 through April 13, 2012 (“2008 Agreement”), and from June 18, 2013 through the present (“2013 Agreement”). The parties were without collective-bargaining agreements from the expiration of the 1977 Agreement until the start of the 2008 Agreement, and again from the expiration of the 2008 Agreement until the start of the 2013 Agreement (Jt. Ex. 4, 5, 6; Stip. Para. 12, 13, 14, 15, 16).

### **B. Contractual language pertaining to BeneFlex**

Respondent maintains a set of corporate-wide benefit plans which are accessible to all of its United States employees, regardless of union affiliation. This includes BeneFlex, which is Respondent’s self-insured benefit plan originally introduced in 1991. BeneFlex includes a variety of employee benefit options, including health, dental, and vision plans. (Stip. Para. 5, 6, 18).

Despite initial objections during discussions between the parties in August and October 1991, the Union agreed to supplement the 1977 Agreement to grant eligibility for BeneFlex to bargaining unit members “subject to all terms and conditions of [BeneFlex].” (hereinafter “1991 Supplemental Agreement”). At no time during the negotiations leading to the 1991 Supplemental Agreement did the Union agree to waive bargaining over the terms and conditions of BeneFlex beyond the term of the 1977 Agreement. While the 1991 Supplemental Agreement maintained some of the local (non-BeneFlex) health insurance options, some unit employees elected to receive all of their benefits through BeneFlex beginning January 1, 1992. (Jt. Ex. 8, 9; Stip. Para. 20, 21, 34).

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<sup>2</sup> The lengthy duration of the 1977 Agreement resulted from an evergreen clause. In September 1993, Respondent properly notified the Union that it was terminating the collective-bargaining agreement. (Stip. Para. 14; Jt. Ex. 4.)

As part of a global settlement regarding changes made by Respondent to BeneFlex in 2006, the parties agreed to the 2008 Agreement, which maintained unit employees' right to opt out of BeneFlex and receive health insurance through a local health insurance carrier. Like the 1991 Supplemental Agreement, the 2008 Agreement stated that "employees shall receive benefits [through BeneFlex], subject to the terms and conditions of BeneFlex." (Stip. Para. 34).

The 2013 Agreement, like the 1991 Supplemental Agreement and the 2008 Agreement, states that "employees shall receive benefits [through BeneFlex], subject to the terms and conditions of BeneFlex." (Jt. Ex. 6; Stip. Para. 45).

**C. Union objections to and attempts to bargain over BeneFlex changes between the expiration of the 1997 Agreement and the commencement of the 2008 Agreement.**

**1. Annual BeneFlex changes**

It is undisputed that beginning in the fall of 1991, and each year thereafter, Respondent conducted an "open enrollment" period at the Yerkes facility during which employees select various benefit options within BeneFlex. It is further undisputed that, from the inception of BeneFlex through the present, Respondent made changes to various plans offered within BeneFlex.<sup>3</sup> Those changes are announced to the employees in conjunction with the annual open enrollment period and become effective on January 1. In addition, Respondent generally notifies the Union prior to instituting those changes. Over the years, the changes have included, among other things, increases to premiums, co-pays and deductibles, and alterations to plan design. (Stip. Para. 37, 38, 39).

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<sup>3</sup> The General Counsel acknowledges that the BeneFlex changes made during the term of both the 1977 and 2008 Agreements were lawful by virtue of the waiver language contained in those contracts. (Stip. Para. 41).

## **2. The history of Union objections to and attempts to bargain over changes to BeneFlex between contracts**

### **a. 1997 Settlement Agreement**

The parties began negotiations for a successor contract in 1993 because Respondent opted out of the 1977 Agreement. During those negotiations, Respondent proposed the elimination of all local health insurance options, leaving only the health insurance options available through BeneFlex available to unit members. With the parties not yet at agreement, Respondent, in 1994, implemented its final offer which included the elimination of all local health insurance options for unit members. The Union filed unfair labor practices charges, alleging in part that the parties were not at impasse at the time of implementation. The parties, in 1997, entered into an informal settlement agreement of those charges which included monetary reimbursement to unit employees as a result of the Respondent's health insurance implementation ("1997 Settlement Agreement"). (Jt. Ex. 10; Stip. Para. 22).

### **b. The 2001 Final Offer**

The parties resumed successor contract negotiations in 1997, failed to reach agreement, and in April 2001, Respondent implemented its final offer which provided that anticipated health care costs would be paid 75 percent by Respondent and 25 percent by participating unit members, and that any future cost increases would be shared equally by Respondent and the participants ("2001 Offer"). The 2001 Offer stated that employees would receive benefits through BeneFlex "subject to the terms and conditions of [BeneFlex]." In addition, in October 2001, Respondent announced changes to BeneFlex that would be unilaterally implemented in January 2002. (Jt. Ex. 11, 12; Stip. Para. 23, 24).

The Union filed unfair labor practice charges disputing Respondent's implementation of the 2001 Offer and the subsequent unilateral changes to BeneFlex. In the subsequent litigation, the Union took the position that the 1997 Settlement Agreement required that all cost components of BeneFlex, including premiums, co-pay and deductibles, be frozen at 1996 levels, while Respondent took the position that the 1997 Settlement Agreement only required that premiums with BeneFlex be frozen at 1996 levels. The Board, in 2006, (and ultimately the United States Court of Appeals for the District of Columbia) found that Respondent's implementation of its BeneFlex proposal was lawful. (Stip. Para. 24, 25, 32).

**c. BeneFlex medical plan premium changes for the 2002-2006 plan years**

In the fall of 2001, Respondent informed the Union of BeneFlex medical insurance premium increases for the 2002 plan year, and pursuant to the terms of the 2001 Offer, assessed 50 percent of premium costs increases from the previous year to participants. (Jt. Ex. 11; Stip. Para. 26).

During the meetings between the parties in October 2002, Respondent informed the Union of BeneFlex changes for the 2003 plan year. During those meetings, the Union made clear that it wanted to bargain over all aspects of the BeneFlex plan, and that it was the Union's position that Respondent had an obligation to bargain over any and all BeneFlex changes. In November 2002, Respondent proposed an alteration of the BeneFlex medical insurance premium cost share agreement to the Union, whereby Respondent would pay 70 percent of the premiums and participants 30 percent of the premiums ("70/30 premium split"). The Union rejected that offer, and, consistent with the 2001 Offer, Respondent again assessed 50 percent of the premium cost increases for the 2003 plan year to participants. (Jt. Ex.17(c) p. D002359; Stip. Para. 27).

In October 2003, Respondent again met with the Union to inform it of upcoming BeneFlex changes. Again, during that meeting, the Union made clear that its position was that any BeneFlex changes had to be bargained. Respondent informed the Union that BeneFlex medical premiums were increasing, and offered the Union the same 70/30 premium split for the 2004 plan year. The Union accepted that offer, and the parties signed a Memorandum of Agreement. In October 2004, the parties agreed to an identical Memorandum of Agreement for the 2005 plan year. (Jt. Ex.13, 14, 17(d) p. D002374; Stip. Para. 28, 29).

In September 2005, Respondent offered the Union a 70/30 premium split for BeneFlex medical premiums on a continuing basis. The Union rejected that offer, and the parties ultimately signed a Memorandum of Agreement with a 70/30 premium split for the 2006 plan year only. (Jt. Ex. 15, 16; Stip. Para. 30, 31).

**d. BeneFlex medical plan changes from 2007 and 2008 plan years**

In February 2006, the Board found that Respondent's implementation of the 2001 Offer, which included the 50/50 premium increase split, was lawful. (Stip. Para. 32).

The parties resumed successor contract negotiations in summer 2006, during which Respondent proposed a contract that included a 70/30 premium split for BeneFlex medical premiums. The Union rejected the contract offer, and proposed that the parties agree to a 70/30 premium split for the 2007 plan year only. Respondent rejected that proposal because it did not want to enter into another one year arrangement as a result of the Board's ruling that the 2001 offer was lawfully implemented. (Stip. Para. 32).

Respondent announced changes to medical benefits, including altered plan designs and participant costs, in October 2006 and October 2007. Respondent unilaterally implemented

those changes in January 2007 and January 2008 respectively. The Union did not protest those changes as a result of the Board's February 2006 ruling, which found that Respondent was privileged to unilaterally alter BeneFlex consistent with the terms of the implemented 2001 Offer. (Stip. Para. 32, 33).

At no time during meetings to inform the Union of changes to BeneFlex, held in either September or October 2007, 2008, 2009, 2010 or 2011 did Respondent ever indicate, or did the parties even discuss, that the bargaining waiver contained in the 2008 Agreement would survive expiration of the contract. (Jt. Ex. 17(e) – (i)).

#### **D. The unilateral changes to BeneFlex effective for the 2013 plan year**

On September 17, 2012, Respondent announced changes to BeneFlex that became effective January 1, 2013. The announcement and implementation of the changes occurred after the expiration of the 2008 Agreement and before the effective date of the 2013 Agreement. The changes included premium alterations for the BeneFlex medical and dental plans, increased deductibles for the medical plan, changes to employee Health Care Spending Accounts, and a change to the accidental death and dismemberment coverage (hereinafter "2013 BeneFlex changes"). (Jt. Ex. 18, 19; Stip. Para 42, 43, 45).

It is undisputed that Respondent did not bargain with the Union prior to announcing or implementing these BeneFlex changes. It is further undisputed that these BeneFlex changes were similar to prior changes announced and implemented by Respondent in prior years. (Stip. Para. 44).

### III. ARGUMENT

#### **The 2013 BeneFlex changes violate Section 8(a)(1) and (5) of the Act**

It is well-established that health insurance and related medical benefits and disability benefits are mandatory subjects of bargaining. Mid-Continent Concrete, 336 NLRB 258 (2001); *see also* E.I DuPont de Nemours, Louisville Works, 355 NLRB No. 176, slip. op. at 11 (August 27, 2010) (medical, prescription drug, dental and vision benefits are mandatory subjects of bargaining). Therefore, unilateral changes by an employer to such benefits, absent a valid defense, constitute a violation of Section 8(a)(1) and (5) of the Act. Caterpillar, Inc., 355 NLRB 521, 522 (2010).

Here, it is undisputed that Respondent made the 2013 BeneFlex changes without bargaining with the Union. Therefore, absent a valid defense by Respondent, those changes constitute a violation of Section 8(a)(1) and (5) of the Act.

#### **A. The contractual waiver was not in effect at the time of the changes**

It is well established Board law that “the waiver of a union’s right to bargain does not outlive the contract that contains it, absent some evidence of the parties’ intentions to the contrary.” Omaha World-Herald, 357 NLRB No. 156, slip. op. 3-4 (December 30, 2011) *quoting* Ironton Publications 321 NLRB 1048, 1048 (1996); *see also* Register Guard, 339 NLRB 353, 355 (2003), Paul Mueller, Co., 332 NLRB 312, 313 (2000). This applies to both bargaining waivers contained in collective-bargaining agreements and in plan documents that are incorporated by reference into the collective-bargaining agreement. Omaha World-Herald, *supra*, *quoting* E.I DuPont de Nemours, Louisville Works, 355 NLRB slip. op. at 2.

The 2008 Agreement, which indisputably contained a bargaining waiver regarding changes to BeneFlex, expired on April 13, 2012, and the 2012 Agreement, which contained the same bargaining waiver, did not commence until June 18, 2013. As such, from April 13, 2012 through June 18, 2013, the bargaining waiver was not in effect. Therefore, the 2013 BeneFlex changes were announced (in October 2012) and implemented (January 1, 2013) at a time when the bargaining waiver was not in effect. Importantly, the record contains no evidence to indicate that the parties intended that the bargaining waiver survived the expiration of the 2008 Agreement. As such, Respondent was not contractually privileged to make the 2013 Beneflex changes without bargaining with the Union. (Jt. Ex. 5, 6, 8; Stip. Para. 35).

Respondent's argument that the waiver language survived the expiration of the 2008 Agreement because it was granted by the Union as a *quid pro quo* for admission into BeneFlex in 1991 fails. First, to the extent the parties did agree to a *quid pro quo*, the record illustrates that it was captured as part of the 1991 Supplemental Agreement, which, as discussed above, was simply an addendum to the 1977 Agreement. As such, it is clear that the Union's obligation to accept unilateral BeneFlex changes pursuant to the waiver language ended in 1993 when Respondent opted out of the 1977 Agreement. Omaha World-Herald, *supra*. The Union's obligation to accept unilateral annual BeneFlex changes was renewed in 2006, when the Board found that the 2001 Offer, which contained the waiver language, was lawfully implemented, and continued for the effective dates of the 2008 Agreement, which also contained the waiver language. That obligation, however, expired along with the 2008 Agreement on April 13, 2012, and therefore, was not effective at the time of the 2013 BeneFlex changes. *Id.* In addition, to the extent Respondent relies on the incorporation of BeneFlex plan documents into the 2008

Agreement to establish a bargaining waiver, such an argument similarly fails as a result of the expiration of the 2008 Agreement. *Id.* (Jt. Ex. 5, 8, 9; Stip. Para. 19, 20, 32).

Based on the above, the contractual waiver language relied upon by Respondent in making the 2013 BeneFlex changes was not in effect at the time of the changes, and therefore, any argument by Respondent that it was permitted to make those changes is without merit.<sup>4</sup>

**B. The record does not provide evidence of an established past practice of Respondent making unilateral changes to BeneFlex.**

Respondent argues that it was permitted to make the unilateral changes at issue because of its established practice of making changes to Beneflex without bargaining with the Union.

Respondent carries the burden of showing that the unilateral changes were consistent with an established past practice. Caterpillar, Inc., 355 NLRB at 522; Eugene Iovine, Inc., 328 NLRB 294, 294-295 fn. 2 (1999). To carry that burden, Respondent “must show that the practice occurred ‘with such regularity and frequency’ that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” FirstEnergy Generation Corp., 358 NLRB No. 96, slip. op. at 10 (2012); Sunoco, Inc., 349 NLRB 240, 244 (2007); Philadelphia Coca-Cola Bottling Co., 340 NLRB 349, 353 (2003).

In order to establish a past practice that would justify a change during a contract hiatus period, the burden is on an employer to show that it has made the change both during periods where a contract has been in effect and during contract hiatus periods because “contractually authorized past practice does not support unilateral changes made during hiatus between contracts, when the contractual authorization cease to be effective.” E.I. Dupont de Nemours,

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<sup>4</sup> For similar reasons, to the extent Respondent argues that the Union’s 1991 agreement to participate in BeneFlex, permanently waived its right to bargain over any future changes to BeneFlex, such an argument fails.

355 NLRB No. 177, slip op. at 1-2; Louisville Courier-Journal, 342 NLRB 1093 (2004). The Board will not rely on changes to which a union objected in determining the existence of a past practice. *See* FirstEnergy Generation Corp., 358 NLRB slip. op. at 1.

Respondent's argument that it was privileged to make the 2013 BeneFlex changes due to an existing past practice is incorrect for two reasons.

First, Respondent does not have a practice of making unilateral BeneFlex changes during contract hiatus periods. A significant amount of Respondent's annual BeneFlex changes occurred during the term of the 1977 and 2008 Agreements. Because those collective-bargaining agreements provided Respondent clear authority to make those changes, those contractually authorized changes do not support a practice of making unilateral BeneFlex changes outside the term of the 1977 and 2008 Agreements. E.I. Dupont de Nemours, *supra*, Louisville Courier-Journal, *supra*.

Second, while Respondent made changes to BeneFlex outside the terms of the 1977 and 2008 Agreements, they were not made "unilaterally." The Union either objected to those changes or the parties bargained to agreement over the changes.

Specifically, Respondent's attempt to implement a final offer during successor contract negotiations in September 1994, which included changes to employee medical benefits, ultimately resulted in a settlement of unfair labor practice charges in 1997. Around that time the parties commenced successor contract negotiations, culminating in Respondent's implementation of the 2001 Offer, including waiver language requiring a 50/50 premium split between Respondent and unit members for annual cost increases. Consistent with the waiver language, Respondent adjusted employee health care contributions for the 2002 plan year. The Union

protested the changes and filed another unfair labor practice charge, protesting, among other things, the health care cost-share arrangement and other BeneFlex changes for the 2002 plan year. (Jt. Ex. 10, 12; Stip. Para. 22, 24, 26).

Following implementation of the 2001 Offer, Respondent annually approached the Union, seeking changes to the implemented cost-share arrangement. During those discussions, in both October 2002 and October 2003, the Union made it clear that its position was, and continued to be, that Respondent had to bargain any changes to BeneFlex. (Jt. Ex. 17, Stip. Para. 27, 28).

The record shows that the parties continued to bargain over employee BeneFlex medical plan contributions in subsequent years. The Union rejected Respondent's offer for the 2003 plan year, and therefore, employee contributions increased in a manner consistent with the 2001 Offer. The Union and Respondent bargained to agreement on health care cost-sharing, as illustrated by three separate Memorandums of Agreement for the 2004, 2005 and 2006 plan years. Only because of the Board's 2006 determination that Respondent's implementation of the 2001 Final Offer was lawful, did the Union not challenge Respondent's right to unilaterally alter BeneFlex for either the 2007 or 2008 plan years. (Jt. Ex. 14, 15, 16 Stip. Para. 27, 28, 29, 30, 31, 33).

Even if the Union did not object to prior unilateral BeneFlex changes, it is still well-established Board law that a union's prior acquiescence to employer changes to terms and conditions of employment does not constitute a waiver to bargain over future changes, even if those future changes are made without a union's objection. *See First Energy Generation Corp.*, 358 NLRB slip. op. at 1 and 10, *Caterpillar Inc.*, 355 NLRB at 523, *Georgia Power Co.*, 325 NLRB 420, 421 (1998).

In sum, the record fails to establish a past practice of Respondent making unfettered unilateral changes to BeneFlex outside the term of a collective-bargaining agreement. The Union made it clear by statements during meetings and the filing of several unfair labor practices, and the parties made it clear by virtue of bargaining to agreement on certain BeneFlex changes, that Respondent did not have the authority to unilaterally alter BeneFlex in the absence of an enforceable bargaining waiver. First Energy Generation Corp., *supra*. Further, even without the evidence of union objections and the parties' negotiations, Respondent still was not free to make such changes. As such, Respondent has failed to meet its burden of establishing a past practice which would allow it to make the 2013 BeneFlex changes without bargaining with the Union. ((Jt. Ex. 11, 13, 14, 15, 16 17(c) p. D002359, 17(d) p. D002374; Stip. Para. 26, 27, 28, 29, 30, 31).

#### **IV. CONCLUSION**

It is undisputed that Respondent unilaterally implemented the 2013 Beneflex changes. The record illustrates that Respondent was not contractually privileged to make those changes, as there was no waiver language in the extant collective-bargaining agreement. Further, Respondent has failed to meet its burden to show that, by virtue of a past practice, it was permitted to unilaterally implement those changes. Respondent has not established a past practice of making unilateral changes during contract hiatus periods. As a result, Respondent's implementation of the 2013 BeneFlex changes is in violation of Section 8(a)(1) and (5) of the Act. For the reasons set forth above, it is submitted that Respondent has violated the Act in the manner alleged in the Complaint, and that the relief requested in the Proposed Order should be granted.

Dated August 18, 2014  
At Buffalo, New York

Respectfully submitted,

/s/ Jesse Feuerstein

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## **PROPOSED CONCLUSIONS OF LAW**

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By unilaterally implementing the 2013 BeneFlex changes on or about January 1, 2013, Respondent failed and refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act.
4. The unfair labor practices stated in conclusion 3 above are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

## **PROPOSED ORDER**

The Respondent, E.I. DuPont de Nemours & Co., Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:
  - (a) Unilaterally implementing changes to the BeneFlex Flexible Benefits Plan (“BeneFlex”).
  - (b) In any like or related manner interfere with, restrain, or coerce employees in violation of the rights guaranteed to you by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
  - (a) Upon request of the Union, rescind the unlawful unilateral changes to BeneFlex that were implemented on January 1, 2013, including the altered PPO premiums in the medical plan, the increased medical plan deductibles, the increased dental plan premiums, and the reduction in the annual limit for and the change in contributions to Health Care Spending Accounts (“2013 BeneFlex changes”).
  - (b) Restore the unit employees’ benefits under the BeneFlex plan to the terms that existed before the unlawful 2013 Beneflex changes and maintain those terms in effect.
  - (b) Make whole all unit employees for any losses they may have incurred as a result of the 2013 BeneFlex changes by reimbursing them, with interest, for any loss of benefits and any expenses that they suffered as a result of the unlawful unilateral changes in their benefits.
  - (c) Within 14 days after service by the Region, post at the Yerkes facility copies of the attached notice marked “Appendix.” Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily

posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.<sup>5</sup> In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at the Yerkes Plant since January 1, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

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<sup>5</sup> If this Order is enforced by a judgment of a United States Court of Appeals, the words in the Notice reading “Posted by Order of the National Labor Relations Board” shall instead read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

**PROPOSED NOTICE**  
**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything which interferes with, restrains or coerces you with respect to these rights. More specifically,

**WE WILL NOT** fail and refuse to bargain with the United Steelworkers International Union, Local Union 6992 (“Union”) as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit:

All production and maintenance employees at Respondent’s Plant located near Buffalo, New York, including plant clericals and analysts; excluding office clericals, professional employees, Accounting Associates, Project Accounting Associate, Accountant Seniors, Information Systems Associates, guards and supervisors as defined by the Act as initially established in Case No. 3-RC-1212 by the National Labor Relations Board certification dated June 19, 1953.

**WE WILL NOT** fail and refuse to bargain with the Union by unilaterally implementing changes to the BeneFlex Flexible Benefits Plan (“BeneFlex”), including altering PPO premiums in the medical plan, increasing medical plan deductibles, increasing dental plan premiums, and reducing the annual limit for and changing in contributions to Health Care Spending Accounts.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights as guaranteed in Section 7 of the Act.

**WE WILL**, upon the request of the Union, rescind the changes to BeneFlex described above, and restore the terms and conditions of employment that existed before the unlawful unilateral changes.

**WE WILL** make whole, with interest, all employees in the bargaining unit set forth above for any losses they may have suffered as a result of the unlawful unilateral changes to BeneFlex described above.

**WE WILL**, upon request, bargain collectively with the Union as the exclusive representative of the employees in the bargaining unit set forth above regarding changes to BeneFlex.