

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

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E.I. DUPONT DE NEMOURS & CO. )  
 )  
 )

AND )  
 )

UNITED STEELWORKERS INTERNATIONAL )  
UNION, AND ITS LOCAL UNION 6992. )  
\_\_\_\_\_ )

Case No. 3-CA-096616

**OPENING BRIEF OF RESPONDENT  
E. I. DU PONT DE NEMOURS AND COMPANY**

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## INTRODUCTION

This case involves certain unilateral changes to a cafeteria-style benefits plan known as the BeneFlex Flexible Benefits Plan (“BeneFlex” or “the BeneFlex Plan”) created by Respondent E.I. DuPont de Nemours and Company (“DuPont” or “the Company”) more than two decades ago. Through BeneFlex, DuPont provides a variety of benefits, including medical, dental, vision, life insurance and accidental death insurance. DuPont has offered benefits through BeneFlex to its employees nationwide, including union and non-union employees alike, subject to the terms of the BeneFlex Plan itself.

In 1991, DuPont offered employees at its Yerkes site in Tonawanda, New York (“Yerkes”), the opportunity to participate in the BeneFlex Plan on the same basis as other DuPont employees nationwide. DuPont provided the Union<sup>1</sup> at Yerkes with a detailed description of the BeneFlex Plan, along with a copy of the BeneFlex Plan document, which includes reservation of rights language, reserving to DuPont the unilateral right to modify Plan. In 1991, DuPont and the Union specifically discussed the BeneFlex reservation of rights language, and the Union agreed to accept BeneFlex, subject to the terms of the Plan.

Consistent with its rights under the agreed-upon Plan language, DuPont has modified BeneFlex every year since 1992 without first bargaining those changes with the Union. The modifications have included increases as well as decreases to the cost of medical, dental, vision coverage and changes in eligibility for Plan benefits, as well as significant design changes affecting the nature and scope of offered benefits. Such changes have been announced

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<sup>1</sup> The United Steelworkers Local Union 6992, along with its predecessor unions, PACE and the Buffalo Yerkes Union (collectively “the Union”), have represented hourly production, maintenance, plant clerical and analyst employees at Yerkes for more than 60 years.

corporate-wide in the fall of each year, and have gone into effect on January 1<sup>st</sup> of the following year.

In September 2012, DuPont announced another set of BeneFlex changes which became effective January 1, 2013 (the “2013 BeneFlex Changes”) and which are the subject of this proceeding. The 2013 BeneFlex Changes included changes to BeneFlex medical, dental and accidental death and dismemberment benefits. The 2013 BeneFlex Changes were similar in kind to the changes DuPont has announced and implemented unilaterally in prior years. As in prior years, DuPont did not bargain with the Union before announcing and implementing the 2013 BeneFlex Changes. The Union filed an unfair labor practice charge alleging that DuPont violated Section 8(a)(5) by implementing the 2013 BeneFlex Changes unilaterally after the parties’ collective bargaining agreement had expired. Region 3 issued Complaint on the Union’s charge.

As explained more fully below, the Complaint should be dismissed. First, the Complaint should be dismissed because the Union expressly waived its right to bargain over future BeneFlex changes when it accepted the Plan more than two decades ago. As noted above, the Union agreed to the BeneFlex reservation of rights language in 1991 as the “price of admission” for its members’ participation in the Plan. Neither that agreement, nor the BeneFlex “reservation of rights” language has changed since 1991. Union-represented employees at Yerkes have participated in BeneFlex since 1992 and continue to do so today. The Union cannot have its members continue to accept benefits under the terms of the BeneFlex Plan while – at the same time – reneging on its agreement to the Plan’s reservation of rights language. Such a result is wholly inconsistent with the parties’ longstanding agreement and should be rejected.

The Complaint should be dismissed for a second, independent reason: DuPont was privileged to implement the 2013 BeneFlex Changes because they are consistent with the parties' 20-year long past practice and, as such, constitute a lawful continuation of the *status quo*. As the D.C. Circuit recently stated in *E. I. DuPont de Nemours & Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012), another case involving unilateral changes to BeneFlex at a different site, "Under *Katz*, an employer unilaterally may implement changes 'in line with [its] long-standing practice'" because such changes amount to "a mere continuation of the *status quo*." In that case, the D.C. Circuit refused to find that post-contract expiration changes to BeneFlex constituted a violation of Section 8(a)(5) because the changes there, like here, "were similar in scope to those it had made in prior years" and, thus constituted a continuation of the *status quo* under the Board's decision in *Courier-Journal*, 337 NLRB 1093 (2004). For both of these reasons, the Complaint should be dismissed.

## I. STATEMENT OF FACTS

### A. **The Parties**

Respondent DuPont is a Delaware corporation with its principal place of business in Wilmington, Delaware. (Stipulations of Fact ("Stips"), ¶ 1). DuPont operates more than two dozen facilities located throughout the United States, including a plant in Tonawanda, New York, known as the Yerkes site ("Yerkes"). (*Id.*). As of January 1, 2013, DuPont employed approximately 34,000 employees in the United States; fewer than 3,700 of those employees were represented by unions. (*Id.* ¶ 2).

United Steelworkers Union ("USW") Local Union 6992, together with its predecessor unions, the Buffalo Yerkes Union and PACE, has represented hourly production, maintenance, plant clerical and analyst employees ("Unit") at Yerkes for more than 60 years. (*Id.* ¶ 3). The Buffalo Yerkes Union ("BYU") represented Yerkes employees for decades until employees

voted to affiliate with PACE. Following the affiliation vote, BYU became PACE Local Union 1-6992. In 2005, PACE merged with the USW, and the Local Union became USW Local Union 6992. USW Local Union 6992 has represented hourly workers at Yerkes since 2005. Currently, there are approximately 547 DuPont employees at Yerkes, 348 of whom are in the bargaining unit represented by the USW. (*Id.* ¶ 4).

## **II. RELEVANT BARGAINING HISTORY**

The parties have a 60-year collective bargaining relationship. (*Id.* ¶ 12). The parties entered into a new collective bargaining agreement (“CBA”) at Yerkes in 1977, containing an “evergreen” clause, pursuant to which the CBA rolled over year after year unless and until either party elected to terminate the agreement. (*Id.* ¶ 13; *see also* Jt. Exh. 4, 1977 CBA).<sup>2</sup> The 1977 CBA remained in effect until late 1993. (*Id.*)

In September 1993, DuPont notified the Union that it would terminate the 1977 CBA effective December 7, 1993. (*Id.* ¶ 14). The parties remained without a CBA from December 1997 until April 12, 2008, when they entered into a new CBA (the “2008 CBA”). (*Id.* ¶ 15). The 2008 CBA was effective by its terms until April 13, 2012. (*Id.*) In February 2012, the Union gave notice that it wished to terminate the 2008 CBA, and the agreement expired on April 13, 2012. (*Id.*) The parties were without a contract from about April 13, 2012, until June 18, 2013, when they entered into a successor CBA. (*Id.* ¶ 16; *see also* Jt. Exh. 6).

## **III. DUPONT’S CORPORATE-WIDE BENEFIT PLANS GENERALLY**

DuPont maintains a single set of corporate-wide employee benefit plans for union and non-union employees, most of which have been in existence for decades. (*Id.* ¶ 5). DuPont has allowed all U.S. employees to participate in its corporate-wide plans regardless of where they

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<sup>2</sup> References to the Exhibits to the Stipulations of Fact are referred to as Joint Exhibits and abbreviated as (“Jt. Exh.”).

work, their position within DuPont, or whether they are represented by a union. (*Id.* ¶ 6).

DuPont has maintained a single set of corporate-wide plans for two primary reasons. (*Id.* ¶ 7).

First, the Company has sought to ensure that all employees from location to location receive the same benefits based on their years of service and other criteria, irrespective of the specific job they hold or whether they are represented by a union. (*Id.*). Second, having a single set of benefit plans covering all DuPont employees provides significant benefits to both the Company and individual plan participants. (*Id.*). Maintaining a single set of benefit plans allows for easier plan administration, and makes it easier to ensure compliance with all the applicable legal requirements (e.g., non-discrimination testing). (*Id.*). Having corporate-wide benefit plans also provides significant economies of scale that allow the Company to offer plan participants lower premiums and better service. (*Id.*).

Each of DuPont's corporate-wide benefit plans contains a "reservation of rights" provision stating that the Company retains the right to change or modify the plans at its discretion. (*Id.* ¶ 8; *see also* Jt. Exh. 1(a)-(c)). The collective bargaining agreements that DuPont has entered into at its sites represented by the USW and/or its local unions all contain an article entitled "Industrial Relations Plans and Practices" ("IRP&P Provision"). The IRP&P Provision in each USW CBA confirms the Company's right to modify unilaterally the benefit plans identified within the IRP&P provision. (*Id.* ¶ 9; *see also* Exhibits 2(a)-(c)). Historically, DuPont has assessed its benefit plans and plan offerings on an ongoing basis, and implemented unilaterally the changes it has deemed necessary.

Information concerning benefit changes has been provided to DuPont employees, retirees, and other benefit plan participants in a variety of ways. (*Id.* ¶10). DuPont employees, retirees, and plan participants, as well as the unions representing DuPont employees, have been

notified of changes to the Company's corporate-wide benefit plans through one or more of the following vehicles: DuPont publications such as "Plain Talk" and "Extensions," "Benefit Bulletins," "BeneFlex Guides," "Benefit Highlights," "Retiree Health Care Highlights," "Health Care Communication to Employees," benefits Q&As, and benefit-related PowerPoint presentations, as well as through ERISA-required Notices of Material Modifications and letters to employees and/or retirees. (*Id.*; see also Jt. Exhs. 3(a)-(bb)). In recent years, DuPont employees, retirees, and unions have also received email communications and have been directed to Company-sponsored benefit websites for more information concerning benefits provided through DuPont's corporate-wide benefit plans and about changes that affect those benefits. (*Id.*). Historically, the Company has provided the Union with information about employee benefit changes prior to the time that the Company announced them to the general employee population at the Yerkes site. (*Id.*; see also Jt. Exhs. 3 (a)-(bb)).

DuPont has created new corporate-wide benefit plans from time to time. (*Id.* ¶ 11). When new corporate benefit plans have been created, DuPont has presented them to the Union and offered the Union the opportunity to have its members participate in the benefit plans, subject to the terms of the benefit plans themselves. (*Id.*).

#### **IV. THE UNION'S AGREEMENT TO BENEFLEX**

##### **A. The Creation of BeneFlex**

DuPont created BeneFlex as a new comprehensive, corporate-wide benefit plan in 1991. BeneFlex is a self-insured, cafeteria-style benefits plan, through which comprehensive health coverage, dental coverage, vision coverage, a "vacation buying" program, a flexible healthcare spending account, and life insurance are provided. (*Id.* ¶ 18). Each of these benefits is described in a separate BeneFlex Plan document. BeneFlex and each of its sub-plans contain a reservation

of rights clause, which has often been called the “management rights” provision by the parties. (*Id.*).

### **B. The Union’s Acceptance of BeneFlex**

In May 1991, DuPont and the Union met to discuss the introduction of BeneFlex at Yerkes. (*Id.* ¶ 11). In July and August 1991, DuPont provided the Union with a copy of the BeneFlex Plan language, along with a copy of a “BeneFlex Sourcebook,” which provided information about the BeneFlex sub-plans. (*Id.* ¶ 19). The Company also provided the Union with a copy of the BeneFlex Plan language. (*See* Jt. Exh. 8(a), August 9, 1991, meeting summary). In mid-October 1991, the parties held a “meeting to discuss BeneFlex, in particular whether the Union was prepared to accept BeneFlex.” (*See* Jt. Exh. 8(b), October 18, 1991, meeting summary). At that time, the Union voiced concerns with parts of BeneFlex Plan language, including “the Definition, Participation, Failure to Elect, Administration and Modification language.” (*Id.*). The Company informed the Union that BeneFlex was being made available to Union-represented employees at Yerkes but only if the Union agreed to the terms of the Plan. (Stips. ¶ 19).

On October 28, 1991, following further discussions, the Union agreed to have its members participate in BeneFlex, subject to the terms set forth in the BeneFlex Plan document. (Stips. ¶¶ 19-20). At that time, the BeneFlex Plan, to which the Union expressly agreed, contained the following reservation of rights language:

#### **XIII. MODIFICATION OR TERMINATION OF THE PLAN**

The Company reserves the sole right to change or discontinue this Plan in its discretion provided, however, that any change in price or level of coverage shall be announced at the time of annual open enrollment and shall not be changed during a Plan Year unless coverage provided by an independent, third-party provider is significantly curtailed or decreased during the Plan Year. Termination of this Plan or any benefit plan incorporated

herein will not be effective until one year following the announcement of such change by the Company.

(See Jt. Exh. 7(a) at p. 4). The BeneFlex sub-plans each contained similar reservation of rights language expressly stating that the Company reserved the right to change or discontinue the Plans, subject to the above-quoted limitation on the Company's right to change benefit prices or coverage during a Plan Year and the one-year notice requirement for discontinuation of the sub-plans. (See, e.g., Jt. Exh. 7(b), BeneFlex Medical Care Plan, at p. 20; Jt. Exh. 7(c) BeneFlex Dental Care Plan, at p. 16; Jt. Exh. 7(d), BeneFlex Accidental Death Insurance Plan, at 7, and Jt. Exh. 7(e), BeneFlex Health Care Spending Account Plan, at p. 7).

The parties memorialized the Union's agreement to participate in BeneFlex and to the terms of the Plan in a Supplemental Agreement dated October 28, 1991 (the "1991 Supplemental Agreement"). (Stips. ¶ 20). The 1991 Supplemental Agreement amended the then-current 1977 CBA by adding a new Section 3 to the contract's IRP&P<sup>3</sup> provision, which confirmed that Union-represented employees at Yerkes were eligible to receive benefits under the then-newly-created BeneFlex Flexible Benefit Plan, "*subject to all the terms and conditions of the BeneFlex Plan.*" (*Id.*) (emphases added).<sup>4</sup> Union employees at Yerkes began to participate in BeneFlex on January 1, 1992, and have continued to receive medical, dental, vision care and other benefits under BeneFlex ever since. (*Id.* ¶ 21).

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<sup>3</sup> Each Yerkes CBA since 1947 has contained an IRP&P provision listing the corporate-wide benefit plans and practices then in existence at the site. (*Id.* ¶ 17).

<sup>4</sup> The 1991 Supplemental Agreement also retained other, non-BeneFlex local health care insurance options, and deleted from the IRP&P provision any reference to the Non-Contributory Group Life Insurance Plan, the Contributory Group Life Insurance Plan, and the Dental Assistance Plan, as benefits provided under those plans were also provided under BeneFlex. (Stip. ¶ 20; see also Jt. Exh. 9, 1991 Supplemental Agreement).

**C. The Parties' 1993 Contract Negotiations, Associated Unfair Labor Practice Charges, and 1997 Settlement Agreement**

In 1993, DuPont and the Union commenced bargaining over a successor agreement and DuPont proposed eliminating all local health care insurance options. (*Id.* ¶ 22). In September 1994, DuPont implemented its final offer ("1994 Offer"), the healthcare component of which continued to provide medical benefits through the BeneFlex Medical Care Assistance Plan, but eliminated the local health care insurance options. (*Id.*). The Union filed unfair labor practice charges alleging the parties were not at impasse and, therefore, the implementation of the 1994 Offer was unlawful. (*Id.*). DuPont and the Union entered into an informal settlement of those charges in 1997. (*Id.*)

**D. Implementation of the Company's 2001 Final Offer and Discussion of Medical Premiums During the Period 2002-2006**

Negotiations for a successor collective bargaining agreement resumed in 1997 following the settlement of the Union's charges. (*Id.* ¶ 23). The bargaining history regarding the resumption of negotiations is set forth in the Board's decision in *E. I. DuPont de Nemours*, 346 NLRB 553 (2006). In April 2001, DuPont implemented its final contract offer ("2001 Offer"), which provided, among other things, that healthcare costs for 2001 would be paid 75 percent by DuPont and 25 percent by the participants, and that any future increases in healthcare costs would be shared equally by the Company and the participants, on a 50-50 basis. (*Id.*). The 2001 Offer did not address or seek to modify any other aspects of the BeneFlex Plan pertaining to Union-represented employees at Yerkes. (*See* Jt. Exh. 11). In 2001, the Union filed unfair labor practice charges alleging violations of Sections 8(a)(1) and 8(a)(5) of the Act regarding DuPont's implementation of the 2001 Offer and the unilateral changes to the BeneFlex Medical Plan that DuPont announced in October 2001 and went into effect in January 2002 ("BeneFlex Litigation"). (*Id.* ¶ 24).

In the fall of 2001, DuPont informed the Union that medical insurance premiums would increase for the BeneFlex 2002 plan year. (*Id.* ¶ 26). Union employees at Yerkes were to be assessed 50 percent of those premium increases under the terms of DuPont's implemented 2001 Offer. (*Id.*). In late 2002, DuPont approached the Union and proposed that the Company cover 70 percent of the cost of health insurance premiums and that participants cover the remaining 30 percent of the cost ("70/30 premium split"). (*Id.* ¶ 27). The Union rejected that offer. As a result, DuPont charged participants of the self-insured plan 50 percent of the medical premium increases for 2003 in accordance with the terms of the implemented 2001 Offer. (*Id.*).

In October 2003, DuPont advised the Union that premiums for the BeneFlex medical plan were increasing in 2004, and again offered the Union the option of accepting a 70/30 split of the costs for the self-insured plan. (*Id.* ¶ 28). The Union accepted the Company's offer for the 2004 plan year. (*Id.*). The parties executed a Memorandum of Agreement entitled "2004 Enrollment Guidelines BeneFlex Medical Care Plan," which reflected the parties' agreement ("2004 MOU"). (*Id.*; *see also* Jt. Exh. 13, the 2004 MOU). The next year, October 2004, the parties entered into an identical Memorandum of Agreement for the 2005 BeneFlex plan year ("2005 MOU"). (Stips. ¶ 29; *see also* Jt. Exh. 14, the 2005 MOU).

In September 2005, DuPont proposed that the 70/30 premium cost split for BeneFlex medical benefits be implemented on a continuing basis. (Stips. ¶ 30). The Union rejected that proposal, and the parties ultimately agreed to a Memorandum of Agreement which included a 70/30 split on cost increases for the self-insured BeneFlex plan only for the 2006 plan year ("2006 MOU"). (*Id.* ¶ 31; *see also* Jt. Exh. 16, the "2006 MOU").

The parties' discussions, and the execution of MOUs regarding medical premium increase cost-splitting during the 2002-2006 time period, all took place while the BeneFlex

Litigation concerning the implementation of DuPont's 2001 Offer was pending. During that same time period, DuPont announced and unilaterally implemented numerous changes to other aspects of BeneFlex in addition to adjustment of premiums under the BeneFlex Medical Care Plan. (*See, e.g.*, Jt. Exh. 3(g)-3(p)). Those changes were not subject to the various MOUs into which the parties entered and the Union did not challenge those changes.

**E. The Board's 2006 Decision Regarding the Implementation of DuPont's 2001 Final Offer and Relating Benefit Discussions**

In the BeneFlex Litigation, DuPont argued that the 1997 Settlement Agreement only required that the medical premium rate be frozen at the 1996 level, but that the other cost components of BeneFlex, such as co-pays and deductibles, were not frozen. (Stips. ¶ 25). The Union's position was that all costs were frozen. (*Id.*). In February 2006, the Board ruled, *inter alia*, that DuPont's implementation of its 2001 Final Offer, containing the 50/50 Company-employee split with respect to BeneFlex medical premium increases, was lawful. (*Id.* ¶ 32; *see also E. I. du Pont de Nemours & Co.*, 346 NLRB 553 (2006)). The Board's decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit in *E. I. du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007).

Following the Board's ruling, the parties resumed negotiations for a successor contract in the summer of 2006. (Stips. ¶ 32). At that time, the Company made a comprehensive contract offer which included a provision under which Union-represented employees at Yerkes would be subject to the same 70/30 premium BeneFlex cost split that was applicable to plan participants elsewhere. (*Id.*). The Union rejected DuPont's contract offer, and proposed instead that the parties enter into another MOU including the 70/30 split on medical costs, as they had in prior years. (*Id.*). DuPont rejected the Union's proposal, and informed the Union that it was unwilling

to enter into another MOU in light of the Board's 2006 ruling, and the fact that the 70/30 cost split was already included as a part of the Company's comprehensive contract offer. (*Id.*).

As in the past, DuPont announced changes to medical benefits under BeneFlex in both October 2006 and 2007, which included changes to employee medical costs as well as plan design changes. (*Id.* ¶ 33). DuPont implemented those changes in January 2007 and January 2008, respectively. (*Id.*). DuPont did not seek the Union's agreement before announcing or implementing those BeneFlex changes and the Union did not file unfair labor practice charges challenging DuPont's right to make those changes. (*Id.*).

In August 2006, DuPont announced changes to several of its corporate-wide benefit plans, including changes to the BeneFlex Employee Life Insurance Plan and BeneFlex Vacation Buying Plan. (*Id.* ¶ 34). The Union filed an unfair labor charge in response to those announced changes, and the parties ultimately entered into a global settlement of the Union's unfair labor practice charge and all outstanding contract issues. (*Id.*). As a part of that settlement, DuPont and the Union agreed to the 2008 CBA. (*Id.*). As with the amended 1977 CBA, the employees retained the right to opt out of BeneFlex and receive health coverage through a local health insurance carrier, provided that enrollment in the plans offered by the local health insurance carrier did not drop below a level defined in the 2008 CBA. (*Id.*). The 2008 CBA contained an IRP&P provision relating to the provision of benefits under the Company's corporate-wide benefit plans. (*Id.*). Section 3 of the IRP&P provision was moved to Section 2 in the 2008 CBA, and reaffirmed the Union's pre-existing agreement to be bound by the terms of the BeneFlex plan, providing in pertinent part:

**ARTICLE XVII  
INDUSTRIAL RELATIONS PLANS AND PRACTICES**

\* \* \*

SECTION 2. In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, employees shall receive benefits as provided by the COMPANY'S BeneFlex Flexible Benefits Plan, subject to the terms and conditions of said plan.

BeneFlex was also referenced in Article XIX of the 2008 CBA, entitled Hospital and Medical-Surgical Coverage. That provision provides in pertinent part:

SECTION 1. (A) The COMPANY will provide medical coverage for employees under the BeneFlex Medical Care Plan, which is part of the BeneFlex Flexible Benefits Plan. (See Art. XVII, Sec. 2.) Participants will pay the premiums, co-pays, co-insurance and deductibles established for a particular plan year. *The bargaining unit members will be offered the same cost sharing as the other plan participants.*

(Emphasis added).

In February 2012, the Union gave DuPont notice that it wished to terminate the 2008 CBA; the 2008 CBA expired on April 13, 2012. (Stips. ¶ 35). In June 2013, the parties reached agreement on a successor collective bargaining agreement. (See Jt. Exh. 6). The 2013 CBA retained from the 2008 CBA the operative language regarding BeneFlex. (Stips. ¶ 45).

**V. HISTORY OF UNILATERAL BENEFLEX CHANGES**

In the fall of each year since 1991, DuPont has conducted an "open enrollment" period at Yerkes during which employees can select various benefit options within BeneFlex. (Stips. ¶ 37).<sup>5</sup> DuPont has announced and made changes to various of the BeneFlex sub-plans, including

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<sup>5</sup> During the period 2001 through 2013, Union-represented employees could elect to receive their health insurance via a local carrier that was not a part of BeneFlex. (*Id.* ¶ 37). The 2008 CBA provided that the local health care plan option would be discontinued if enrollment in the local health care plan dropped below certain prescribed levels. Pursuant to the terms of the 2008 CBA, the local health  
(Continued...)

changes to the BeneFlex Medical Plan, every year since 1992. (*Id.* ¶ 38). The BeneFlex changes have been announced in September or October of each year, just prior to, or in conjunction with, the BeneFlex open enrollment period. (*Id.*) The BeneFlex changes announced each fall became effective in the new BeneFlex plan year, which begins January 1. (*Id.*) Annual BeneFlex medical, dental and vision plan changes have included, among other things:

- Increases in employee medical, dental and vision premiums
- Increases in employee co-pays
- Increases in deductibles
- Changes to stop-loss protection levels
- Plan design changes, such as changes in available plan options, the level of coverage offered, the specific medical or dental procedures covered and changes to the plan eligibility criteria
- Introduction of and adjustments to health savings plans
- Benefit plan enhancements

(*Id.*).

Since, 1992, DuPont has maintained a practice of notifying the Union of upcoming BeneFlex changes during Union-management meetings held prior to the annual BeneFlex open enrollment period. (*Id.*) With the limited exception of the cost-sharing discussions resulting in MOUs with respect to the cost-sharing formula for medical premium increases, DuPont has always made BeneFlex changes unilaterally. (*Id.* ¶ 40). Indeed, because BeneFlex is a corporate-wide plan, the Company has consistently reminded the Union, and the Union has understood, that the Company would not bargain over the annual BeneFlex changes. (*See, e.g.,*

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insurance options were not offered at Yerkes in 2011 or 2012 due to low enrollment in those plans in 2010. (*Id.* ¶ 36). The option for employees to elect local health insurance options outside of BeneFlex was eliminated in the most recent 2013 CBA. (*Id.*)

Jt. Exh. 17(d), Union-Management Meeting summary, dated October 13, 2003) (Company stated that it was meeting “to review 2004 BeneFlex changes,” not bargain over them, because “BeneFlex has already been accepted by the Union”). Accordingly, DuPont has not bargained to agreement or impasse with the Union over any of the annual changes it has made to BeneFlex in the 20 years that passed between the Union’s agreement to have its members participate in BeneFlex in 1992 and 2012. (*Id.*). The Union here concedes that DuPont retained the right to make BeneFlex changes, subject to the terms of the BeneFlex plan, during the term of the 1977 CBA, which expired in 1993, and during the term of the 2008 CBA. (*Id.* ¶¶ 22, 41).

In addition, although the Company and Union negotiated over – and in some cases entered into MOUs concerning – the percentage of the medical premium cost increases to be borne by the Company and employees, the parties did *not* negotiate over the medical increases themselves, either during that period or at any other time. Nor has the Company ever bargained with the Union over *any* of the multitude of changes that it has implemented to the various sub-plans that comprise the BeneFlex offering. Finally, the undisputed record shows that DuPont announced and implemented changes to BeneFlex unilaterally during contract hiatus periods, such as during the period 2003 through 2007 when there was no contract between the parties.

Examples of changes made unilaterally by DuPont during hiatuses between contracts include modifications to the BeneFlex Medical Plan in 2003 to discontinue “Option L,” creating a new “Option U” and expanding coverage to include infertility treatment. (*See* Jt. Exh. 3(k)). Other examples of “hiatus” changes implemented unilaterally by DuPont during this period were its decisions, in 2004, to increase medical premiums, add a legal plan to the BeneFlex offering, and modify the BeneFlex Dental and BeneFlex Vision Plans to add new features. (*See* Jt. Exh. 3(i)). Likewise, in 2005, DuPont amended its BeneFlex plans unilaterally to extend coverage

and eligibility to same-sex partners. (See Jt. Exh. (m)-(n)). In 2006, the Company increased – again, unilaterally – premiums for medical, vision, and accidental death coverage and decreased employee and dependent life insurance premiums under BeneFlex. In 2007, the Company increased medical premiums, imposed limits on stop-loss protections, and implemented a new disease management program under BeneFlex unilaterally. (See Jt. Exh. 3(q)(r)). DuPont also lowered premiums for dental and vision coverage under BeneFlex in 2007. (*Id.*). The Company did not negotiate with the Union over any of these changes. And the Union did not file any unfair labor practices challenging the changes, notwithstanding the prior termination of the CBA.

#### **VI. THE 2013 BENEFLEX CHANGES AT ISSUE**

On September 17, 2012, DuPont announced another set of changes to BeneFlex which became effective January 1, 2013 (the “2013 BeneFlex Changes”). (*Id.* ¶ 42). The 2013 BeneFlex Changes were similar to prior BeneFlex changes, and included changes to BeneFlex medical, dental and accidental death and dismemberment benefits. (*Id.*). More specifically, the 2013 BeneFlex Changes included:

- Slight increases to premiums under the BeneFlex Medical Plan for Managed Care PPO coverage for those not taking advantage of DuPont’s health incentive program
- Decreases to premiums under the BeneFlex Medical Plan for Health Savings PPO coverage
- Slight increases to premiums for coverage under the BeneFlex Dental Plan
- Increases in medical deductibles from \$1,200 to \$1,250 for individuals and by \$100 per year, to \$2,500, for all other levels of coverage
- Reductions in the annual limit for employee Health Care Spending Accounts from \$5,000 to \$2,500 based on the Health Care Reform Act
- Amendment of the accidental death and dismemberment coverage to provide employees with a new AD&D benefit equal to one times their earnings

- Modifications to DuPont's contributions to employee HSAs, such that DuPont would contribute through a lump sum paid at the beginning of the year, rather than on a pro-rated monthly basis

*See also* Jt. Exh. 18(a)-(b).

The Union concedes, as it must, that the 2013 BeneFlex Changes were similar in kind to the types of BeneFlex changes DuPont announced and implemented in prior years at Yerkes. (Stips. ¶ 44). As in prior years, DuPont announced the changes to the Union in a Union-management meeting held prior to the BeneFlex open enrollment period. (*Id.*). And, as in prior years, DuPont did not bargain with the Union over the new BeneFlex changes prior to announcing or implementing them. (*Id.*).

The 2013 BeneFlex Changes were announced and implemented after the 2008 CBA had expired on April 13, 2012, and prior to the effective date of the successor agreement on June 18, 2013. (*Id.*). The parties' 2013 CBA retained the operative contract language regarding BeneFlex from the 2008 CBA. (*Id.* ¶ 45).

### ARGUMENT

The Complaint alleges that DuPont violated Section 8(a)(5) of the Act by announcing and implementing the 2013 BeneFlex Changes, following expiration of the 2008 CBA, without first bargaining with the Union. As demonstrated below, the Complaint should be dismissed for two independent reasons.

First, the 2013 BeneFlex Changes are fully consistent with, and covered by, the parties' 1991 agreement which granted DuPont the express right to modify BeneFlex unilaterally. Simply put, the Union agreed to BeneFlex in its entirety. Having done so, the Union cannot now contend that its members are entitled to participate in BeneFlex, and enjoy the benefits flowing from the economies of scale offered by that corporate-wide Plan and other terms and conditions

of the Plan, while at the same time claiming that it is not bound by those terms in the Plan that the Union considers less desirable.<sup>6</sup>

Second, the record shows that DuPont did not violate Section 8(a)(5) by implementing the 2013 BeneFlex Changes, even assuming they were not covered by the parties' longstanding agreement and the Union's express waiver, because the changes were consistent with past practice and did not alter the *status quo*. The 2013 BeneFlex Changes were similar in scope to the recurrent changes that DuPont has implemented annually each year since 1992. (Stips. ¶ 44). Accordingly, the 2013 BeneFlex Changes were lawful under the Board's rulings in *The Courier-Journal*, 342 NLRB 1093 (2004), *The Courier Journal*, 342 NLRB 1148 (2004) (collectively "*Courier Journal*") and *Capital Ford*, 343 NLRB 1058 (2004), as well as the D.C. Circuit's recent decision in *DuPont v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012).

**I. THE 2013 BENEFLEX CHANGES WERE COVERED BY AND FULLY CONSISTENT WITH THE PARTIES' 1991 AGREEMENT THROUGH WHICH THE UNION EXPRESSLY WAIVED THE RIGHT TO BARGAIN OVER FUTURE BENEFLEX CHANGES**

The Board and courts have long held that an employer has a statutory duty to bargain over mandatory subjects of bargaining, including employee benefits. *NLRB v. Katz*, 369 736, 743 (1962). The Board and courts have likewise held that a union may relinquish its statutory

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<sup>6</sup> The Complaint should also be dismissed pursuant to the "contract coverage" analysis. As several courts have explained, "[w]hen a union agrees to a management rights clause that gives the employer the exclusive right to [act on a matter], no further bargaining on the issue is required by the NLRA." *Local 15, IBEW v. Exelon Corp.*, 495 F.3d 779, 783 (7th Cir. 2007), citing *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992). See also *NLRB v. United Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993) (holding that a union may exercise its right to bargain about a particular subject by negotiating over a contract provision that "fixes the parties' rights and forecloses further mandatory bargaining as to that subject"). Here, the parties' bilateral agreements as to future bargaining over changes to BeneFlex are reflected in the BeneFlex plans' reservation of rights provisions, which formed the "contract" between the parties. As the D.C. Circuit made clear, "neither the Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement." *United Postal Service*, 8 F.3d at 836.

right to bargain over mandatory subjects of bargaining if the waiver of that right is clear and unmistakable. *See American Broadcasting Co.*, 290 NLRB 86, 88 (1988) (“A union . . . may contractually relinquish a statutory bargaining right if the relinquishment is expressed in clear and unmistakable terms”); *California Pacific Med. Ctr.*, 337 NLRB 910, 914 (2002) (finding union’s rights to bargain over layoffs clearly and unmistakably waived).

When assessing whether a “clear and unmistakable waiver” exists, the Board analyzes: (1) language in the parties’ collective bargaining agreements; (2) the parties’ past dealings; (3) the relevant bargaining history; and (4) other “bilateral arrangements that may shed light on the parties’ intent.” *NLRB, Office of the General Counsel, Advice Memorandum*, case 27-CA-21211, 4 & n. 6 (2009); *see also Omaha World-Herald*, 357 NLRB No. 156 (2011); *Johnson-Bateman*, 295 NLRB 180, 184-187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992).

The Board and courts have made it clear that enforceable agreements need not be contained in a formal collective bargaining agreement: “The [National Labor Relations] Act, it is to be remembered, does 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* 29 U.S.C. § 158(d); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550-51 (1964), *NLRB v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058, 1061 (8th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); *Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 524 v. Billington*, 402 F.2d 510, 513 & n. 3 (9th Cir. 1968); *Warrior Constructors v. International Union of Operating Engineers*, 383 F.2d 700, 706 (5th Cir. 1967).

Here, the Union expressly waived its right to bargain over future BeneFlex changes when it accepted the comprehensive, nationwide BeneFlex Plan on behalf of its members. The undisputed record shows that DuPont provided the Union with extensive materials describing the

newly-created BeneFlex program in the summer of 1991, including a copy of the BeneFlex Plan language. (Stips. ¶ 11, 19; Jt. Exh. 8(a)). The parties specifically bargained over the terms set forth in the BeneFlex Plan; indeed, the Union expressed concerns regarding certain aspects of the Plan, including its reservation of rights or “modification” language. (*Id.*). After exploring its options, and weighing the valuable benefits offered by the corporate-wide BeneFlex Plan against whatever concerns it had over the Plan language, including the reservation of rights language, the Union ultimately agreed to accept BeneFlex, subject to the terms of the Plan, on October 28, 1991.

The Union’s agreement to all of the terms of the BeneFlex Plan, including its reservation of rights language, was the “price of admission” for Union member participation in the corporate-wide plan. Indeed, as the parties have stipulated, the Company specifically informed the Union that BeneFlex was being made available to Union represented employees at Yerkes but only if the Union agreed to the terms of the Plan. (Stips. ¶ 19). The reason for this express condition is clear. BeneFlex provided benefits to tens of thousands of DuPont employees nationwide, both union and non-union alike. Union employees at Yerkes – like union-represented employees of other sites – constituted just a small fraction of the total BeneFlex population. Recognizing that it needed the flexibility to adapt to changing conditions in the market place for benefits, DuPont demanded that all of its unions agree to the BeneFlex reservation of rights language to provide the Company the discretion to modify the Plan unilaterally in the future, without having to negotiate with any of its individual unions.

The Union’s agreement to have its members participate in BeneFlex, subject to the Plan’s reservation of rights language and the terms set forth in Plan document, was memorialized in the 1991 Supplemental Agreement. (Stips. ¶¶ 19-20; *see also* Jt. Exh. 7(a)). The reservation of

rights language contained in the 1991 BeneFlex Plan, to which the Union expressly agreed, states:

### XIII. MODIFICATION OR TERMINATION OF THE PLAN

The Company reserves the sole right to change or discontinue this Plan in its discretion provided, however, any change in price or level of coverage shall be announced at the time of annual open enrollment and shall not be changed during a Plan Year unless coverage provided by an independent, third-party provider is significantly curtailed or decreased during the Plan Year. Termination of this Plan or any benefit plan incorporated herein will not be effective until one year following the announcement of such change by the Company.

(See Jt. Exh. 7(a) at p. 4).

The BeneFlex reservation of rights language has not changed since the Union agreed to it. (See Jt. Exh. 7(a)-(e); 19(a)-(3)). And there is nothing remotely unclear or ambiguous about the Union's waiver. In fact, courts have consistently held that the reservation of rights provisions of the type set forth in the BeneFlex Plan documents clearly place benefit plan participants on notice that their employer has retained the right to modify their benefit plans at the employer's discretion. (See, e.g., *Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994) (retiree health care plan language stating the "Policy may be amended or discontinued at any time" put employees on notice that employer had the unilateral right to modify or terminate the plan and continued benefits were neither guaranteed nor vested); *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (language stating "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet" was unambiguous)).

Simply put, the Union agreed to accept the BeneFlex Plan, with all of its component parts, including the express waiver reflected in reservation of rights language, and that agreement

– with the Union’s express waiver – has never expired or been modified in any way. And, consistent with that agreement, Union employees at Yerkes have remained eligible to receive the valuable benefits provided under the BeneFlex Plan for more than 20 years. The BeneFlex reservation of rights language is as integral to the Plan – and Union members’ participation in the plan – as the schedule of benefits that is set forth in the Plan. Any suggestion that the Union’s waiver, as reflected by the agreed-upon reservation of rights provision, has somehow “expired” while Union members continue to reap the full benefit of their bargain by continuing to participate in BeneFlex under all of the terms of the plan, except the reservation of rights provision – is inconsistent with the deal the parties struck long ago. *See, e.g., Omaha-World Herald*, 357 NLRB No. 156, (2011), slip op. at 2 (employer’s post contract termination changes to company-wide pension plan deemed lawful where the reservation of rights language in the employer’s company-wide plans, and parties’ bargaining history, demonstrated that the employer “preserve[d] its authority to make uniform changes in the plans as they applied to both represented and unrepresented employees”).

If the Board were to accept the argument posited by the Union and counsel for the General Counsel – that Union employees may continue to participate in BeneFlex, without being subject to the Plan’s reservation of rights provision like everyone else in the Plan – it would create an entirely new deal to which no one agreed, and would thereby ignore the Supreme Court’s admonition that:

Courts generally may not interfere in this bargained-for exchange. Judicial nullification of contractual concessions . . . is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relations Act – freedom of contract.

*14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *see also NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 408-409 (1952) (recognizing that the Board may not dictate the substance of proposals or agreements between bargaining parties).

The Union contends that it is “absurd” to suggest “that once the Union agreed to the waiver language in 1992 [sic], that it would be required to live under that language forever regardless of whether there was a CBA in place or not.” *See* Charging Party’s Statement of Its Position, at 2. The Union further asks: “How then can the Union ever come out from under the waiver language?” (*Id.*) The Union’s hand-wringing is but a smokescreen that obscures both DuPont’s position and the central issue in the case.

DuPont has never claimed that the Union has forever waived its right to bargain over the *subject* of health care or participation in BeneFlex. DuPont’s argument is quite simple. As the Union concedes, BeneFlex was made available to Union-represented employees at Yerkes, but only if the Union agreed to the terms of the Plan, which included a reservation of rights provision specifically permitting the Company to make unilateral changes to the Plan. (Stips. ¶¶ 19-20; Jt. Exh. 8(b)-(c)). DuPont simply contends that as long as Union members at Yerkes continue to participate in BeneFlex, they remain subject to all the terms of the plan, including the reservation of rights provision. That, DuPont contends, remains true during hiatus periods between contracts, so long as the Union-represented employees are participating in BeneFlex.

Moreover, contrary to the Union’s argument, Union-represented employees are not subject to the BeneFlex waiver language in perpetuity. If Union employees do not wish to participate in the corporate-wide BeneFlex Plan, with its reservation of rights language, they can simply seek to negotiate something different. In fact, history shows they have done so. Indeed, both the 1991 Supplemental Agreement and the parties’ 2008 CBA provided Union employees

with a choice of health care options in addition to BeneFlex. (*See* Jt. Exh. 5, 2008 CBA, at p. 59). For instance, under the 2008 CBA, Union employees could elect to receive medical coverage provided by a local “Community Blue (HMO).” There is no suggestion that DuPont had the right to make changes to the local Community Blue HMO without first bargaining with the Union, and the Company never asserted such a position as to that “local” plan. And, in fact, it would not need to reserve such a right, since the Community Blue HMO was not a corporate-wide plan and no DuPont employees other than those at Yerkes participated in that local plan.

In short, the Union accepted BeneFlex in its entirety, including the reservation of rights language in the Plan, decades ago. If the Union did not wish to abide by the agreement it struck, it could have, and should have negotiated something different. *See, e.g., Courier-Journal*, 342 NLRB at 1095 (“The union, in bargaining, can seek to take away [employer] discretion and seek definite terms”). The Union should not be permitted to demand that DuPont live up to its part of the bargain (by allowing Union members to continue to participate in the BeneFlex Plan during a hiatus between contracts) while the Union reneges on its agreement to the reservation of rights language – the very language that allows BeneFlex to function as a nationwide Plan and generate the significant economies that result in lower premiums and better service for all Plan participants.

## **II. THE COMPLAINT SHOULD BE DISMISSED EVEN IF THE BOARD FINDS NO EXPRESS WAIVER BECAUSE THE 2013 BENEFLEX CHANGES ARE MERELY A CONTINUATION OF PAST PRACTICE**

The Board and courts have held that an employer does not violate Section 8(a)(5) by making unilateral changes that are consistent with a well-established past practice. *See, e.g., Post-Tribune*, 337 NLRB 1279 (2002) (employer privileged to make unilateral changes to employee health insurance benefits, even during contract negotiations, because the changes were consistent with past practice); *Beverly Health & Rehabilitation Servs., Inc. v. NLRB*, 297 F.3d

468 (6th Cir. 2002) (employer's post-contract change did not violate the Act where it was consistent with a history of unilaterally altering disciplinary rules and work schedules pursuant to the expired management rights clause). More specifically, the Board's decisions in the *Courier-Journal*, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004) and *Capital Ford*, 343 NLRB 1058 (2004), cases and the D.C. Circuit's decision in *E.I. DuPont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012), compel dismissal of the Complaint here.

**A. The 2013 BeneFlex Changes Constitute a Continuation of the *Status Quo* Under *The Courier-Journal* Cases.**

Relying on the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), the Board in *Courier-Journal* specifically held 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)." 344 NLRB at 1093. There, the parties had entered into a series of contracts for two bargaining units, each of which provided that covered employees would receive benefits through an employer maintained healthcare plan on the same terms as in effect for non-represented employees. The parties further agreed that the employer had reserved "the right to modify or terminate" the health care plan. (*Id.* at 1093). Consistent with the parties' agreement, the employer implemented unilateral changes to employee medical coverage each year over a 10-year period, including changes to health care premiums, modifications to coverages and changes in carriers, all of which affected both union and non-union employees. (*Id.*). Prior to 2001, some changes, on a single occasion, were implemented following the termination of the parties' collective bargaining agreement, during a "hiatus" period between contracts.

In 2001, the employer announced another set of health care changes, including changes in employee premiums, new coverages, a change in plan year dates, and a change in the insurance provider. (*Id.* at 1099). These changes were made during a period when a collective bargaining

agreement was not in effect, and the unions objected to the unilaterally-imposed increase, claiming the change violated Section 8(a)(5). (*Id.*) The Board dismissed the union's charge, finding that the announced changes were consistent with the Company's 10-year past practice of making similar changes. (*Id.* at 1094). The Board specifically noted that its finding was not grounded in waiver, but rather was "grounded in past practice, and the continuation thereof." (*Id.* at 1094-1095).

The facts here fall squarely within the holding of *Courier-Journal*. As demonstrated above, DuPont has announced and implemented annual, recurring changes to BeneFlex unilaterally for a period spanning more than 20 years. And there is no dispute that the 2013 BeneFlex Changes at issue here are fully consistent with, and thus constitute a continuation of, the parties practice and do not alter the *status quo*. As a result, the Board's *Courier-Journal* decision requires dismissal of the Complaint. The Union effectively concedes as much, and urges the Board to overrule *Courier-Journal*. See Charging Party's Statement of Its Position, at 2.

In a half-hearted attempt to escape the reach of *Courier-Journal*, the Union – separate from arguing that the Board should overturn *Courier-Journal* – argues that *Courier-Journal* is distinguishable on the basis that the Union here "has never acquiesced to the employer's unilateral changes." (*Id.*) The Union's position is both factually incorrect, and legally irrelevant.

As an initial matter, the Union has repeatedly acquiesced to the Company's unilateral changes, even during hiatus periods between contracts. For example, the record shows that DuPont announced and implemented numerous changes to BeneFlex during the period 2003 through 2007, when there was no contract between the parties. In 2003, the Company unilaterally discontinued "Option L" and established a new "Option U" under the BeneFlex

Medical Care Plan, and expanded medical coverage to include infertility treatment. (See Jt. Exh. 3(k)). In 2004, DuPont increased medical premiums, added a legal plan to the BeneFlex offering, added a new feature to the BeneFlex Dental Plan, and modified the BeneFlex Vision Plan unilaterally. (See Jt. Exh. 3(i)). In 2005, DuPont amended its BeneFlex plans unilaterally to extend coverage and eligibility to same-sex partners. (See Jt. Exh. (m)-(n)). In 2006, the Company increased – again, unilaterally – premiums for medical, vision, and accidental death coverage and decreased employee and dependent life insurance premiums under BeneFlex. In 2007, the Company increased medical premiums, imposed limits on stop-loss protections, and implemented a new disease management program under BeneFlex unilaterally. (See Jt. Exh. 3(q)(r)). DuPont also lowered premiums for dental and vision coverage under BeneFlex in 2007. (*Id.*). The Company did not negotiate with the Union over any of these changes, and the Union did not file any unfair labor practices challenging any of them, notwithstanding the prior termination of the CBA.

As noted above, while the parties did negotiate over MOUs as to health insurance premiums in 2002-2006, those negotiations related only to the BeneFlex Medical Care Plan, and pertained only to the cost-split for medical premiums under those plans. (See Jt. Exh. 13-16). Those MOUs did not extend to the changes outlined above. Moreover, the MOUs the parties entered into did not limit DuPont's unilateral right to increase or decrease medical premiums unilaterally; they simply set forth the agreed-upon apportioned share of the increased or decreased premiums that the Company and employees would pay. (*Id.*). More importantly, as explained below, it is the existence of the consistent past practice, not its timing (in or out of contract) or how it was created that establishes the relevant *status quo*.

**B. *Courier-Journal* Is Not Distinguishable Simply Because Part of the 20-Year Past Practice of Prior BeneFlex Changes Occurred During the Term of a Collective Bargaining Agreement.**

Relying on the Board's now vacated decision in *E. I. DuPont de Nemours*, 355 NLRB No. 176 (2010), Counsel for the General Counsel argues (1) that the continuation of a "contractually authorized past practice does not support unilateral changes made during hiatus between contracts, when the contractual authorization ceases to be effective;" and (2) there is no evidence that DuPont had a past practice of making unilateral changes to BeneFlex during periods when no contract was in effect. *See* General Counsel's Statement of Position on the Issues, at 2. Counsel for the General Counsel is wrong on both counts.

In *E.I. DuPont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012), the D.C. Circuit overturned the Board's decision on the ground that it was entirely inconsistent with prior Board law, which had recognized that a consistent past practice established during the term of a collective bargaining agreement can define the parties' *status quo* following contract expiration. *Id.*, at 69-70. Indeed, the court specifically noted that in *Capitol Ford*, 343 NLRB 1058 (2004), the Board saw no reason it should matter whether an established "past practice first arose under a CBA that has since expired" for purposes of evaluating whether an employer's actions constitute a continuation of the past practice. (*Id.*)

In *Capitol Ford*, a successor employer implemented a productivity bonus that it subsequently modified without bargaining with the incumbent union. The Board adopted the ALJ's finding that the employer's unilateral changes were permissible, and rejected the argument that the established past practice was no longer valid simply because the contract provision that authorized the practice had expired:

Our colleague is correct in saying that a successor employer who does not adopt the predecessor's contract cannot rely upon the management rights clause of that contract to justify unilateral

action. However, the instant case involves the predecessor's practice of acting unilaterally with respect to bonuses. **The Respondent was privileged to continue that practice and did so in this case. Contrary to our colleague, the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice. The Respondent's reliance on its predecessor's past practice is not dependent on the continued existence of the predecessor's collective bargaining agreement.**

343 NLRB 1058, n.3 (2004) (emphasis added).

More recently, in *Finley Hospital*, 359 NLRB No. 9 (2012)<sup>7</sup>, the Board reconfirmed that a binding past practice can be established even if it was developed solely during the term of a collective bargaining agreement. *Finley Hospital* involved a one-year contract that provided for a three percent pay increase on each bargaining unit employee's anniversary date. Upon expiration of the contract, the employer immediately discontinued the increases while bargaining for a new contract. Applying the "familiar dynamic *status quo* doctrine," the Board held that the employer was statutorily required to continue providing the raises until the parties negotiated something different, clearly recognizing that the *status quo* can be established by a past practice based on conduct occurring solely during a single contract. The Board further noted that the duty to maintain the *status quo* "applies with equal force regardless of whether the term or condition of employment was established by the employer alone or jointly by the parties through a collective-bargaining agreement." *Id.*, slip op. at 2, 4.

Perhaps most importantly for purposes of this case, the Board in *Finley Hospital* recognized that the dynamic *status quo* must be assessed in context to ensure the continued preservation of the parties' bargain:

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<sup>7</sup> *Finley Hospital* was decided by Board Members Pearce, Hayes and Block, and is likely to be vacated by application of the Supreme Court's recent decision in *Noel Canning, Inc. v. NLRB*, 573 U.S. \_\_\_ (2014). However, the rationale underscoring the holding is fully consistent with existing Board law.

In the give-and-take of bargaining, a union presumably will make concessions in certain terms and conditions to achieve improvements in other areas, such as wages. Preserving the *status quo* facilitates bargaining by insuring that the tradeoffs made by the parties in earlier bargaining remain in place. Just as the employer continues to enjoy prior union concessions after the contract expires, as part of the “status quo” so too the union continues to enjoy its bargained-for improvements.

(*Id.* 2-3). That logic applies with force here. As the parties stipulated, BeneFlex was offered to, and accepted by, the Union “subject to the terms of the Plan.” That was an express condition of the parties’ agreement, and there is no evidence whatsoever to suggest that DuPont’s obligation to provide benefits under the terms of the BeneFlex Plan would continue, but be divorced from, DuPont’s right to make changes which is part of the Plan itself.

Relying on prior Board law, the Sixth Circuit reached the same conclusion in *Beverly Health & Rehabilitation Systems v. NLRB*, 297 F.3d 468 (6th Cir. 2002):

We interpret *Shell Oil* [149 NLRB 283 (1964)] and its progeny as standing for the proposition that if an employer has frequently engaged in a pattern of unilateral change under the management-rights clause during the term of the CBA, then such a pattern of unilateral action becomes a “term and condition of employment,” and that a similar unilateral change after termination of the CBA is permissible to maintain the status quo. Thus, it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer’s past practice of unilateral change to survive the termination of the contract.

*Id.* at 481. The Board likewise applied this reasoning upon the Sixth Circuit’s remand in *Beverly Health & Rehabilitation Systems*, 346 NLRB 1319, 1319 n.5 (2006) (“without regard to whether the management-rights clause survived, the [employer] would be privileged to have made the unilateral changes at issue if [its] conduct was consistent with the pattern of frequent exercise of its right to make unilateral changes during the term of the contract.”)

The *Courier-Journal*, *Capitol Ford*, *E.I. DuPont* and *Beverly Health* decisions all require dismissal of the Complaint here because the undisputed record shows that the 2013 BeneFlex Changes are fully consistent with DuPont's 20-year past practice of making unilateral changes to BeneFlex and, thus, constitute a continuation of the *status quo*, not a violation of Section 8(a)(5).

**C. DuPont's Exercise of Discretion with Regard to the Implementation of the 2013 BeneFlex Changes Does Not Render Them Unlawful.**

Counsel for the General Counsel may argue that the 2013 BeneFlex Changes are unlawful because they involved discretion rather than the application of some mathematical formula or purely objective criteria. That position is inconsistent with well-established Board law.

The *status quo* that must be maintained following the expiration of a collective bargaining agreement encompasses not only the existing wages and benefits, but also any regular patterns of changes to such terms and conditions of employment. See *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enf'd*, 73 F.3d 406 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997) (employer violated Section 8(a)(5) by discontinuing past practice of granting merit pay increases, even though the amount of such pay increases was discretionary); *Shell Oil Co.*, 149 NLRB 283, 289 (1964) (employer had lawful right to continue pattern of subcontracting). If a pattern of changes occurs with such frequency that employees can reasonably expect the pattern to continue, then the pattern of change becomes a form of past practice. Board law likewise establishes that recurrent changes, even those involving the exercise of discretion, need not be identical to establish a continuation of past practice. Rather, to be considered a continuation of an existing past practice, newly implemented changes simply need to be consistent with the type and scope of the prior changes. See *Courier-Journal* and *Capitol Ford*; see also *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002). That standard is clearly satisfied here.

There is no dispute that DuPont has announced changes to BeneFlex affecting Union-represented employees at the same time every year since 1992, *i.e.*, at or just prior to the benefit open enrollment period during the fall of each year. As such, the past practice of BeneFlex changes has been fully consistent with the limitations set forth in the BeneFlex reservation of rights clause, which only permits discretionary changes during the annual open enrollment periods. Given the consistent, 20-year pattern of BeneFlex changes, there is no doubt that Union-represented employees at Yerkes had a reasonable expectation of the announcement of additional BeneFlex changes during the annual enrollment that took place in the fall of 2012. Consistent with that expectation, the 2013 BeneFlex Changes were announced in September 2012, just prior to the benefits open enrollment period, and were implemented unilaterally on January 1, 2013. In addition, the 2013 BeneFlex Changes were implemented nationwide, affecting union and non-union employees alike, which was consistent with the parties' past practice. In short, there is no evidence whatsoever to suggest that the 2013 BeneFlex Changes constituted a material departure from parties' past practice.

### CONCLUSION

For all of the foregoing reasons, the Complaint should be dismissed.

Respectfully submitted,

/s/ Kris D. Meade

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August 18, 2014

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this the 18th day of August 2014, I caused a true and accurate copy of the foregoing Opening Brief of Respondent E.I. Du Pont De Nemours and Company to be served by electronic mail on the following parties:

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