

**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 REPLY BRIEF TO RESPONDENT’S BRIEF**

**I. Introduction**

The General Counsel herein seeks to reply only to those portions of Respondent’s brief that warrant a response. The record and initial briefs contain all of the evidence, argument and case law necessary for the Board to determine that E.I. DuPont de Nemours (“Respondent”) violated Section 8(a)(1) and (5) of the National Labor Relations Act by making unlawful unilateral changes to the BeneFlex Flexible Benefits Plan (“BeneFlex”) effective January 1, 2013.

**II. Analysis**

**A. The Union never waived its right to bargain over BeneFlex changes in perpetuity.**

Respondent claims that simply because the BeneFlex plan documents allow Respondent to alter BeneFlex, that it can perpetually unilaterally alter BeneFlex without bargaining with the Union. Such an argument fails on several counts.

As explained in depth in the General Counsel’s Brief to the Board, it is well-established Board law that bargaining waivers do not survive the expiration of the contract that contains the waiver. Omaha World-Herald, 357 NLRB No. 156, slip. op. 3-4 (December 30, 2011) *quoting* Ironton Publications 321 NLRB 1048, 1048 (1996).

The collective-bargaining agreement, effective by its terms from April 12, 2008 through April 13, 2012 (“2008 CBA”), contained reservation of rights language which the parties stipulated allowed Respondent to make unfettered changes to BeneFlex without bargaining with the Union. However, the 2013 BeneFlex changes were announced and implemented after the expiration of the 2008 CBA (and before the effective dates of the 2013 CBA). Therefore, as discussed at length in the Board’s initial brief, Respondent could not rely on the bargaining waiver contained in the 2008 CBA when unilaterally implementing the 2013 BeneFlex changes. *See* Omaha World-Herald, *supra*, Ironton Publications, *supra*.(Stip. Para. 34, 35, 41; Jt. Ex. 6).

Respondent argues that the reservation of rights language contained in the BeneFlex summary plan documents provides it with the unfettered authority to make unilateral changes to BeneFlex in perpetuity. Such an argument is not supported by longstanding Board law. The Board has consistently held that “when incorporated by reference in a collective-bargaining agreement, a reservation of rights clause is a waiver of a union’s statutory right to bargain over such matters and, thus, like any waiver, expires with the contract absent evidence of clear and unmistakable intent to the contrary.” Omaha World-Herald, 357 NLRB No. 156, slip. op. 4 (December 30, 2011) *citing* Holiday Inn of Victorville, 284 NLRB 916, 916 (1987).<sup>1</sup>

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<sup>1</sup> It is notable that though Respondent argues that the reservation of rights language contained in the BeneFlex plan documents permits it to make unfettered unilateral changes despite the expiration of the applicable collective-bargaining agreement, it cannot cite a single Board case in support of its position.

The BeneFlex plan documents contain waiver language allowing Respondent “the sole right to change or discontinue [BeneFlex] in its discretion.” It is undisputed that in 1991, the Union and Respondent bargained over several months to agreement, resulting in unit members having the option to participate in BeneFlex “subject to all terms and conditions of [BeneFlex]” (“1991 Supplemental Agreement”). In that agreement, the terms of BeneFlex were explicitly incorporated by reference into the parties’ existing collective-bargaining agreement effective from 1977 through December 7, 1993 (“1977 CBA”). Consistent with Board law, the waiver language contained in the BeneFlex plan documents died upon the expiration of the 1977 CBA. (Stip. Para. 13, 14, 18, 19, 20, Jt. Ex. 4, 7, 8).

Respondent’s claim that the Union’s agreement to be subject to perpetual unilateral benefit changes was the “price of admission” into BeneFlex is simply not supported by the record. While the parties did stipulate that during the 1991 bargaining sessions, Respondent told the Union that admission to BeneFlex was premised on acceptance of the BeneFlex plan terms, there is no evidence that the agreement was premised on acceptance of the BeneFlex reservation of rights language in perpetuity. In fact, neither the 1991 bargaining meeting notes, the 1991 Supplemental Agreement, nor any other record evidence, supports the proposition that the parties intended for the BeneFlex reservation of rights language to extend beyond the expiration of the 1977 CBA. On the contrary, Respondent specifically agreed to supplement the 1977 CBA, which Respondent knew could expire by either party opting out, and never took the position that by allowing its membership into BeneFlex, the Union agreed to unilateral changes to benefits beyond the effective dates of the 1977 CBA. Rather, by including the 1991 Supplemental Agreement in the then-existing 1977 CBA without qualification, Respondent legally

acknowledged that the 1991 Supplemental Agreement would expire along with the 1977 CBA when either party lawfully opted out. Omaha World-Herald, *supra*. (Stip. Para. 19; Jt. Ex. 8, 9).

It should further be noted that there is similarly no record evidence that the parties' 2008 CBA contains reservation of rights language, which is identical to the 1991 Supplemental Agreement, was intended to survive the expiration of that agreement. As such, there was no agreement between the parties which have allowed for Respondent's unilateral 2013 BeneFlex changes, which took place at a time when no collective-bargaining agreement was in effect. *Id.* (Stip. Para. 34; 35; Jt. Ex. 6).

Respondent argues that the Board's decision in Finley Hospital, 359 NLRB No. 9 (2012) supports its claim that the status quo must remain in force even in the face of an expired contract. However, Finley Hospital is not applicable to the instant matter, which involves a contractual waiver of the right to bargain over changes to Beneflex *during* the term of a contract. Finley Hospital, on the other hand, dealt with the issue of whether the union had waived the right to bargain about an annual wage increase *after* contract expiration.<sup>2</sup>

The instant matter differs because it is undisputed that the Union did waive its right to bargain over changes to Beneflex as a result of the 1977 CBA (as supplemented in 1991) and the 2008 CBA, and, as previously noted, it is longstanding Board law that bargaining waivers do not survive the expiration of a contract. Therefore, following contract expiration, Respondent was

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<sup>2</sup> In Finley Hospital, the Board found that the respondent violated the Act by ceasing an annual wage increase after the contract expired. In so finding, the Board noted that the collective-bargaining agreement provided for the annual wage increase, and the union had never waived the right in the contract to bargain about the wage increase after contract expiration. There was no issue in that case of whether a contractual waiver to bargain about a term and condition of employment during the life of a collective-bargaining agreement survives contract expiration. Thus, respondent's reliance on Finley Hospital is misplaced.

required to bargain over any changes to BeneFlex. *See Omaha World-Herald, supra, Ironton Publications, supra.*

In summary, because the contractual waiver which permitted Respondent to make unilateral changes to Beneflex was not in effect at the time of the 2013 BeneFlex modifications, Respondent's unilateral implementation of those changes violated Section 8(a)(1) and (5) of the Act.

**B. The 2013 BeneFlex changes are not a continuation of any past practice because there is no history of unilateral changes during hiatus periods and because Union has consistently objected to those changes**

As explained at length in the General Counsel's Brief to the Board, Respondent's argument that the 2013 BeneFlex changes constitute a continuation of a past practice wholly lacks merit, because the record fails to establish a history of changes during contract hiatus periods. Rather, the evidence demonstrates that during periods when no contract was in effect, the parties either bargained to agreement, or the Union consistently objected to changes to Beneflex. First Energy Generation Corp., 358 NLRB No. 96 (2012), E.I. DuPont de Nemours, 355 NLRB No. 177 (2010).

In order to establish a past practice that would justify a unilateral change during a contract hiatus period, the burden is on the employer to show that it has made the types of changes at issue both during periods when 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 ceases to be effective." E.I. Dupont de Nemours, 355 NLRB No. 177, slip op. at 1-2. 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.

Regarding the timing of the unilateral changes, the record establishes that a significant number of changes were made during the term of the 1977 and 2008 CBAs, and therefore, do not support a practice of making changes to BeneFlex during contract hiatus periods, including at the time of the 2013 BeneFlex changes. *E.I. DuPont de Nemours*, *supra*. For those changes made when no contract was in effect, the record establishes that the Union did not acquiesce. Rather, the record demonstrates that the Union either protested or bargained with Respondent over Beneflex changes that were made outside of the effective periods of the 1977 and 2008 CBAs.

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, which included waiver language requiring a 50/50 premium split between Respondent and unit members for annual cost increases. When Respondent adjusted employee health care contributions for the 2002 plan year, the Union protested the changes and filed another unfair labor practice charge alleging, inter alia, 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. Because of the Board's 2006 determination that Respondent's implementation of the 2001 Final Offer was lawful, the Union did 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).

Despite Respondent's claim that it acted consistent with the Board's finding in Courier Journal, 342 NLRB 1093 (2004), that case is factually distinguishable from the instant scenario. In Courier Journal, the Board found that ten years of changes to employees' medical insurance constituted a past practice which the respondent then lawfully (and unilaterally) continued in the eleventh year. The Board relied on the fact that the union had essentially acquiesced to the changes. In so finding, the Board noted that the union never previously objected to or requested bargaining over the changes. The Board further relied on the fact that the changes had been made *both* during the terms of contract *and* during contract hiatus periods. In the instant matter, the record clearly reflects that while the Union did not protest changes to BeneFlex during the terms of the 1977 and 2008 CBAs, during which the contractual waivers were in effect, the Union consistently protested Respondent's unilateral changes to Beneflex, or the parties bargained to agreement. Thus, there is no basis to conclude that, consistent with the Board's

decision in Courier Journal, Respondent had a longstanding practice of making unfettered unilateral changes to BeneFlex.

Respondent argues that the Union acquiesced to the 2013 BeneFlex changes by virtue of its failure to protest or bargain over each and every previous BeneFlex change. While the record is replete with evidence illustrating the Union's attempts to protest and bargain over prior 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. *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).

Respondent also argues that E.I. DuPont de Nemours, 355 NLRB No. 177 should simply be ignored, because the D.C. Circuit refused to enforce the Board's order and remanded the case to the Board. *See* E.I. DuPont de Nemours and Co. v. NLRB, 682 F.3d 65 (C.A.D.C. 2012). However, to date the Board has not changed its position, as articulated in Omaha World-Herald, *supra*, that contractual waivers do not survive contract expiration. To the extent that Respondent relies on Capitol Ford, 343 NLRB 1058 (2004), the Board noted that Capitol Ford pertained to a successor employer's obligation to continue the predecessor's *past practice* and the majority specifically noted that its decision was not based on language contained in an expired contract. *Id.* at 1060, fn. 3.

In sum, Respondent has failed to demonstrate that it had an established past practice of making unilateral changes to Beneflex *both* during the terms of the CBAs *and* during hiatus periods.

### III. Conclusion

Based on the stipulated record, General Counsel's Brief to the Board, this reply brief, and the relevant case law, the General Counsel respectfully requests that the Board, consistent with its decisions in Omaha World-Herald, *supra*, E.I. DuPont de Nemours, *supra* and Ironton Publications, *supra*, find that Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully implementing the 2013 BeneFlex changes without bargaining with the Union, and issue an order directing Respondent to remedy those violations.

Dated September 8, 2014  
At Buffalo, New York

Respectfully submitted,

/s/ Jesse Feuerstein

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