

Nos. 16-1357, 16-1421

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

E.I. DU PONT DE NEMOURS & CO.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JILL A. GRIFFIN
Supervisory Attorney

JOEL A. HELLER
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2949
(202) 273-1042

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

National Labor Relations Board

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

E.I. Du Pont de Nemours & Co. (“Du Pont”) is the petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers

International Union is an intervenor before the Court, and was the charging party before the Board.

B. Rulings Under Review

This case is before the Court on Du Pont's petition to review a Board Order issued on August 26, 2016, and reported at 364 NLRB No. 113. The Board seeks enforcement of that Order.

C. Related Cases

The case on review was previously before this Court in *E.I. Du Pont de Nemours & Co. v. NLRB*, Case Nos. 10-1300, 10-1301, 10-1355, which was remanded to the Board. Board counsel is unaware of any related cases pending in this Court or any other court.

/s/David Habenstreit

David Habenstreit

Assistant General Counsel

NATIONAL LABOR RELATIONS BOARD

1015 Half Street SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 21st day of July, 2017

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GLOSSARY

Act National Labor Relations Act

Board National Labor Relations Board

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**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of E.I. Du Pont de Nemours & Co. (“Du Pont”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued on August 26, 2016, and reported at 364 NLRB No. 113. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act

(“the Act”). 29 U.S.C. § 160(a). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides that petitions for review of final Board orders may be filed in this Court and allows the Board, in that circumstance, to cross-apply for enforcement. The petition and application were both timely, as the Act provides no time limits for such filings.

STATEMENT OF THE ISSUE

The Board found that Du Pont violated Section 8(a)(5) and (1) of the Act by unilaterally changing employee benefits during contract negotiations at its Louisville and Edge Moor plants. Was that conclusion reasonable and consistent with the Act and supported by substantial evidence?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions appear in the addendum to this brief.

STATEMENT OF THE CASE

This case returns to the Court following a remand to the Board with instructions to “conform to its precedent ... or explain its return to the rule it followed in its earlier decisions.” *E.I. Du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012) (*Du Pont I*). On remand, the Board again found that Du Pont violated the Act by making a series of unilateral changes to employee benefits at two union-represented facilities. In doing so, the Board heeded the

Court's instructions to address inconsistencies in its precedent and explained why the cases that the Court identified as obstacles to the Board's finding of a violation in this case were themselves departures from established bargaining principles. Exercising its expertise in determining the scope of the statutory duty to bargain, the Board overruled those cases and reaffirmed the holdings in the "earlier decisions" that the Court noted were supportive of the Board's finding that Du Pont's actions were unlawful.

I. THE BOARD'S FINDINGS OF FACT

A. Du Pont Offers a Variety of Employee Benefits under the Beneflex Flexible Benefits Plan

Du Pont manufactures chemical products at facilities across the country. Among its operations are the Louisville Works plant in Louisville, Kentucky, which manufactures fluoro-products, and a facility in Edge Moor, Delaware, which produces titanium oxide and ferric chloride. (JA 23, 30; JA 143 ¶ 1, 623 ¶ 1.)¹ Both plants have long been unionized, with United Steelworkers Local 4-786 representing employees at Edge Moor and Local 5-2002 at Louisville. (JA 23, 30, 858; JA 143 ¶ 1, 623 ¶ 1.)²

¹ Citations to the Joint Appendix ("JA") and Supplemental Appendix ("SA") preceding a semicolon are to the Board's findings; citations following a semicolon are to supporting evidence. "Br." cites are to Du Pont's opening brief to the Court.

² The unions representing Louisville and Edge Moor employees went by other names during some of the events in this case, prior to merger with the United

Beginning in 1991, Du Pont implemented a cafeteria-style benefits program called the Beneflex Flexible Benefits Plan. Under Beneflex, employees can select from a series of benefits, including medical, dental, and vision care, life and accidental-death insurance, a health-savings account, a vacation buy-back program, and financial-planning programs. Each benefit category includes a series of options from which employees choose. For example, Beneflex Medical—the healthcare component of Beneflex—offers various plans and coverage levels. (JA 858; JA 49-50, 144-45 ¶ 6, 172, 624 ¶¶ 3, 6.)

Implementation of Beneflex was delayed at several Du Pont plants with union-represented employees, including Louisville and Edge Moor, pending collective-bargaining negotiations on the subject. The Beneflex plan documents provided that Beneflex would not apply to union-represented employees “unless and until collective bargaining on the subject has taken place.” (JA 858-59; JA 63, 171, 625 ¶ 6.)

From the inception of the program, Article XIII of the Beneflex plan documents contained the following language:

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 enrollment and shall not be changed during a Plan Year unless coverage provided by an independent, third-party

Steelworkers. For ease of reference, this Brief will use Local 5-2002 and Local 4-786 to refer to the unions during all times.

provider is significantly curtailed or decreased during the Plan Year. (JA 858-59; JA 174, 625 ¶ 8.)

Every year, Du Pont made changes to Beneflex. It announced the upcoming year's changes in the fall, and implemented them the following January 1. Over the years, changes sometimes included increases or decreases in premiums and co-pays, modification of coverage, changes to eligibility, addition of new benefits, and elimination of existing benefits. Some of those types of changes occurred year-to-year, and others were one-time or intermittent. (JA 23-24, 31, 859, 866; JA 52, 147-59 ¶¶ 14-17, 21-22, 25-29, 33, 41-42, 626-38 ¶¶ 12-24, 29-37.) With one exception, the annual changes were made on a corporate-wide basis. From 1997-2001, premium increases made at other facilities were not implemented at Du Pont's Yerkes plant in Tonawanda, New York, pursuant to a settlement of unfair-labor-practice charges alleging unlawful unilateral changes. Yerkes employees continued to receive benefits under Beneflex, but were not subject to such changes during that period. (JA 32; JA 145 ¶ 8, 626 ¶ 10.)

B. Du Pont's Unilateral Changes at Louisville

Du Pont and Local 5-2002 agreed to implement Beneflex for employees at the Louisville Works plant during negotiations for a successor collective-bargaining agreement in 1994. The contract established that Du Pont would provide coverage "as set forth in the Du Pont Beneflex Medical Care Plan." (JA 859 n.4; JA 145 ¶ 7, 168-69.) During contract negotiations, Du Pont informed

Local 5-2002 that the terms of the Beneflex plan permitted Du Pont to make changes to the level or costs of benefits on an annual basis. Coverage began January 1, 1995. The parties negotiated a new collective-bargaining agreement in 1997, which contained the same language on Beneflex as the previous contract. During the terms of those two contracts, Du Pont unilaterally made the annual changes to Beneflex described above without objection from Local 5-2002. (JA 23-24, 859 n.4; JA 145-58 ¶¶ 7, 15, 17, 20, 22, 26, 28, 33, 42.)

The parties' contract expired on March 1, 2002, and negotiations began for a successor agreement. That fall, Du Pont announced changes to Beneflex for the upcoming year. Local 5-2002 requested bargaining over the changes, but Du Pont refused, citing the plan language and Local 5-2002's agreement to it. (JA 24; JA 160-61 ¶¶ 48, 52-55.) In fall 2003, while contract negotiations continued, Du Pont announced changes for the 2004 year. Local 5-2002 again requested bargaining, and Du Pont again refused. Du Pont unilaterally implemented the changes on January 1, 2004, which included increases in medical-care premiums, addition of a legal-services plan and a new dental-plan feature, elimination of a financial-planning option, and changes to mental-health benefits, infertility treatment, reimbursement rules for non-prescription drugs, and the list of qualifying life events. Du Pont also changed the definition of eligible dependent to require that

dependent children over 19 be full-time students in order to receive coverage. (JA 24, 859 & n.5; JA 162-64 ¶¶ 58-60, 62, 411-12, 415-22.)

The same series of events occurred the next fall for the 2005 year—successor-contract negotiations were still ongoing, Local 5-2002 requested bargaining on Beneflex changes, Du Pont refused, and Du Pont unilaterally implemented the changes on January 1. The 2005 changes included increased medical-care, dental-care, and financial-planning premiums, new coverage levels for medical, dental, and vision, changes to prescription-drug coverage, increased co-pays for certain maintenance medication, and a redesigned catastrophic medical option. (JA 24, 859 & n.5; JA 164-65 ¶¶ 63-66, 423-30, SA 16, 18.)

C. Du Pont’s Unilateral Changes at Edge Moor

Du Pont and Local 4-786 executed a Memorandum of Understanding in August 1993 providing that employees at the Edge Moor plant would participate in Beneflex. Coverage began there on January 1, 1994. The Memorandum superseded language related to benefits in the existing collective-bargaining agreement. (JA 31, 859 n.4; JA 625 ¶ 7.) The parties negotiated a new contract in 2000, which provided in Article IX, Section 3 that “employees shall ... receive benefits as provided by the Company’s Beneflex Benefits Plan, subject to all terms and conditions of said plan.” (JA 31, 859 n.4; JA 632-33 ¶ 25, 706-07.) When the Memorandum and the subsequent contract were in effect, Du Pont unilaterally

made annual changes to Beneflex without objection from Local 4-786. (JA 31; JA 627-38 ¶¶ 13, 15, 17, 19, 21, 24, 30, 32, 34, 37.)

The parties' collective-bargaining agreement expired May 31, 2004. During negotiations for a successor agreement, Du Pont proposed language giving it the right to make unilateral changes to Beneflex regardless of whether a contract was in place. After Local 4-786 objected, Du Pont expressed an unwillingness to continue providing Beneflex at Edge Moor without such language, and told Local 4-786 to propose an alternative benefits program. (JA 32, 859; JA 638-42 ¶¶ 38, 41-48.)

In the fall of 2004, while contract negotiations were ongoing, Du Pont announced changes to Beneflex for 2005. Local 4-786 requested bargaining over the changes, but Du Pont did not respond. (JA 33, 859; JA 546, 642-43 ¶¶ 53, 55, 812-13.) The next month, Local 4-786 proposed a new benefits program through Blue Cross/Blue Shield. Alternatively, it offered to accept the 2005 changes if Du Pont dropped its proposal that the right to make unilateral changes would survive contract expiration. Du Pont rejected both of Local 4-786's counterproposals. On January 1, 2005, Du Pont implemented the changes to Beneflex described above, p. 7. The parties had not reached impasse, and negotiations for a successor agreement continued. (JA 33, 859 & n.5; JA 643-46 ¶¶ 56-57, 59, 64.)

II. PROCEDURAL HISTORY

The Board's General Counsel issued complaints alleging that Du Pont violated Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment for employees at its Louisville and Edge Moor plants. After separate hearings in the two cases, the administrative law judge in the Edge Moor case issued a decision and recommended order finding violations as alleged and the judge in the Louisville case found no violation. In separate decisions issued on August 27, 2010, the Board found violations in both cases.

On appeal in the then-consolidated cases, the Court granted Du Pont's petition for review, finding that the Board's decisions were not consistent with *Courier-Journal*, 342 NLRB 1093 (2004), *Capitol Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319 (2006), and that the Board had not explained its departure from that precedent. The Court also noted that, by contrast, earlier Board cases such as *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635 (2001), and *Register-Guard*, 339 NLRB 353 (2003), had found unilateral changes unlawful under similar circumstances. The Court remanded to the Board with instructions to "either conform to its precedent ... or explain its return to the rule it followed in its earlier decisions." 682 F.3d at 68-70.

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 26, 2016, the Board (Chairman Pearce and Members Hirozawa and McFerran; Member Miscimarra, dissenting)³ issued a Decision and Order finding that Du Pont violated Section 8(a)(5) and (1) of the Act by unilaterally changing employee benefits in 2004 (at Louisville) and 2005 (at Louisville and Edge Moor). The Board reaffirmed the orders in its prior decisions in this case, as modified. The Board's Order requires Du Pont to cease and desist from the violations found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. (JA 870-71.)

Affirmatively, the Order directs Du Pont to notify and, on request, bargain with Local 5-2002 and Local 4-786 prior to implementing any changes in terms and conditions of employment for represented employees; upon request, restore the benefits that existed prior to the unlawful unilateral changes and maintain those terms until the parties have reached a new agreement or a valid impasse, or until the unions agree to the changes; make employees whole for any losses suffered as a result of the unilateral changes; and post a remedial notice. The Board allowed that Du Pont could litigate in later compliance proceedings whether restoring the

³ On April 24, 2017, Member Miscimarra was named Chairman of the Board.

benefits that existed prior to the changes would be impossible or unduly burdensome. (JA 870-72 & n.33.)

STANDARD OF REVIEW

The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Court also "applies the familiar substantial evidence test to the Board's ... application of law to the facts." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). The existence of a past practice is a question of fact reviewed for substantial evidence. *Daily News of L.A. v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996). Similarly, "[i]f the Board adopts a rule that is rational and consistent with the Act ... then the rule is entitled to deference from the courts." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991) (internal quotations omitted). And the Court will "defer to the Board's policy choice[s]" that are based on reasonable interpretations of the Act. *Local 702, IBEW v. NLRB*, 215 F.3d 11, 17 (D.C. Cir. 2000). When the Board overrules its prior decisions, the Court "will not upset" that choice so long as the Board "provide[s] a reasoned justification for departing from precedent." *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1346-47 (D.C. Cir. 2008). In the context of cases involving the Act's bargaining obligations, the Court's deferential standard of review reflects a recognition that

Congress has “delegat[ed] to the Board ... the primary responsibility of marking out the scope ... of the statutory duty to bargain.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

SUMMARY OF ARGUMENT

An employer’s duty to bargain in good faith includes the duty to refrain from unilaterally changing terms and conditions of employment during contract negotiations. In violation of that statutory prohibition, Du Pont changed numerous employee benefits without bargaining with the unions representing employees at its Louisville and Edge Moor plants. Substantial evidence supports the Board’s finding that Du Pont failed to meet its burden to show, as an affirmative defense, that it was privileged to act unilaterally because it had done so in the past.

In finding a violation, the Board heeded the Court’s instructions on remand to address inconsistencies in its caselaw. It overruled decisions identified by the Court as obstacles to the Board’s finding of a violation in this case, explaining why those decisions departed from established policy and precedent regarding the past-practice exception to the unilateral-change doctrine. Specifically, those decisions’ findings that employers could make discretionary unilateral changes as part of an ostensible past practice developed under an expired management-rights clause were in tension with two strands of precedent. Permitting employers to continue making unilateral changes in that situation would conflict with the longstanding

principle that management-rights clauses expire with the contracts that contain them. The effect would be to render expiration meaningless, and would discourage collective bargaining. Those cases further departed from policy and precedent by finding past practices even though the prior unilateral changes were highly discretionary. Decades of court and Board precedent make clear that prior changes based largely on employer discretion lack the requisite predictability to establish a past practice that can privilege further unilateral action. With reasoned explanation, the Board reaffirmed those general principles and earlier decisions applying them to find unilateral changes unlawful in similar circumstances to this case. In so doing, the Board acted as the Court expressly gave it the option to do on remand.

Applying the reaffirmed principles, the Board reasonably found that Du Pont's unilateral changes did not fall within the past-practice exception, and thus violated the Act. Du Pont's prior changes were made pursuant to reservation-of-rights language incorporated into the expired collective-bargaining agreements. Upon expiration, Du Pont's authority to act unilaterally ceased, and the statutory obligation to maintain the status-quo level of benefits took effect. Du Pont's prior changes also followed no predictable pattern or fixed criteria, such that employees would not know what kind of changes to expect from year to year. They were instead premised on the exercise of wide discretion over a broad range of employee

benefits, without substantive limit. Du Pont's arguments in support of its failure to bargain largely track the rejected analysis in the overruled cases, and thus would exacerbate a tension in the caselaw that the Board's decision resolved. By contrast, the Board's position clarifies the state of the law in a manner that furthers the Act's goal of promoting collective bargaining.

ARGUMENT

Du Pont Breached Its Statutory Duty To Bargain by Unilaterally Changing Employee Benefits During Contract Negotiations at Its Louisville and Edge Moor Plants

Du Pont made a series of unilateral changes to a broad range of employee benefits at Louisville and Edge Moor during negotiations for successor collective-bargaining agreements. In analyzing the legality of those changes, the Board followed the remand instructions of the Court by addressing inconsistencies in its caselaw and explaining its decision to overrule cases that it found departed from established principles regarding the duty to bargain. Applying the principles that it reaffirmed, the Board found that Du Pont's unilateral changes violated the Act. Du Pont's defense of those changes relies largely on the very arguments that the Board rejected in overruling caselaw that it found incompatible with the unilateral-change and past-practice doctrines, and thus cannot satisfy Du Pont's burden to show that it was privileged to act unilaterally.

A. The Duty To Bargain Includes the Duty To Refrain from Unilateral Changes During Contract Negotiations

Employers have a duty under the Act to “to bargain collectively ... in good faith with respect to wages, hours, and other terms and conditions of employment” with the representative of their employees, 29 U.S.C. § 158(d), and failure to do so

constitutes an unfair labor practice under Section 8(a)(5), 29 U.S.C. § 158(a)(5).⁴

The duty to bargain includes the obligation to refrain from unilaterally changing terms and conditions of employment during contract negotiations absent a bargaining impasse. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enforced*, 15 F.3d 1087 (9th Cir. 1994).

The prohibition on such unilateral changes extends both to negotiations for an initial contract and for a successor contract. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

Unilateral changes during contract negotiations by their nature undermine collective bargaining. As a practical matter, “it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations.” *Litton*, 501 U.S. at 198. Such changes destabilize the bargaining process by shifting the universe of issues at play in negotiations. For example, unions would have difficulty crafting bargaining proposals if the terms and conditions those proposals would address were a moving target. Preparations and proposals based on then-existing conditions likewise would be for naught if the employer changed those conditions on its own before the parties reached the table. Moreover, unilateral changes undermine the very idea of

⁴ A violation of the duty to bargain under Section 8(a)(5) also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

collective bargaining; they “injure[] the process of collective bargaining itself ... by emphasizing to the employees that there is no necessity for a collective bargaining agent.” *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001) (internal quotations omitted). They thus run counter to the Act’s stated policy of “encouraging the practice and procedure of collective bargaining ... for the purpose of negotiating the terms and conditions of ... employment.” 29 U.S.C. § 151.

To comply with the duty to refrain from unilateral changes, parties must maintain the status quo regarding terms and conditions of employment during bargaining. *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 373-74 (D.C. Cir. 2017); *Cascade Painting Co.*, 277 NLRB 926, 930 (1985), *enforced mem.*, 804 F.2d 1253 (9th Cir. 1986). In the successor-bargaining context, the status quo consists of the terms and conditions that existed at the time the previous contract expired. Those terms are maintained by operation of the Act, not by any lingering force of the old contract. *Litton*, 501 U.S. at 206. That is, the terms and conditions of employment that exist following expiration “are no longer agreed-upon terms; they are terms imposed by law.” *Id.*

In certain circumstances, an employer may continue to make unilateral changes to particular terms and conditions of employment if it has an established past practice of doing so. *Katz*, 369 U.S. at 745-46; *Post-Tribune Co.*, 337 NLRB

1279, 1279-81 (2002). If the same kind of changes have recurred with such regularity and predictability that “employees could reasonably expect the[m] ... to continue,” then the changes themselves are considered part of the status quo that is maintained during bargaining. *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010) (internal quotations omitted), *enforced*, 2011 WL 2555757 (D.C. Cir. May 31, 2011). In line with the Supreme Court’s admonition that unilateral action during contract negotiations “will rarely be justified,” *Katz*, 369 U.S. at 747, and as described in more detail below, that exception to the general prohibition on unilateral changes is narrow. On that issue, the employer bears the “heavy burden” of proving, as an affirmative defense, that prior changes establish a past practice. *NLRB v. Allis-Chalmers Corp.*, 601 F.2d 870, 875 (5th Cir. 1979); *accord Eugene Iovine, Inc.*, 328 NLRB 294, 294-95 n.2 (1999), *enforced*, 1 F. App’x 8 (2d Cir. 2001).

Because the unilateral-change doctrine and the past-practice exception “represent the Board’s interpretation of the NLRA requirement that parties bargain in good faith,” *Litton*, 501 U.S. at 200, the Board’s determinations regarding those doctrines implicate its expertise in crafting the scope of the duty to bargain and its congressional mandate to apply the Act. Such rulings warrant significant deference. *Id.*

B. The Board Confirmed the Narrow Scope of the Past-Practice Exception

In this case, the Board applied the established principles detailed above to address inconsistencies in its caselaw, as instructed by the Court on remand. Explaining why they conflicted with tenets of the unilateral-change and past-practice doctrines, the Board overruled *Courier-Journal*, 342 NLRB 1093 (2004), and *Capitol Ford*, 343 NLRB 1058 (2004), and disavowed dicta in *Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319 (2006) (“*Beverly 2006*”)—the three cases identified by the Court.⁵ Specifically, the Board found those cases contrary to policy and precedent limiting the extent to which unilateral changes based on management-rights clauses or employer discretion can establish a past practice. In doing so, it reaffirmed and applied its holding in prior cases that “discretionary unilateral changes ostensibly made pursuant to a past practice developed under an expired management rights clause are unlawful.” (JA 858.) That is, the Board “explain[ed] its return to the rule it followed” in *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635 (2001) (“*Beverly 2001*”), enforced *in part*, 317 F.3d 316 (D.C. Cir. 2003), and *Register-Guard*, 339 NLRB 353

⁵ The Board also confirmed (JA 862-63 n.17) that *Shell Oil Co.*, 149 NLRB 283 (1964), and cases following it were no longer good law, a proposition previously recognized in *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 636-37 nn.6-7 (2001).

(2003), as the Court expressly gave it the option to do on remand, *Du Pont I*, 682 F.3d at 70.

1. The Board Confirmed That Prior Discretionary Changes Made Pursuant to a Management-Rights Clause That Has Since Expired Do Not Establish a Past Practice

Courts and the Board have long held that a management-rights clause permitting the employer to act unilaterally does not survive the expiration of the collective-bargaining agreement containing it, unless the parties expressly have provided otherwise. *Holiday Inn of Victorville*, 284 NLRB 916, 916 (1987); *accord Local 65-B v. NLRB*, 572 F.3d 342, 348 (7th Cir. 2009); *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1245 (3d Cir. 1994); *Ryder/Ate, Inc.*, 331 NLRB 889, 889 n.1 (2000), *enforced mem.*, 22 F. App'x 3 (D.C. Cir. 2001). The same principle applies to a reservation-of-rights clause in employee-benefit plan documents incorporated within a collective-bargaining agreement. *Omaha World-Herald*, 357 NLRB 1870, 1872-73 (2011). As waivers of the statutory right to bargain, such clauses constitute the kind of “consensual surrender of ... economic power” that is not maintained as part of the status quo after the contract expires. *Litton*, 501 U.S. at 199-200 (internal quotations omitted); *see also Sw. Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (contractual waiver of statutory right did not survive expiration); *Lincoln Lutheran of Racine*, 362 NLRB No. 188, 2015 WL 5047778, at *4 (2015) (“[W]aivers are presumed not to survive

the contract.”). The continued maintenance of a management-rights clause would conflict with the purposes of the status-quo doctrine because preserving a status quo of not bargaining does not further collective bargaining. Employers thus cannot continue to make changes pursuant to such a clause after contract expiration. *Holiday Inn*, 284 NLRB at 916.⁶

The Board’s holding here that an employer cannot lawfully make “discretionary unilateral changes ... pursuant to a past practice developed under an expired management rights clause” (JA 858) follows logically from that well-established proposition. Permitting unilateral changes to continue post-expiration would render the expiration meaningless. So long as the employer had exercised its authority under that clause during the contract term, it would be able to make changes at any point thereafter. *Beverly 2001*, 335 NLRB at 636-37. The effect would be the same as if the clause had not expired at all—it would extend in perpetuity. Such a policy would create an exception that would swallow the rule that contractual waivers of the right to bargain end with the contract that created them.

⁶ The limited duration of such clauses is also in line with the longstanding principle that “a ‘union’s acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.” *Verizon N.Y. Inc. v. NLRB*, 360 F.3d 206, 209 (D.C. Cir. 2004) (quoting *Owens-Corning Fiberglas Corp.*, 282 NLRB 609, 609 (1987)).

Moreover, as the Board explained, there is an “integral connection between a management-rights clause and discretionary unilateral changes authorized by it.” (JA 862.) The employer’s authority to act unilaterally existed only because of the union’s waiver of its right to bargain when it agreed to the management-rights clause. In other words, none of the employer’s prior unilateral changes could lawfully have been made *absent* that waiver. Thus, the union’s waiver and the employer’s ability to act unilaterally stand or fall together, because a power made possible only by virtue of the waiver cannot outlast the waiver. *See Beverly 2001*, 335 NLRB at 636 n.7 (explaining that “the status quo after contract expiration cannot include the right to make unilateral changes since such changes cannot be made in the absence of a waiver”).

Further, permitting such changes to continue post-expiration under the guise of past practice would frustrate collective bargaining, in conflict with the policy underlying the principle that such clauses do not survive expiration. For one, it would foster more unilateral changes (and thus less bargaining) as a general matter. As the Board explained (JA 863, 869), it also would discourage bargaining over management-rights clauses themselves. Once the employer already has the ongoing authority to act unilaterally, it would have little incentive to bargain for a new management-rights clause in the successor contract. Similarly, a union that knows the clause effectively would continue post-expiration and operate as an

open-ended waiver would be less likely to agree to it as part of a contract. Because a management-rights clause can be an effective bargaining chip, such a result could make bargaining more difficult and lessen the likelihood of agreement. Such clauses also give parties the flexibility to respond to issues that arise during a contract term as they occur, alleviating the need to provide expressly for all potential issues in the contract itself. Removing them from parties' toolkit thus could bog down bargaining in the details of predicting and preemptively addressing hypothetical mid-term issues. A policy that unilateral discretionary changes made pursuant to such clauses can continue post-expiration thus "discourages, rather than promotes, collective bargaining." *Beverly 2001*, 335 NLRB at 637.

Because *Courier-Journal*, *Capitol Ford*, and dicta in *Beverly 2006* are contrary to the principles detailed above, the Board properly overruled them. Those decisions permitted employers to make unilateral changes after the contracts authorizing such changes expired, ignoring expiration on the grounds that their ruling was "not grounded in waiver[, but] ... in past practice," *Courier-Journal*, 342 NLRB at 1095.⁷ Such reasoning fails to recognize the connection between the purported past practice and the waiver on which it was based. As the Board

⁷ Similar language in *Beverly 2006* was dicta, as the Board found that the employer had no history of prior changes. 346 NLRB at 1319 n.5.

explained, both the result and the analysis in those cases “cannot be reconciled either with fundamental Board law limiting broad discretionary employer actions under management-rights waivers to the duration of their source contracts, or to the requirement that post-expiration changes ... be subject to the full bargaining process required by the Act.” (JA 863-64.)

The Board further noted (JA 863) that, in addition to creating tension with the *Holiday Inn* line of cases on the expiration of management-rights clauses, *Courier-Journal*, *Capitol Ford*, and *Beverly 2006* were also in direct conflict with the Board’s prior decisions in *Beverly 2001* and *Register-Guard*, which found such post-expiration changes unlawful. Those earlier decisions expressly held that prior unilateral changes made “under a contract provision that has since expired do not establish a past practice,” *Register Guard*, 339 NLRB at 356, and rejected the argument that prior changes under a management-rights clause “established a status quo ... which continues beyond contract expiration,” *Beverly 2001*, 335 NLRB at 636. *Courier-Journal*, *Capitol Ford*, and *Beverly 2006* did not even acknowledge that earlier precedent, let alone explain their departure from it. The Board thus properly exercised its prerogative to re-evaluate its caselaw, consistent with the Court’s remand instructions.⁸

⁸ Through selective quotation (Br. 14, 20, 34), Du Pont mischaracterizes the Court’s decision in *Du Pont I* as having “reject[ed]” (Br. 14) the Board’s analysis here. The omitted language or context makes clear that the passages Du Pont

2. The Board Confirmed That Prior Changes Involving Significant Employer Discretion Do Not Establish a Past Practice

An employer's prior unilateral changes do not establish a past practice if they "were in no sense automatic, but were informed by a large measure of discretion." *Katz*, 369 U.S. at 746. When changes can vary at the employer's whim, "[t]here simply is no way ... to know whether or not there has been a substantial departure" from the employer's prior actions. *Id.* Such changes lack the predictability that is the hallmark of a past practice. *See Caterpillar*, 355 NLRB at 522 (prior changes constitute past practice if "employees could reasonably expect the[m] ... to continue"). Permitting more such changes thus would not serve the overall goal of the status-quo doctrine to promote stability in the bargaining relationship.

Thus, the Supreme Court in *Katz* found unlawful the employer's unilateral grant of discretionary wage increases despite "the fact that the ... raises were in

quotes were descriptions of or quotations from the Board's decisions in *Courier-Journal* and *Capitol Ford* or Du Pont's own argument, not holdings of the Court. Moreover, if the Court had "reject[ed]" (Br. 14) the Board's position outright, it would not have remanded.

Likewise, the quoted passage (Br. 23, 34) from the Sixth Circuit's decision in *Beverly Health & Rehabilitation Services, Inc. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002), was interpreting the Board's decision in *Shell Oil*. Any observation about that case was misplaced at the time, at it had already been recognized as overruled in *Beverly 2001*, 335 NLRB at 636 nn.6, 7, and is certainly beside the point now that the Board has made that overruling explicit.

line with the company's long-standing practice of granting quarterly or semiannual merit reviews." 369 U.S. at 746. Citing *Katz*, courts and the Board long have used the degree of employer discretion involved in prior unilateral changes as a touchstone for whether such changes could continue as a past practice. For example, the employer in *City Cab Co. of Orlando v. NLRB* "had not committed itself to any fixed practice" and had "exercised an impermissible degree of discretion" when it both increased and decreased certain charges to its employees, and had alternately added and eliminated others; such "numerous and irregular fluctuations" did not privilege it to make additional changes. 787 F.2d 1475, 1479-80 (11th Cir. 1986). The court in *Allis-Chalmers* similarly rejected the employer's argument that its periodic surveys of benefits permitted it unilaterally to add a new sick-leave benefit where prior changes were neither "automatic" nor "pursuant to definite guidelines" but involved "considerable discretion." 601 F.2d at 875-76. And in *Dynatron/Bondo Corp.*, the employer unlawfully increased employee contributions to health-insurance premiums without bargaining where the amounts employees had paid in past years did not follow a fixed percentage, and had both decreased and increased. 323 NLRB 1263, 1265 (1997), *enforced in relevant part*, 176 F.3d 1310 (11th Cir. 1999).⁹

⁹ Other cases are in accord. See *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 864 (6th Cir. 1990) (no past practice where changes were "unpredictably episodic as well as *ad hoc* and highly discretionary" (internal quotations omitted)); *Aaron*

Moreover, the fact that an employer has made some unilateral changes in the past does not grant it license to make other types of changes going forward.

Simply put, there is no “practice” if the changes are unrelated. *See Caterpillar*, 355 NLRB at 522 (holding that “a series of disparate changes without bargaining does not establish a ‘past practice’ excusing bargaining over future changes”); *see also City Cab of Orlando*, 787 F.2d at 1480 (no past practice where, “if [the employer] had any practice at all, it was simply one of constant change”). Thus, the employer’s prior changes to its prescription-drug benefit in *Caterpillar* did not establish a past practice where, “[o]ther than the fact that they each altered the ... prescription-drug plan, there is no thread of similarity running through and linking the several types of change.” 355 NLRB at 522-23. The fact that, at a high level of generality, the changes all affected the prescription-drug plan was insufficient.

Id.

Bros. Co. v. NLRB, 661 F.2d 750, 753 (9th Cir. 1981) (focus is on “whether the benefit change was fixed by an established formula”); *Goya Foods of Florida*, 350 NLRB 939, 941 (2007) (no past practice where prior changes “were not made pursuant to any objective criteria but were discretionary”), *enforced*, 298 F. App’x 12 (D.C. Cir. 2008); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999) (“[U]nlimited discretion is not a ‘practice’ which has evolved into a term or condition of employment.”), *enforced*, 1 F. App’x 8 (2d Cir. 2001); *Oneita Knitting Mills, Inc.*, 205 NLRB 500, 502 (1973) (unilateral wage increases might be lawful if “there exists no element of discretion”). In *Du Pont I*, this Court likewise explained that “the Act does not permit a unilateral change ‘informed by a large measure of discretion.’” 682 F.3d at 67 (quoting *Katz*, 369 U.S. at 746).

By contrast, courts and the Board have found an established past practice where, for example, prior unilateral changes were based on “fixed criteria” or subject to other substantive limits on the employer’s discretion. *Daily News of L.A.*, 73 F.3d at 412. In the employee-benefit context, an employer thus has made out a successful past-practice defense where it long had allocated the cost of health-insurance premiums with employees according to a set percentage; in those circumstances, employees knew to expect such increases, and the employer was privileged to increase premiums in a manner that maintained that ratio. *See, e.g., Post-Tribune*, 337 NLRB at 1279-80 (80/20 split); *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984) (one-third/two-third split), *affirmed*, 772 F.2d 421 (8th Cir. 1985). Similarly, the employer in *State Farm Mutual Auto Insurance Co.* could continue automatically applying cost-of-living adjustments calculated by the Bureau of Labor Statistics. 195 NLRB 871, 889-90 (1972).¹⁰ Absent such substantive limits on an employer’s discretion, fixed timing is not sufficient by itself to establish a past practice. *Daily News of L.A.*, 73 F.3d at 412 n.3. Thus,

¹⁰ Courts and the Board also have found an established past practice of granting wage increases where they were fixed as to criteria or amount. *See, e.g., Daily News of L.A.*, 73 F.3d at 412 (fixed criteria); *Se. Michigan Gas Co.*, 198 NLRB 1221, 1221-22 (1972) (fixed amount), *enforced*, 485 F.2d 1239 (6th Cir. 1973). Because such raises were part of the status quo, the employer violated Section 8(a)(5) by failing to grant them. *Daily News of L.A.*, 73 F.3d at 408; *Se. Michigan Gas*, 198 NLRB at 1222-23.

discretionary wage increases could not continue unilaterally “even though the raises had been awarded annually.” *Id.*¹¹

Against that background, the Board here reasonably determined that *Courier-Journal* “veered sharply from the well-established precedent defining a past practice status quo” and should be overruled. (JA 865.) Contrary to *Katz* and its progeny, *Courier-Journal* held that a series of prior changes could establish a past practice “even if the discretion is not limited.” 342 NLRB at 1094. With that understanding, *Courier-Journal* permitted the employer to continue unilaterally making a broad range of changes to employee health benefits—changes that, as the Board here explained, “were unlike those made pursuant to a fixed formula ... [or] based on reasonably certain criteria” in other past-practice cases. (JA 865.) Although it purported to find a limit on the employer’s discretion in the contractual obligation to provide benefits to union employees “on the same basis as” non-union employees, the *Courier-Journal* Board at the same time “recognize[d] that the [employer] had discretion as to the nonunit employees.” 342 NLRB at 1094.

¹¹ The same analysis applies regardless of whether the unilateral change benefits employees. See *Daily News of L.A.*, 73 F.3d at 411 (“[I]t makes absolutely no difference under *Katz* whether the change at issue adds to or subtracts from employees’ wages”); see also *State Farm*, 195 NLRB at 890 (unlawful unilateral wage increase); *Se. Michigan Gas*, 198 NLRB at 1222-23 (unlawful unilateral withholding of wage increase).

Because the decision thus departed from the focus on limited employer discretion, and did so without explanation, the Board here determined that it could not stand.¹²

Du Pont ignores much of that history and policy in seemingly arguing for a broader past-practice doctrine that includes changes “even if they involve the exercise of discretion” (Br. 26). It fails to recognize that the past-practice doctrine is an exception to the general rule that parties engaged in collective bargaining cannot act unilaterally, and is thus properly narrow. *See Adair Standish*, 912 F.2d at 864 (describing the doctrine as an “exception”); *Aaron Bros.*, 661 F.2d at 753 (same); *Eugene Iovine*, 328 NLRB at 294-95 n.2 (same). Du Pont’s position would increase the occurrence of unilateral changes, contrary to the Supreme Court’s admonition that such changes “will rarely be justified,” *Katz*, 369 U.S. at 747. Yet even Du Pont’s purportedly broader standard shows why a limit on the scope of employer discretion is an important component of the past-practice analysis. Du Pont contends that the key question is whether an employer’s new unilateral changes are a “continuation of” or “substantial departure from” previous changes. (Br. 25.) But there must be some way to gauge whether the changes have deviated from the changes made before—some criteria by which to judge

¹² *Capitol Ford* similarly departed from established principles by finding a past practice of unilateral changes to bonus programs based on the “discretionary use of such programs at the employer’s initiative,” 343 NLRB at 1058, and similarly made “no attempt to reconcile this result with the traditional definition of a cognizable past practice status quo” (JA 866 n.24).

whether the changes are “in line with” (Br. 24) the asserted past practice. Changes involving significant discretion (like Du Pont’s, pp. 37-40) lack any such benchmark, and thus provide no clear basis either for courts and the Board to analyze the changes or for employees and unions to predict them. Moreover, given that the language on limited discretion comes from *Katz* itself, the Board’s use of that touchstone cannot be, as Du Pont asserts, “contrary to ... *Katz*” (Br. 22). If it were, the Court would not have presented it as an option on remand.¹³

In sum, the Board exercised its authority to interpret the scope of the Act’s bargaining obligation, and reasonably determined that the cases it overruled were inconsistent with established principles of the unilateral-change and past-practice doctrines that it took the opportunity to reaffirm. After addressing the conflict

¹³ Many of Du Pont’s cited cases (Br. 27-30) involve the kind of discrete, fixed-criteria, and limited or non-discretionary changes discussed above. *See Eastern Maine Med. Ctr. v. NLRB*, 658 F.2d 1, 7 (1st Cir. 1981) (regular wage increases to reflect “inflation and community wage patterns”); *Dynatron/Bondo Corp.*, 323 NLRB at 1264 (regular raises “pursuant to fixed, merit-based criteria”); *Central Maine Morning Sentinel*, 295 NLRB 376, 379 (1989) (wage increases based on “a formula derived from uniform factors across-the-board”); *Se. Michigan Gas*, 198 NLRB at 1222 (standard wage increase to all employees was “not truly discretionary”). It also discusses *Shell Oil* and *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965), for the proposition that new changes are lawful if they do not “var[y] in kind or degree from what had been customary in the past.” (Br. 28 (quoting *Shell Oil*, 149 NLRB at 288).) But that standard presupposes that there was a measurable custom by which to compare the changes, which would not be the case if the prior changes were the product of unbounded discretion.

identified by the Court, the Board applied those reaffirmed principles to Du Pont's unilateral changes in this case.

C. Du Pont Unilaterally Changed Employee Benefits, and Has Not Met Its Burden To Show Such Changes Were Permissible

Du Pont made numerous unilateral changes to employee benefits at Louisville and Edge Moor at a time when negotiations for successor collective-bargaining agreements were ongoing and the parties were not at impasse. Such changes were thus unlawful unless they fit within an exception to the unilateral-change doctrine. Du Pont contends (Br. 36-38) that it was privileged to act unilaterally as a "continuation of the status quo" given its history of doing so in previous years. But substantial evidence supports the Board's finding that Du Pont has not met its "heavy burden" for a past-practice defense, *Allis-Chalmers*, 601 F.2d at 875, and absent an exception, "the overriding statutory obligation to bargain controls," *Beverly 2001*, 335 NLRB at 636.

Indeed, Du Pont repeats much of the faulty analysis in *Courier-Journal* and the other cases that the Board overruled. As in those cases, its arguments are inconsistent with the principles explained above that management-rights clauses do not survive contract expiration and unilateral changes informed largely by employer discretion do not establish a past practice permitting further unilateral changes. Accordingly, Du Pont's position would exacerbate the very tension in the caselaw that the Board's decision removes.

1. Du Pont's Prior Changes Were Made Pursuant to a Waiver That Has Since Expired

Du Pont's ability to make unilateral changes to employee benefits at Louisville and Edge Moor expired with the collective-bargaining agreements at those facilities. Its authority to act unilaterally in prior years was premised on the reservation-of-rights language in the Beneflex plan documents that was incorporated into those collective-bargaining agreements. As a waiver of the right to bargain, such language did not survive the expiration of the contracts in 2002 (in Louisville) and 2004 (in Edge Moor). *Omaha World-Herald*, 357 NLRB at 1872-73; *Holiday Inn*, 284 NLRB at 916. For the reasons explained above, pp. 21-23, permitting Du Pont nonetheless to continue making unilateral discretionary changes under the guise of past practice would render expiration meaningless and frustrate collective bargaining.

Du Pont does not challenge the principle that a management-rights clause does not survive contract expiration, instead describing it as an “unremarkable proposition.” (Br. 35.) Nor does it directly contest the Board's analysis regarding the policy implications or practical consequences of permitting post-expiration changes. Instead, it ignores those principles altogether and repeats the rejected *Courier-Journal* analysis that the case does not implicate waiver at all, but is solely about past practice (Br. 33-36). But the two issues are inseparable here—the purported past practice exists only by virtue of the waiver. Du Pont's ability to act

unilaterally in prior years was grounded in the waiver, and would not have existed but for the waiver. Absent the reservation-of-rights clause, there would be no history of discretionary unilateral changes, and an edifice cannot stand once the foundation crumbles.¹⁴

Du Pont attempts to escape the consequences of expiration by asserting that the parties' agreements regarding Beneflex at Louisville and Edge Moor were "supplemental to, and not dependent upon" the expired contracts (Br. 38). But that contention is not only unsupported by, but is directly contrary to, the record. By its terms, Beneflex covers union-represented employees only by virtue of a collective-bargaining agreement; it does not apply in such circumstances "unless and until collective bargaining on the subject has taken place" (JA 171). In practice, too, Beneflex was not implemented at Louisville until the 1994 collective-bargaining agreement took effect or at Edge Moor until the parties amended their contract

¹⁴ The Board is not, as Du Pont asserts (Br. 33-34), creating a substantive difference between contractual and extra-contractual changes for past-practice analysis. The Board looked to whether Du Pont's purported past practice of unilateral changes was grounded in waiver, and discussed contractual waiver because of the facts of this case.

In alleging internal inconsistency (Br. 34), Du Pont misunderstands the Board's statement that its position would not require "drilling down" into the contract. The Board simply was explaining that identifying the post-expiration status quo would not be a difficult task—where, as here, a management-rights clause involves health benefits, parties should look to what benefits employees were receiving at the time of expiration. (JA 869.)

with the 1993 memorandum of understanding, even though it was implemented at non-union facilities in 1991. There is no evidence in the record of any other agreement regarding Beneflex not pegged to those contracts. Accordingly, whether the Beneflex plan's reservation-of-rights language itself "contains no durational limitation" (Br. 42) is immaterial, because that language applied to employee benefits at Louisville and Edge Moor only by virtue of time-bound collective-bargaining agreements.¹⁵

That lack of evidence likewise undermines Du Pont's contention that the Board's decision should be rejected because it somehow "re-writes ... the parties' agreement regarding Beneflex" at Louisville and Edge Moor (Br. 38). Once the collective-bargaining agreements expired, the "parties' agreement" as to how Beneflex benefits would apply there was no longer operative—there was nothing left to re-write. Du Pont's related argument (Br. 38-40) that employees would continue to receive "benefits provided by all other terms of the Beneflex" without the quid pro quo of Du Pont's ability to make unilateral changes is premised on a

¹⁵ Du Pont relies (Br. 41-42) on *UMWA 1974 Pension v. Pittson Co.*, but that case stands simply for the straightforward proposition that when a party agrees to be bound beyond the life of the contract, the expiration of the contract does not relieve it of that obligation. 984 F.2d 469, 473-74 & n.6 (D.C. Cir. 1993). Here, there is no evidence of such an intent as to Du Pont's contractual reservation of rights. Key to the holding in *Pittson* was not just the absence of a durational limit in the plan documents, but the express inclusion of an evergreen clause setting forth a "perpetual obligation." *Id.* Neither the collective-bargaining agreements at Louisville and Edge Moor nor the Beneflex plan documents contains such a clause.

misunderstanding of the status-quo doctrine. Post-expiration, employee benefits at Louisville and Edge Moor were not provided by the “terms of the Beneflex” at all, but were set at status-quo levels by operation of the Act. At that point, they “are no longer agreed-upon terms; they are terms imposed by law.” *Litton*, 501 U.S. at 206. The maintenance of current benefit levels absent the reservation-of-rights follows from the general, uncontested proposition that the post-expiration “terms imposed by law” include health benefits but not management-rights clauses.¹⁶

For similar reasons, Du Pont’s invocation of the Court’s “contract coverage” doctrine (Br. 40-41) is misplaced. Without factual support for its position that some other agreement besides the expired contracts governed benefits at Louisville and Edge Moor, Du Pont cannot contend that such an agreement “covered”

¹⁶ Du Pont’s arguments regarding ERISA’s plan-amendment rules (Br. 43, 46) are not properly before the Court, as they were not raised to the Board, and “[n]o objection that has not been urged before the Board ... shall be considered by the court” absent “extraordinary circumstances.” 29 U.S.C. § 160(e); *see also New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011). In any event, those arguments likewise rest on the faulty premise that post-expiration benefits are set by “Beneflex terms” (Br. 43) rather than operation of the Act. None of the cases Du Pont cites (Br. 43) implicated the duty to bargain, which is not displaced or lessened by ERISA; by its terms, ERISA does not “alter, amend, modify, invalidate, impair, or supersede any law of the United States.” 29 U.S.C. § 1144(d); *see also Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 541, 547-49 (1988) (distinguishing statutory duty to bargain under the Act from duty to comply with contract under ERISA); *see generally New York Shipping Ass’n, Inc. v. Fed. Mar. Comm’n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) (“[W]e expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose.”).

benefits changes. Further, Du Pont does not argue that the expired collective-bargaining agreements themselves privileged the unilateral changes under contract coverage; according to Du Pont, the agreement purportedly covering the matter “is not set forth in a CBA” (Br. 41). Nor could it make such an argument. Because the benefits “were no longer provided pursuant to the collective bargaining agreement” at the time of the unilateral changes, Du Pont “cannot rely on any ... contract coverage the agreement might have effected.” *Enterprise Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 547-48 (D.C. Cir. 2016). As the Court has explained, contract-coverage analysis relates to the “duty to bargain during the term of an agreement.” *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993).

In sum, Du Pont’s attempt to resurrect the reservation-of-rights clause, or otherwise escape the consequences of contract expiration, finds no support in law or fact. It cannot excuse Du Pont’s failure to bargain.

2. Du Pont’s Prior Changes Were Discretionary, Wide-Ranging, and Unpredictable

Even under Du Pont’s view of the case as involving only past-practice analysis independent of waiver, its unilateral changes in 2004 and 2005 were unlawful. As the Board explained, Du Pont’s actions “fell outside the limited range of repeated changes made with little or no discretion that ... the Board has recognized as a statutory status quo that may be maintained.” (JA 867.) Du Pont’s prior changes to the various benefits under Beneflex were indisputably

discretionary, and fit no discernible pattern such that employees and their unions would know what to expect from year to year.

The record amply supports the Board's finding that Du Pont's prior unilateral changes to Beneflex were "wide-ranging and varied, ... with no cognizable fixed criteria." (JA 867). The reservation-of-rights language itself states unqualifiedly that Du Pont may change Beneflex "in its discretion." (JA 174.) Many of its prior changes consisted of the kind of "numerous and irregular fluctuations" that fail to establish a past practice privileging further unilateral action. *City Cab of Orlando*, 787 F.2d at 1479. For example, premiums for vision coverage have variously increased (as in 1996 and 1998) (JA 147-50 ¶¶ 15, 22, 231, 249), decreased (as in 1997, 1999, 2000, and 2002) (JA 148-58 ¶¶ 17, 26, 28, 42, 239, 269, 278, 329), and remained steady (as in 2001 and 2003) (JA 55-61 ¶¶ 33, 55, 288). Some years saw the elimination of existing medical plans, others saw the addition of new plans, and some had both eliminations and additions. (JA 323, 364, 367.) The number of financial-planning options increased by one each in 1996 and 1998, then held steady until 2002, when one was eliminated. (JA 231, 255, 330.) Even among the types of changes that occurred with some frequency, there was no set formula or criteria governing their extent. Medical premiums increased most years, for example, but not, as in cases like *Post-Tribune*, 337 NLRB at 1279-80, by any fixed amount or percentage. Considering just the Point-

of-Service (Option P) plan for individuals, the increases were as high as 58% (in 2002) and as low as 10% (in 2000), with the other years ranging from 13% to 38%. (JA 241, 251, 264, 277, 290, 323, 367.) Other types of changes were isolated or intermittent. The stop-loss amount under the medical plans changed only once between 1995 and 2003, for example. (JA 241, 290, 323.) In 2002, Du Pont launched a “total redesign of the prescription drug program” to a co-insurance model. (JA 322-23.) The only guiding principle behind those disparate changes appears to be Du Pont’s discretion to make changes as it saw fit.

Therefore, even if Du Pont employees could expect some changes from year to year, they would not know what kind of changes to expect. Adding to that uncertainty, Beneflex is not a discrete term like wages or premiums, but twelve different categories of benefit plans—each with a panoply of options—any or all of which could change in a given year. As of 2002, there were nine different options just within the life-insurance plan, for example, and four in Beneflex Medical. (JA 323, 327.) A regular increase in medical premiums would not lead employees to predict the elimination of financial-planning options.

Du Pont’s unilateral changes to Beneflex in 2004 and 2005 thus had no predictable pattern to follow. Nor were they predictable themselves. For example, some of those changes were further fluctuations, such as eliminating another financial-planning option. (JA 163 ¶ 62.) Dental premiums were adjusted for the

first time since 1999. (JA 165 ¶¶ 66, 266, 278, 294, 328.) Other 2004 and 2005 changes were unprecedented. For the first time, Du Pont instituted a higher co-pay for maintenance medication than for short-term prescriptions, after not previously distinguishing between the two. (SA 16, 18.) It introduced an independent stop-loss program for mental-health benefits, which previously had been part of the medical program, even though mental-health benefits had otherwise changed only once since 1998. (JA 252, 324, 420-21.) Du Pont had never before placed new eligibility limits on dependent children before adding the full-time student requirement in 2004. It had only once before amended the eligible-dependent definition at all, and that was to remove in 2001 the rule that the child live with the parent. (JA 289.) It also added a legal-services plan as an entirely new category of benefit within Beneflex. (JA 392, 421.) Further evading predictability, the changes ranged from the general (an overall increase in medical premiums) to the highly specific (new allotment of costs for infertility treatment). (JA 163-64 ¶¶ 62, 420.) The 2004 and 2005 unilateral changes thus not only had no pattern to follow, but compounded the unexpectedness of Du Pont's actions; the only identifiable similarity with prior changes was Du Pont's exercise of unpredictable discretion.

Du Pont acknowledges that its changes to Beneflex involved the exercise of discretion (Br. 36). In arguing that it nonetheless had established a past-practice defense, Du Pont both understates and overgeneralizes the scope of its prior

changes. Pointing to its history of changes to “various features of Beneflex offerings” (Br. 37), Du Pont’s position is essentially that *some* changes to *some* benefits in the past privileged it to make *any* type of change to *any* benefit going forward. But Du Pont’s “series of disparate changes” to Beneflex over the years, *Caterpillar*, 355 NLRB at 522, were insufficiently related to either each other or the 2004 and 2005 changes to create the kind of predictability and regularity that would establish a past practice. Indeed, Du Pont’s contention is even broader than the rejected argument in *Caterpillar* that the employer established a past practice because its changes all related to a prescription-drug benefit. Further, given the number of benefit categories within Beneflex, options within each category, and terms within each option, Du Pont’s assertion that its changes were limited to “one small subject area” (Br. 47) is a significant understatement.¹⁷

Du Pont identifies (Br. 37) two purported limits on its discretion, but neither is sufficient to bring its unilateral changes within the past-practice exception. Du Pont’s reliance on the fact that the Beneflex changes occurred “at the same time every year” (Br. 37) is contrary to the Court’s holding that fixed timing alone does not establish a past practice. *Daily News of L.A.*, 73 F.3d at 412 n.3. In addition,

¹⁷ In any event, unilateral changes to a single term or condition of employment can be unlawful. See, e.g., *Maple Grove Health Care Ctr.*, 330 NLRB 775, 777-81 (2000) (only change was to medical premiums); *Circle Imp. Exp. Co.*, 244 NLRB 255, 258 (1979) (only change was to wages).

as the Board explained, the requirement that Du Pont provide benefits to union-represented employees on the same basis as unrepresented employees is “no meaningful limitation at all.” (JA 866.) There is no limit on the type or scope of changes Du Pont can make to benefits for unrepresented employees (because they are not subject to the duty to bargain and to maintain the status quo), and the supposed “same basis” limit simply extends that same discretion to represented employees; unbounded discretion applied even-handedly is no less unbounded. That is why the Board consistently has held that an employer’s history of providing the same benefits to both union and non-union employees does not establish a past practice exempting the employer from its bargaining obligation over uniformly applied changes to those benefits. *See, e.g., Larry Geweke Ford*, 344 NLRB 628, 632 (2005); *Mid-Continent Concrete*, 336 NLRB 258, 259, 268 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002); *United Hosp. Med. Ctr.*, 317 NLRB 1279, 1282 (1995).¹⁸ Without any boundary on their substance or scope, Du Pont’s changes were so “informed by a large measure of discretion” to foreclose a past-practice defense. *Katz*, 369 U.S. at 746.¹⁹

¹⁸ Because the benefit or detriment to employees of Du Pont’s changes is not a relevant consideration, *Daily News of L.A.*, 73 F.3d at 411, whether some of them “enhanced the benefits” available to employees, as Du Pont claims (Br. 37), is beside the point.

¹⁹ As with its observations regarding waiver, the Court’s discussion that Du Pont cites (Br. 37) from *Du Pont I* regarding past practice and purported limits on Du

Given the range of discretionary changes made in prior years, Du Pont has not met its burden of establishing a past practice privileging the unilateral 2004 and 2005 changes at Louisville and Edge Moor. Absent such a showing, it had an obligation to bargain, and its failure to do so was a clear unfair labor practice.

3. Du Pont's Remaining Arguments Are Unsupported, Inapplicable, or Otherwise Mistaken

Du Pont launches a variety of additional arguments to excuse its unilateral changes. None undermine the Board's determination, however, because they rely variously on unsupported contentions, inapplicable law, and exaggerations of the Board's decision and its application to this case.

a. The Board's Decision Is Consistent with the Goal of Stable Labor Relations

Du Pont contends (Br. 44-49) that its position will better serve collective bargaining, but its arguments ignore foundational principles of the duty to bargain or are unsupported by the record. Moreover, they fail to overcome the deference owed to the Board on that issue. *Ford Motor*, 441 U.S. at 496.

Du Pont objects (Br. 44-46) that, if it has to bargain over changes at Louisville and Edge Moor, employees at those plants might receive different benefits than unrepresented employees at its other facilities. But any such differences would simply be a consequence of the fact that the duty to bargain and

Pont's discretion was made in light of *Courier-Journal*, treating that decision as valid precedent.

to maintain the status quo apply to Louisville and Edge Moor employees but not the unrepresented employees; it is “a function of the Act, not a Board-imposed burden” (JA 869). Du Pont also insists that the possibility of making changes to Beneflex benefits at some locations but not others would not be “realistic” (Br. 45-46), but it already had done so for several years at the Yerkes plant, in recognition of its bargaining obligation there. Moreover, Du Pont itself was prepared to give up some “benefits derived from the economies of scale associated with ... a single benefit plan” (Br. 46) when it encouraged Local 4-786 to propose an alternative to Beneflex for Edge Moor employees during contract negotiations.

Du Pont also contends (Br. 46-48) that its unilateral changes had no deleterious effect on bargaining with Local 4-786 and Local 5-2002, despite the longstanding principle that such changes by their nature “injure[] the process of collective bargaining,” *Honeywell Int’l*, 253 F.3d at 131. Du Pont points (Br. 47) to the longevity of the bargaining relationship, but fails to recognize that unilateral changes are unlawful during successor bargaining as well as initial bargaining. *Litton*, 501 U.S. at 198. No more availing is Du Pont’s assertion that its changes “did not remove benefit issues from the bargaining table.” (Br. 48.) The record is not clear whether any such bargaining occurred at Louisville, where Du Pont flatly rejected Local 5-2002’s requests to bargain over changes to Beneflex. Even though some bargaining over benefits generally took place at Edge Moor, the

parties were not at impasse. The duty to bargain is not satisfied just because some bargaining occurs. Rather, unilateral action is not permitted “unless and until an overall impasse has been reached.” *Bottom Line Enterprises*, 302 NLRB at 374.

Finally, Du Pont faults the Board (Br. 48-49) for not setting forth precisely how much discretion would be too much discretion to foreclose a past-practice defense in any given instance. But a bright-line rule is not always warranted or required. *See, e.g., UFCW, Local No. 150-A v. NLRB*, 1 F.3d 24, 32-33 (D.C. Cir. 1993) (explaining that the Court “does not require that the Board establish standards devoid of ambiguity at the margins”). Whether a past practice exists is a fact-specific question that looks to the circumstances of a given case. Here, the Board chronicled its caselaw, highlighting examples of both sufficient limits and overly unbounded discretion. It also clarified the state of the law by making clear that the discretion exercised in *Courier-Journal* was too great to establish a past practice. Ultimately, the Board was dealing with the facts of the case before it, and given the scope of Beneflex and the lack of discernible pattern to Du Pont’s prior changes, those facts fit comfortably within existing caselaw without presenting the need for definitively setting the outer bounds of permissible discretion.

b. The *Stone Container* Exception Is Inapplicable and Unmet

Du Pont’s alternative argument that the 2005 changes at Edge Moor were lawful “because the union was given a reasonable opportunity to bargain” (Br. 49-

52) faces both legal and factual obstacles. It relies on the doctrine set forth in *Stone Container Corp.*, 313 NLRB 336, 336-37 (1993), that an employer sometimes need only give notice and an opportunity to bargain before unilaterally implementing a proposal regarding a recurring “discrete event” that occurs during negotiations. But as the Board explained, the *Stone Container* analysis applies only “where the parties are negotiating for an initial collective-bargaining agreement.” (JA 866 n.26.) The doctrine applies “in the context of a new collective-bargaining relationship” because it is intended to provide “a bargaining bridge to cross the transitional period when an employer must deal with that event while engaged in initial negotiations.” *TXU Elec. Co.*, 343 NLRB 1404, 1407 (2004); *see also Conn. Inst. for the Blind, Inc.*, 360 NLRB 359, 409-10 (2014) (explaining that “the *Stone Container* exception applies only to first contract negotiations and not to negotiations for successor contracts”). Du Pont’s 2005 changes were made during bargaining for a successor contract, in the context of a decades-long collective-bargaining relationship. The parties were long past any “transitional period,” *TXU Elec.*, 343 NLRB at 1407, that might justify an exception to the general rule against unilateral changes and piecemeal bargaining.

Even if the *Stone Container* standard were applicable, Du Pont has not met it. Local 4-786 did not, as Du Pont insists, “fail[] to seek bargaining” (Br. 49). It requested bargaining over the 2005 changes three days after Du Pont announced

them. It made multiple counterproposals, offering both an alternative benefits program through Blue Cross/Blue Shield and an agreement to accept the 2005 changes in exchange for Du Pont dropping its proposal for additional waiver language. In the cases Du Pont cites (Br. 50-51), by contrast, the union either did not request bargaining at all, *TXU Elec.*, 343 NLRB at 1407; *Alltel Kentucky, Inc.*, 326 NLRB 1350, 1350 (1998); *Stone Container*, 313 NLRB at 336, or did not do so in a timely manner, *Nabors Alaska Drilling, Inc.*, 341 NLRB 610, 611 (2004), or the parties had bargained to impasse, *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542, 542 (2004), *enforced*, 426 F.3d 455 (1st Cir. 2005). The fact that Local 4-786 did not separately ask to bargain over each individual change does not, as Du Pont would have it (Br. 51), mean that it did not pursue bargaining. Because negotiations were ongoing, Du Pont was not privileged to short circuit that process by acting unilaterally.

c. The Board Properly Applied Its Decision to This Case

Finally, Du Pont's challenge (Br. 52-55) to retroactive application of the Board's decision is unavailing in light of the Board's general practice of applying its decisions "to all pending cases in whatever stage." *Aramark School Servs., Inc.*, 337 NLRB 1063, 1063 n.1 (2002) (internal quotations omitted); *see also AT&T Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) ("Retroactivity is the norm in agency adjudications"). The Court will reject retroactive application of an agency

adjudication “only when such application would work a manifest injustice.” *Gen. Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1061 (D.C. Cir. 1989) (internal quotations omitted).

The Board’s decision did not, as Du Pont asserts, announce a “new legal standard.” (Br. 24, 53.) Instead, as the Board explained, its analysis was “consistent with longstanding precedent and well-established principles.” (JA 870.) And it follows from the Court’s remand instructions, which identified prior Board decisions applying the analysis that Du Pont now claims is unprecedented. The limited duration of a management-rights clause is well recognized, and, given the provenance and longevity of *Katz*’s “informed by a large measure of discretion” standard for past-practice analysis, the Board’s reliance on that factor here can hardly be deemed novel or unexpected. Overruling cases that deviated from those principles was an act of affirming the principles, not creating new ones. As the Court has explained, retroactive application of a decision overruling prior cases is appropriate where “the overruling was necessary to clarify the Board’s precedent,” because “such an effort is more appropriately viewed as an attempt to fill a void in an unsettled area of the law” than a break with settled policy. *Daily News of L.A.*, 73 F.3d at 416 (internal quotations omitted).

Du Pont contends (Br. 53-54) that it relied on the cases that the Board overruled when it acted unilaterally. But any reliance interest in those cases was

undermined by the direct tension between them and other Board precedent. *See Local No. 150-A*, 1 F.3d at 34 (permitting retroactive application where “Board precedent was ... no[t] consistent at the relevant time” (internal quotations omitted)); *Local 900, Int’l Union of Elec., Radio & Mach. Workers v. NLRB*, 727 F.2d 1184, 1195 (D.C. Cir. 1984) (retroactive application proper where party “had notice that [a Board policy] w[as] under attack”). Moreover, *Courier-Journal* and *Capitol Ford* had not been decided at the time of Du Pont’s unilateral changes in 2004, and *Beverly 2006* post-dated all of the changes at issue. Du Pont also claims reliance on *Shell Oil* and related cases, but those cases had already been recognized as overruled in 2001.

Finally, courts must balance the effect of retroactively applying agency action with “the mischief of producing a result which is contrary to a statutory design” by not doing so. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *see also Consol. Freightways v. NLRB*, 892 F.2d 1052, 1059 (D.C. Cir. 1989) (proper for Board “to conclude that complete vindication of employee rights should take precedence over the employer’s reliance on prior Board law”). Here, the mischief of failing to apply the Board’s holding to this case is permitting Du Pont to evade its duty to bargain by acting unilaterally, contrary to the fundamental goals and principles of the Act. Under the circumstances of this case, the Board appropriately gave retroactive application to its decision reaffirming foundational

unilateral-change and past-practice principles central to the Act's bargaining obligation.

The changes that Du Pont imposed without bargaining could have a “profound effect on the lives of individual employees and their families” at Louisville and Edge Moor (JA 869), from the cost of medicine to whether their children have health insurance. Yet those changes were put in place without any opportunity to prepare (because they were unpredictable) or push back (because they were unilateral), harming both the individual employees and the collective-bargaining process that the duty to bargain was meant to protect. In this case and going forward, the Board's reaffirmation of key unilateral-change and past-practice principles, rendered in accordance with the Court's instructions on remand, thus will have a salutary effect on both the state of the law and the lives of employees.

CONCLUSION

The Board respectfully requests that the Court deny Du Pont's petition for review and enforce the Board's Order in full.

s/ Jill A. Griffin

JILL A. GRIFFIN

Supervisory Attorney

s/ Joel A. Heller

JOEL A. HELLER

Attorney

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570

(202) 273-2949

(202) 273-1042

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

DAVID HABENSTREIT

Assistant General Counsel

National Labor Relations Board

July 2017

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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)	Nos. 16-1357, 16-1421
v.)	
)	
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)	
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)	09-CA-041634
UNITED STEEL, PAPER AND FORESTRY,)	
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND SERVICE)	
WORKERS INTERNATIONAL UNION)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,000 words of proportionally spaced, 14-point type, and that the word-processing system used was Microsoft Word 2010.

/s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 21st day of July, 2017

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)	
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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Dated at Washington, DC
this 21st day of July 2017

STATUTORY ADDENDUM

Section 1 of the Act (29 U.S.C. § 151):

.... It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

Section 8(a) of the Act (29 U.S.C. § 158(a)):

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

...

(5) to refuse to bargain collectively with the representatives of his employees

Section 8(d) of the Act (29 U.S.C. § 158(d)):

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder

Section 10(e) of the Act (29 U.S.C. § 160(e)):

.... No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances