UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E.I. Du Pont De Nemours, Louisville Works,

and 09-CA-040777,
09-CA-041634

Paper, Allied-Industrial, Chemical and
Energy Workers International Union
and its Local 5-2002.

E.I. Du Pont De Nemours and Company,

and 04-CA-033620

United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial
and Service Workers International Union
(USW) and its Local 4-786.

CHARGING PARTIES' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

Charging Parties Local 5-2002 and Local 4-786 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, "the Union") move for reconsideration because the National Labor Relations Board ("the Board") mistakenly treated this case as identical to *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017), rather than applying the legal standard set forth in *Raytheon* to the distinct facts at issue here.

Specifically, *Raytheon* repeatedly emphasizes that, "even though [*NLRB v.*] *Katz*[, 369 U.S. 736 (1962),] permits the employer to take unilateral actions to the extent they are consistent with past practice and therefore not a 'change,' the employer must engage in bargaining regarding those actions whenever the union requests such bargaining[.]" *Id.* at 4 n.11. As explained in detail below, the stipulated record in this case clearly shows that the Union requested bargaining over the annual changes to employee benefits at issue here and that DuPont refused, thereby violating the Act.

The Board's failure to apply the legal standard set forth in *Raytheon* to the undisputed record evidence in this case constitutes a material error since it is outcome determinative. For this reason, the Board should vacate its decision and either issue a new decision or, in the alternative, call for position statements from the parties regarding the proper disposition of this case under *Raytheon*.

STATEMENT

This case concerns annual changes to a package of employee benefits, known as the "Beneflex Plan," made by E.I. DuPont De Nemours ("DuPont") at the company's Louisville Works and Edge Moor, Delaware plant in 2004 and 2005. In its initial decisions in this now-consolidated case, the Board held that DuPont's unilateral changes to benefits violated Section 8(a)(5) of the Act, rejecting DuPont's claim that the annual changes qualified as a past practice the

company was entitled to continue in order to maintain the status quo following contract expiration. *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB 1084 (2010) ("*Louisville Works*"); *E.I. DuPont de Nemours and Co.*, 355 NLRB 1096 (2010) ("*Edge Moor*").

In response to DuPont's alternative defense that its changes to the Beneflex Plan "were privileged under *Stone Container Corp.*, 313 NLRB 336 (1993)," the Board in *Louisville Works* also found that "the record shows that the Respondent flatly refused the Union's request during contract negotiations to bargain over the Respondent's proposed changes to employee benefits under the Beneflex Plan." 355 NLRB at 1086. "Indeed, the parties have stipulated that the 'Union requested to bargain over these changes' in the Beneflex Plan in 2004 and 2005 but that the 'Respondent did not offer to, nor did it, negotiate over these changes.'" *Ibid.* (quoting stipulations). For that reason, the Board held, "*Stone Container* provides no defense to Respondent's conduct." *Ibid.*

Addressing the same *Stone Container* argument in *Edge Moor*, the Administrative Law Judge (ALJ) concluded that, although the Union requested bargaining, "[t]he Respondent has not shown that prior to implementing the changes to benefit plans on January 1, 2005, it ever indicated that the Company viewed those changes as a discrete event that should be bargained about in isolation from the ongoing contract negotiations concerning the continued

existence of those plans." 355 NLRB at 1107. For that reason, the ALJ concluded that "[DuPont] failed to meet even the lower bargaining duty that pertains in cases controlled by *Stone Container*." *Id.* at 1108.[1]

DuPont petitioned for review in both cases and, in a consolidated decision, the D.C. Circuit refused to enforce the decisions on the basis that they conflicted with recent Board precedent on the unilateral change doctrine, remanding for the Board to decide whether to "either conform to its [recent] precedent . . . or explain its return to the rule it followed in its earlier decisions." *E.I. Du Pont De Nemours and Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). The Court did not address DuPont's alternative *Stone Container* defense.

After inviting position statements from the parties on remand, the Board, over the dissent of Member Miscimarra, issued a new decision, overruling the recent precedent identified by the Court and reaffirming its conclusion that DuPont's unilateral changes violated the Act. *E.I. Du Pont de Nemours, Louisville Works*, 364 NLRB No. 113, slip op. 1 (Aug. 26, 2016). In dissent, Member Miscimarra disagreed with the majority's decision to overrule the relevant precedent. *Id.* at 17-18 (Miscimarra, Member, dissenting). But Member

[1] While the Board did not specifically address the *Stone Container* defense in its brief *Edge Moor* decision, it adopted the ALJ's decision in reliance on its more fully-elaborated decision in *Louisville Works*. *See Edge Moor*, 355 NLRB at 1096 & n.2.

Miscimarra went on to explain that it was "ironic" that his colleagues even reached the doctrinally-complex unilateral change issue, suggesting that DuPont had violated Section 8(a)(5) in a much more straightforward manner – *i.e.*, "the Union at DuPont's Louisville plant requested bargaining over the potential Beneflex changes, and DuPont refused to engage in such bargaining[.]" *Id.* at slip op. 27 (Miscimarra, Member, dissenting).

DuPont once again petitioned for review in the D.C. Circuit. *See E.I. Du Pont De Nemours & Co. v. NLRB*, Nos. 16-1357, 16-1421 (D.C. Cir.). After that appeal was fully-briefed, and while the case was pending oral argument, the Board issued its decision in *Raytheon*. The Board successfully moved the Court to "remand the case to the Board so that the Board may reconsider the case in light of its current precedent established in *Raytheon*." *DuPont*, Nos. 16-1357, 16-1421, Doc. #1710018 ¶ 4 (filed Dec. 21, 2017). Without first calling for position statements from the parties, the Board then issued its decision in this case.

ARGUMENT

Member Miscimarra's dissent in the Board's 2016 *DuPont* decision makes clear that – unilateral changes aside – DuPont violated the Act by refusing the Union's requests to bargain over annual changes to the Beneflex Plan. Because the Board overlooked that dispositive issue, it should grant this motion for reconsideration, vacate its decision, and address the issue in the first instance.

The Board's holding in *Raytheon* generally tracks Member Miscimarra's dissent in the Board's 2016 *DuPont* decision. *See, e.g.*, *Raytheon*, 365 NLRB No. 161, slip op. 1, 10-11 (quoting *DuPont* dissent at length). As specifically relevant here, Member Miscimarra explained:

> "Under existing law, even when an employer's past practice permits the employer to take the same or similar actions unilaterally under *Katz* (i.e., without first giving its union notice and the opportunity for bargaining), the employer is required under Section 8(a)(5) to engage in bargaining over the same subject matter – indeed, over the actions being taken unilaterally – upon request by the union. This duty to engage in bargaining upon request over mandatory subjects, which includes matters that may be unilaterally implemented by an employer under *Katz*, is completely unaffected by any past practice, and an employer's refusal to engage in such bargaining clearly constitutes a violation of Section 8(a)(5)." *DuPont*, 364 NLRB No. 113, slip op. 27 (Miscimarra, Member, dissenting).

The Board in *Raytheon* repeatedly held the same. *See* 365 NLRB No. 161, slip op. 11 ("[E]mployers still have an obligation to bargain *upon request* with respect to all mandatory subjects – including actions the employer has the right to take unilaterally – whenever the union *requests* such bargaining." (Emphasis in original)). *See also id.* at 4 n.11, 7 n.31, 16-17 (stating same).

In the paragraph of his dissent immediately following the quotation above, Member Miscimarra suggests the proper application of the quoted legal rule to the facts of this case:

> "As to this last issue, it is ironic that my colleagues have insisted on completely overhauling the Act's treatment of bargaining obligations in the instant case. The record contains some suggestion that the Union at DuPont's Louisville plant requested bargaining over the potential Beneflex changes, and DuPont refused to engage in such bargaining in reliance on DuPont's past practice described above. Such a refusal would clearly constitute a violation of Section 8(a)(5), not because it is a unilateral 'change' under *Katz*, but rather because it violates an employer's separate duty to bargain upon request regarding any mandatory subject, and this separate duty is completely unaffected by any past practice." *DuPont*, 364 NLRB No. 113, slip op. 27 (Miscimarra, Member, dissenting) (footnote omitted).[2]

[2] Member Miscimarra mistakenly believed that "the D.C. Circuit's remand [wa]s limited to the Board's treatment of what constitutes a unilateral 'change' under *Katz*." *DuPont*, 364 NLRB No. 113, slip op. 27 (Miscimarra, Member, dissenting). On that basis, he concluded that, "although I believe the record might support the existence of a refusal-to-bargain violation by DuPont . . . when the Union in Louisville requested bargaining over the Beneflex changes, this issue is not presently before the Board." *Id.* at 27-28. In fact, nothing in the D.C. Circuit's first remand of this case – or, for that matter, the Court's second remand – prevents the Board from deciding the refusal-to-bargain issue.

Member Miscimarra's suggestion is correct. As the Board explained in its 2010 *Louisville Works* decision – relying on the parties' stipulations – "the record shows that the Respondent flatly refused the Union's request during contract negotiations to bargain over the Respondent's proposed changes to employee benefits under the Beneflex Plan." 355 NLRB at 1086 (discussing DuPont's *Stone Container* defense). Indeed, in letters refusing the Union's requests to bargain at Louisville Works – attached as exhibits to the parties' stipulations – DuPont stated that "it would be wholly inappropriate to engage in bargaining over the recently-announced changes to the Plan" because "the Company has reserved the right under the Beneflex Flexible Benefit Plan to 'suspend, modify, or terminate said

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In the first remand, the Court made clear that "[b]ecause we grant the petitions for review on th[e] ground [that the Board failed to give a reasoned justification for departing from its precedent], we do not reach Du Pont's alternative argument that the changes were 'covered by' the expired CBAs." *Du Pont*, 682 F.3d at 70 n.*. Presumably, then, the Court also "d[id] not reach Du Pont's alternative argument," *ibid.* – which the Court similarly did not address – that DuPont was privileged by *Stone Container* to make the annual changes to the Beneflex Plan. As we explain in the text, that argument, which was fully litigated in both the *Louisville Works* and *Edge Moor* cases, required proof that DuPont bargained with the Union upon the Union's request. *See* pages 8-12, *infra*.

In the second remand, the Court stated that it was "remand[ing] to the Board for further consideration in light of the Board's recent decision in *Raytheon*[]." *DuPont*, Nos. 16-1357, 16-1421, Doc. #1712214 (unpublished order, dated Jan. 9, 2018). The Board in *Raytheon* "emphasize[d] . . . that our holding has *no effect* on the duty of employers, under Section 8(d) and 8(a)(5) of the Act, to bargain upon request over any and all mandatory subjects of bargaining[.]" 365 NLRB No. 161, slip op. 16-17 (emphasis added). The refusal-to-bargain violation identified by Member Miscimarra, therefore, is now properly before the Board.

Plan at its discretion at any time'" and "[y]our Union has agreed to these provisions and the Employer has exercised these rights on several occasions over the past few years." *Louisville Works*, Jt. Ex. 44 (2004 changes) & Jt. Ex. 49 (2005 changes).

DuPont's response to the Union's bargaining request that, because the Union had agreed to permit the company to make unilateral changes to employee benefits in previous years – *i.e.*, that such changes allegedly constituted an established past practice – "it would be wholly inappropriate to engage in bargaining over the recently-announced changes to the Plan," *ibid.*, is contrary to the holding of *Raytheon*. As *Raytheon* makes clear, "the duty to bargain upon request regarding a mandatory subject of bargaining is *not* eliminated by an employer's past practice." 351 NLRB No. 161, slip op. 4 n.11 (emphasis in original). "Even if an employer has taken actions involving wages or other employment terms in precisely the same way, the existence of such a past practice does *not* permit the employer to refuse to bargain over the subject if requested to do so by the union." *Ibid.* (emphasis in original). DuPont's steadfast refusal to bargain with the Union at Louisville over its announced changes to employee benefits, therefore, constituted

an independent violation of the Act, regardless of whether the benefit changes themselves were consistent with the company's past practice.[3]

The facts of the *Edge Moor* case are more complicated, but no less worthy of full consideration by the Board under the *Raytheon* standard.

After the parties' collective bargaining agreement expired, "Respondent told the Union that it would not continue to provide its benefits package to unit employees in the new contract unless the Union agreed to language setting forth management's right to make unilateral out-of-contract changes to benefits, such as the 2005 benefits changes at issue here." *Edge Moor*, 355 NLRB at 1107. When the Union refused to negotiate over such language – which it correctly viewed as a

[3] The Complaints in *DuPont* each allege straightforward refusal-to-bargain violations of the sort described by Member Miscimarra. At Louisville, the Complaint states that, by "ma[king] and implement[ing] changes to its Beneflex [] Health and Welfare Benefits for unit employees . . . without affording the Union an opportunity to bargain with Respondent with respect to this conduct or the effects of such conduct," "Respondent has been failing and refusing to bargain with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act." *Louisville Works* Second Consolidated Complaint, GC Ex. 1(v), ¶¶ 7 & 8. At Edge Moor, the Complaint states that, by "notif[ying] the Union that it would not bargain concerning the changed terms and conditions of employment," and by making changes to the Beneflex Plan "without having afforded the Union an opportunity to bargain with Respondent over these changes," "Respondent has been failing and refusing to bargain with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act." *Edge Moor* Complaint, GC Ex. 1(c), ¶¶ 6 & 7.

Moreover, as previously noted, the question of whether DuPont bargained with the Union over the changes to the Beneflex Plan was fully litigated in both cases in relation to DuPont's *Stone Container* defense. *See* pages 8-12 of the text, *infra*.

permissive topic – and reiterated its view that DuPont had a duty to bargain over the annual changes to the Beneflex Plan it had announced, DuPont responded that "if the Union would not agree to discuss [the company's proposal], the Union would have to propose an alternative to the entire Beneflex package of benefit plans." *Id.* at 1101. The Union then did so – developing a proposal for bargaining unit members to be covered by a package of Blue Cross/Blue Shield plans rather than Beneflex – but the parties could not reach agreement on this alternative plan. *Id.* at 1101-02.

After negotiations over the Blue Cross/Blue Shield alternative fell apart, "the Union offered to accept Respondent's benefit plans, along with all the changes that Respondent planned for 2005, while the parties negotiated a new contract, if Respondent would withdraw the waiver proposal[,]" along with offering, as an alternative, a new version of the Blue Cross/Blue Shield proposal. *Id.* at 1102. "Respondent rejected these proposals." *Ibid.* DuPont then moved to unilaterally implement its changes to the Beneflex Plan. "The Union responded that it did not agree to the implementation of the changes, that the benefits were a mandatory subject of bargaining, and that, in its view, the Respondent's planned course of action was unlawful." *Ibid.*

As the ALJ summarized, "[DuPont] has not shown that prior to implementing the changes to benefit plans on January 1, 2005, it ever indicated

that the Company viewed those changes as a discrete event that should be bargained about in isolation from the ongoing contract negotiations concerning the continued existence of those plans." *Id.* at 1107. That is, rather than simply agree to bargain over the 2005 Beneflex Plan changes alone, as the Union had requested, DuPont insisted on tying any negotiations over those imminent benefit changes to reaching agreement on contract language regarding the company's right to make unilateral changes to employee benefits *in the future*. Under *Raytheon*, that refusal to bargain over the 2005 changes to the Beneflex Plan without conditions tied to overall contract negotiations violated the Act.

As already noted, the ALJ's discussion of the bargaining in *Edge Moor* – and a similar discussion by the Board in *Louisville Works*, *see* 355 NLRB at 1086 – was prompted by DuPont's claim in each case that "the unilateral implementation of the 2005 changes in benefits was permissible under the *Stone Container* exception." *Edge Moor*, 355 NLRB at 1106. *See also Louisville Works*, 355 NLRB at 1086 (same). As the ALJ in *Edge Moor* correctly explained, *Stone Container* constitutes an exception from the general "duty to refrain from implementation at all, absent impasse on bargaining for the agreement as a whole." 355 NLRB at 1106 (citing *Bottom Line Enterprises*, 302 NLRB 373 (1991)). In *Stone Container*, "the Board recognized an exception to that duty where a change concerns a discrete, annually recurring, event that is scheduled to take place during

contract negotiations." *Ibid.* In such a case, the employer is permitted to insist on dealing with that issue separately from overall bargaining, "[a]s long as the union is given notice and opportunity to bargain as to those matters[.]" *TXU Electric Co.*, 343 NLRB 1404, 1407 (2004).

The *Stone Container* exception is consistent with the Board's holding in *Raytheon* that "employers still have an obligation to bargain *upon request* with respect to all mandatory subjects – including actions the employer has the right to take unilaterally – whenever the union *requests* such bargaining." 365 NLRB No. 161, slip op. 11 (emphasis in original). The point of such bargaining may be as a "bargaining bridge to cross the transitional period" while the parties continue "negotiations for an overall contract," *TXU Electric*, 343 NLRB at 1407. Or, the parties may have specific, but nonetheless important, local issues about which to bargain, notwithstanding the company-wide nature of the benefit plan or other working condition at issue.

The latter point is of particular salience in this case, as the record demonstrates that the Beneflex Plan includes a mix of geographically-defined plan options, some of which were available to all DuPont employees nationwide and some only at specific locations. For example, several of the medical benefit plans available to employees through Beneflex were self-insured "national plan options." *Louisville Works*, Tr. 25 (testimony of DuPont Senior Consultant for Health and

Welfare Benefit policy). However, at "certain local sites" DuPont also provided an "Alternative Plan Option" – typically, a plan provided by an outside insurance company, rather than a self-insured DuPont plan. *Ibid.* *See also Edge Moor*, Jt. Ex. 35 (DuPont 2005 Beneflex Guide at 10).[4]

In an annual Beneflex Plan pamphlet distributed to employees, DuPont explained that whether the company provided additional benefit plans at a particular location – such as "a choice of two carriers providing the current Options" or "an entirely new type of benefit plan, such as a Preferred Provider Organization (PPO) or an HMO" – depended on factors including "[w]hat specific needs and concerns have been expressed by employees." *Louisville Works*, Jt. Ex. 16 ("Plain Talk" Beneflex pamphlet at 4). Bargaining over such local plan options could certainly have been meaningful for employees at Louisville Works and the

[4] The stipulated record also shows that at various times DuPont treated individual facilities differently under the Beneflex Plan, despite the general company-wide nature of that plan. For example, at Louisville Works, DuPont held premiums, co-pays, and deductibles at 1994 levels during the 1995 Beneflex Plan year. *Louisville Works*, Jt. Ex. A, Stipulated Facts ¶ 9. Similarly, at the company's Tonawanda, New York plant, DuPont agreed to hold premiums at the 1996 level until good faith impasse or agreement was reached with the employees' union, something which did not occur until 2001. *Edge Moor*, Jt. Ex. 1A, Stipulated Facts ¶ 10. On the basis of these undisputed facts, the ALJ in the *Edge Moor* case rejected DuPont's claim that "in 2005, the Company could not have provided its benefit plans to unit employees under the 2004 terms while the negotiations for a new contract were ongoing," finding no "reliable evidence to show that continuing the 2004 benefits terms for unit members would have been impossible, or even difficult." 355 NLRB at 1102 n.10.

Edge Moor plant – how else, if not through bargaining, would DuPont know "what specific needs and concerns" were felt by employees at these facilities?

In other words, there most certainly *was* something for DuPont and the Union to bargain about, even if DuPont would have ultimately been entitled to make unilateral changes to the Beneflex Plan if the parties had reached impasse over this discrete issue. DuPont's refusal to bargain over the Beneflex Plan changes altogether, however, deprived the Union of the opportunity to at least try to reach agreement with the company over its announced changes. Because "[t]his duty to engage in bargaining upon request over mandatory subjects, which includes matters that may be unilaterally implemented by an employer under *Katz*, is completely unaffected by any past practice," DuPont's "refusal to engage in such bargaining clearly constitute[d] a violation of Section 8(a)(5)." *DuPont*, 364 NLRB No. 113, slip op. 27 (Miscimarra, Member, dissenting).

CONCLUSION

The Board should grant this motion for reconsideration, vacate its decision, and either issue a new decision in light of the record evidence or, in the alternative, call for position statements from the parties regarding the proper disposition of this case under *Raytheon*.

Dated: November 7, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2018, the foregoing Charging Parties' Brief In Support of Motion for Reconsideration was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the following in the manner specified below:

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