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' REPLY TO DUPONT'S OPPOSITION TO THE 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"), file this reply in response to E.I. DuPont De Nemours and Company's argument that the Motion for Reconsideration should be denied because it raises a new legal theory that was not presented in the General Counsel's Complaints concerning unfair labor practices at DuPont's Edge Moor and Louisville Works facilities. As the Union demonstrates below – including by reproducing the relevant portions of the Complaints – whether DuPont violated the Act

by refusing the Union's repeated requests to bargain over its announced Beneflex Plan changes has always been at issue in this case.

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In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), the Board overruled the legal standard it previously applied in this case with regard to unilateral changes. The Board then applied its new legal standard in a manner that treated this case as identical to *Raytheon*. As the Union explained in its Motion for Reconsideration, this case is meaningfully distinguishable from *Raytheon* on its facts. For that reason, the Board's decision to treat the two cases as identical constituted a material error.

Raytheon repeatedly emphasized 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[.]" 365 NLRB No. 161, slip op. 4 n.11. *See also id.* at 7 n.31, 11, 16-17 (stating same). As the Union explained in detail in its Motion, the stipulated record in this case and the Board's decisions in *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB 1084 (2010), and *E.I. DuPont de Nemours and Company (Edge Moor)*, 355 NLRB 1096 (2010), clearly show that the Union requested bargaining over the company's announced changes to the Beneflex Plan and that DuPont refused, thereby violating the legal rule set forth in *Raytheon*. *See* Charging Parties' Brief in Support of Motion for Reconsideration (hereafter, "Union MFR") 8-12.

DuPont now contends that "the Union's Motion should be denied because it seeks to raise a new legal theory, one that was never pursued either by the General Counsel or the Union."[1] Respondent's Opposition to the Charging Parties' Motion for Reconsideration (hereafter, "DuPont Opp.") at 1. *See also id.* at 7 ("The record in this case shows that the General Counsel (and Union) pursued a theory of violation based solely upon the allegation that DuPont violated the Act by ***implementing*** changes to BeneFlex unilaterally on January 1 of the relevant years, not on a general 'refusal to bargain upon request' theory that the Union now advances for the first time." (Emphasis in original)). That claim is demonstrably untrue.

DuPont rests its "new legal theory" argument primarily on a claim that the Complaints the General Counsel issued in the Edge Moor and Louisville Works cases "adopt[ed] the Union's unilateral change theory" to the exclusion of a straightforward refusal-to-bargain-upon-request allegation.[2] DuPont Opp. 3. "For example," DuPont

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[1] The remainder of DuPont's opposition consists of arguments on the merits of the Union's refusal-to-bargain claim – *i.e.*, regarding the precise contours of the bargaining duty set forth in *Raytheon*, DuPont Opp. 10-12, and whether, at least at Edge Moor, DuPont engaged sufficiently with the Union over the Beneflex Plan changes to meet the *Raytheon* bargaining requirement, *id.* at 12-13. DuPont does not dispute the Board's conclusion that, at Louisville Works, the company "flatly refused the Union's request during contract negotiations to bargain over the Respondent's proposed changes to employee benefits under the Beneflex Plan." *DuPont, Louisville Works*, 355 NLRB at 1086.

The Board should address these merits arguments after granting the Motion for Reconsideration, vacating its decision, and accepting position statements from the parties regarding the proper application of the *Raytheon* bargaining requirement to the facts of this case.

[2] DuPont also emphasizes that the Union's unfair labor practice charges alleged a unilateral change violation. However, the refusal-to-bargain allegations pleaded by the General Counsel in the Complaints were "of the same class of violations as those set up

claims, "the Louisville Complaint alleges that DuPont violated Sections 8(a)(1) and (5) of the Act when it 'implemented changes to its BeneFlex' plan effective on January 1, 2004 and January 1, 2005." *Ibid.* (quoting Louisville Works, GC Ex. 1(v)).

That is a mischaracterization of the Complaints. As set forth in the Motion for Reconsideration, *see* Union MFR at 10 n.3, the Complaints at both Edge Moor and Louisville Works clearly allege straightforward refusal-to-bargain violations. To demonstrate this fact, we reproduce the relevant portions of the Complaints at length below:

Edge Moore Complaint

At Edge Moor, the General Counsel alleged that:

> "6. (a) On or about October 11, 2004, Respondent announced that, effective January 1, 2005, its Beneflex Plan, providing health insurance benefits, dental, vision and financial planning benefits for Unit employees, would change, and that the employees' costs for these benefits would increase.
>
> (b) The subjects set forth in above in subparagraph (a) relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purpose of collective bargaining.

in the charge." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959) (quoting *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940)). "The responsibility . . . of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party." *Ibid.*

(c) On or about October 14, 2004, the Union requested to bargain with Respondent concerning the changes referred to above in subparagraph (a).

(d) On or about December 16, 2004, Respondent notified the Union that it would not bargain concerning the changed terms and conditions of employment referred to above in subparagraph (a), and, on or about January 1, 2005, Respondent implemented the changes.

(e) Respondent engaged in the conduct described above in subparagraph (a) without having afforded the Union an opportunity to bargain with respondent concerning these changes.

7. By the conduct described above in paragraph 6, 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."[3] Edge Moor Complaint, GC Ex. 1(c) ¶¶ 6 & 7.

Louisville Works Complaint

At Louisville Works, the General Counsel alleged that:

"7. (a) Between November 10 and 21, 2003, and effective about January 1, 2004, Respondent made and implemented changes to its Beneflex 2004, Health and Welfare Benefits for unit employees by: . . . [describing specific changes to the Beneflex Plan].

[3] The Administrative Law Judge specifically noted that "[t]he complaint alleges that the Respondent failed and refused to bargain over the changes in violation of Sec. 8(a)(5) . . . . " *DuPont (Edge Moor*), 355 NLRB at 1103 n.12.

(b) About October 11, 2004, and effective about January 1, 2005, Respondent made and implemented changes to its Beneflex 2004, Health and Welfare Benefits for unit employees by: . . . [describing specific changes to the Beneflex Plan].

(c) The subject matter set forth above in paragraphs 7(a) and (b) relates to wages, hours and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(d) Respondent engaged in the conduct described above in paragraphs 7(a) and (b) without the Union's consent and without affording the Union an opportunity to bargain with Respondent with respect to this conduct or the effects of such conduct.

8. By the conduct described above . . . , 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.

As the plain language demonstrates, the Complaint in each case alleges a straightforward refusal-to-bargain-upon-request violation of Section 8(a)(5), precisely the sort of violation that *Raytheon* holds unlawful.

It is no surprise, then, that the factual findings in each of these cases, including the facts to which DuPont stipulated, conform to these pleadings.

As the Board explained in its 2010 decision regarding Louisville Works:

> "Here, 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. 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, not did it, negotiate over these changes." *DuPont, Louisville Works*, 355 NLRB at 1086 (quoting stipulations).

At Edge Moore, as the Union explained in detail in its Motion for Reconsideration, *see* Union MFR 10-12, the ALJ found, in a decision adopted by the Board, that, "Respondent told the Union that it would not continue to provide its [Beneflex] 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." *DuPont (Edge Moor)*, 355 NLRB at 1107. The Union did not agree to this prospective waiver of its bargaining rights, informing DuPont that it considered the proposal to constitute a permissive subject. *Id.* at 1101. Later, "[t]he Union offered to accept the existing benefits, but without the addition of the Respondent's proposed waiver language." *Ibid.* DuPont "rejected that proposal, and linked the nonmandatory waiver proposal to the mandatory subject of the benefits themselves by stating that it would not continue providing its benefits package to unit employees unless the Union accepted the proposed waiver language." *Ibid.* Ultimately, DuPont unilaterally implemented its changes to the

Beneflex Plan without withdrawing its waiver proposal, "conced[ing] that the parties were not at impasse when it made those changes." *Id.* at 1102.

In sum, there is no merit to DuPont's claim that the Union's Motion for Reconsideration "seeks to raise a new legal theory . . . that was never pursued either by the General Counsel or the Union." DuPont Opp. 1. The General Counsel clearly pleaded in the Complaints that "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) ¶ 7; Louisville Works, Second Consolidated Complaint, GC Ex. 1(v) ¶ 8. And, in both cases, the issue of whether DuPont *in fact* fulfilled its bargaining obligation with regard to its proposed changes to the Beneflex Plan was fully litigated by the parties and decided by the Board.

CONCLUSION

The Board should grant the Union's 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: January 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2019, the foregoing Charging Parties' Reply to DuPont's Opposition to the 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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