**E. I. Dupont de Nemours and Company *and* Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of Dupont Workers.** Case 05–CA–033461

June 21, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On December 20, 2006, the Respondent implemented certain unilateral changes to its companywide Dental Assistance Plan (DAP) and Medical Care Assistance Program (MEDCAP) retirement benefit plans. The changes limited DAP and MEDCAP retirement coverage to employees hired before January 1, 2007 (and their covered dependents). These plans covered the Respondent's more than 30,000 employees nationwide, including the approximately 1000 employees represented by Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers (the Union) in two separate bargaining units at the Respondent's Spruance Fibers plant (the Spruance facility) in Ampthill, Virginia. One of the conditions on which the Respondent had offered, and the Union had accepted, the unit employees' participation in DAP and MEDCAP was that the Respondent reserved to itself the right to make changes to the plans, to suspend the plans, or to terminate them entirely. Exercising that reserved right, the Respondent made over 50 unilateral changes to DAP and MEDCAP over the years, without objection by the Union. Nevertheless, the Union challenged the December 2006 changes, and the judge found that the Respondent violated Section 8(a)(5) of the Act by implementing them unilaterally. We disagree with the judge's determination that the Respondent acted unlawfully. The language of the parties' collective-bargaining agreement, the parties' bargaining history and their past practice, considered together, establish that the Union clearly and unmistakably waived its right to bargain over the December 2006 DAP and MEDCAP changes. Accordingly, the Respondent made those changes lawfully, and we shall dismiss the complaint.[1]

Facts

The Respondent manufactures synthetic fibers and related products at various facilities throughout the United States. As of 2006, approximately 4500 of the Respondent's 30,000-plus employees nationwide were represented by one or another of various unions.

This case involves the Respondent's Spruance facility in Ampthill, Virginia. For over 60 years, the Respondent and the Union have had a collective-bargaining relationship at the Spruance facility. The Union represents over 1000 hourly employees in separate Production and Maintenance (P&M) and Clerical, Technical, and Office (CT&O) bargaining units.

The relevant collective-bargaining agreement for the P&M unit became effective on September 1, 1999, and the relevant agreement for the CT&O unit became effective on October 1, 2000. Each collective-bargaining agreement contained a provision recognizing the Union as the exclusive bargaining agent for the covered employees. Pursuant to annual renewal provisions, both collective-bargaining agreements remained in effect in 2006. Although the agreements differed in several ways, the provisions relevant to this case were identical. Accordingly, for the sake of convenience, we shall refer to the two agreements collectively in the singular as the "collective-bargaining agreement" or "CBA."

At issue here are the Respondent's December 2006 unilateral changes to two companywide benefit plans, DAP and MEDCAP. The Respondent typically provides its employees benefits through companywide plans as opposed to site-specific or regional plans. Providing benefits in this way makes them easier to administer and less costly (by achieving economies of scale). However, at the Spruance facility as at its other unionized plants, the Respondent offered bargaining unit employees the opportunity to either participate in companywide benefit plans or negotiate local benefit plans.[2]

In March 1976, the Respondent proposed to introduce DAP at the Spruance facility as one of its companywide benefit plans. DAP provided dental benefits to all of the Respondent's United States–based employees, eligible retirees, eligible survivors and dependents, and certain former employees represented by the Union who met the eligibility requirements. During a bargaining session, the Respondent explained to the Union the reservation-of-

[1] On August 22, 2011, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. Additionally, the General Counsel filed limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[2] Before MEDCAP was introduced at Spruance in the 1980s, the unit employees at that facility were covered by a site-specific hospital and medical-surgical plan. See infra fn. 4 and accompanying text.

rights provision in DAP's plan document. (DAP's summary plan description contains virtually identical reservation-of-rights language.) The DAP plan document reservation-of-rights provision stated:

> The [Respondent] reserves the sole right to amend or discontinue this Plan at its discretion by action of the Executive Committee. Any change which has the effect of reducing or terminating benefits hereunder will not be effective until one year following announcement of such change by the [Respondent].

The Union requested to bargain over DAP on a local level. The Respondent declined to do so because DAP is a companywide plan. However, the Respondent stated that if the Union wanted to substitute a different plan for the Spruance facility, the Respondent would seriously consider it. In May 1976, the Union accepted the Respondent's DAP proposal, including the reservation-of-rights language in the DAP plan document and summary plan description. On May 13, 1976, the parties agreed to include DAP as an additional plan among the Respondent's companywide benefit plans listed in article VII of the CBA, "Industrial Relations Plans and Practices" (IRP&P), "subject to the provisions of such Plans and Practices and to such rules, regulations and interpretations as existed prior to the signing of this Agreement . . . ."[3] Article VII provided that the "Dental Assistance Plan, effective September 1, 1976, has a schedule of allowances applicable to employe[e]s covered by this Agreement which are subject to revision solely by the Company and without reference to such a schedule in effect for any other em[p]loye[e]s, and any such revision of schedules shall not be construed as a reduction, termination or withdrawal of benefits."[4]

The reservation-of-rights language in the DAP plan document remained unchanged after 1976 (with the inconsequential exception of its reference to action by Executive Committee, which was eventually deleted), and the DAP summary plan description contains reservation-of-rights language. For example, the July 2003 DAP summary plan description states: "While the [Respondent] intends to continue the benefits and policies described in this booklet, the [Respondent] reserves the right to change, modify, or terminate this Plan at its discretion at any time."

In 1983, the Respondent adopted MEDCAP as a companywide healthcare benefit plan. MEDCAP, like DAP, applied to all of the Respondent's employees nationwide, as well as its former employees who met the eligibility requirements of the plan and their covered dependents. This included certain former employees represented by the Union who met the MEDCAP eligibility requirements. The MEDCAP plan document and the summary plan description, like the DAP plan documents, contained reservation-of-rights language reserving to the Respondent the right to amend the plan or terminate it in its entirety.

When the Respondent introduced MEDCAP, the collective-bargaining agreement between the Respondent and the Union contained a Hospital, Medical, and Surgical coverage provision (the HMS provision). Under the HMS provision, unit employees at the Spruance facility received hospital and medical-surgical coverage through Blue Cross/Blue Shield of Virginia (BCBS).[5]

In September 1985, the Respondent and the Union began discussing the increasing costs of healthcare coverage and alternative healthcare plans that would address those costs. In October 1985, the Respondent provided the Union with examples of alternative coverage. The Respondent explained to the Union that MEDCAP was a healthcare program developed by DuPont and administered by Connecticut General and Aetna.[6] In February 1986, the Respondent presented its proposal for the unit employees at the Spruance facility to participate in MEDCAP.

Over the course of approximately 10 months of bargaining, the Union resisted the MEDCAP proposal because of the plan's reservation-of-rights language. For example, at one bargaining session the Union's negotiator stated that the "problem with the Aetna Plan [MEDCAP] is the Management Rights clause."[7] The Union pointed out that the

[3] The record in this case contains contracts that first became effective for the P&M and CT&O units in 1984. However, the 1976 contract for the P&M unit, and the corresponding 1977 contract for the CT&O unit, are in the record in another proceeding before the Board (Cases 05–CA–090984, 09–CA–091793, and 26–CA–092629). We take administrative notice that the relevant language in the 1976 and 1977 contracts remained materially unchanged in the relevant contracts contained in the record in the instant case (until the parties deleted contractual references to DAP and MEDCAP in light of the 1993 implementation of BeneFlex for active employees, as discussed below). The parties do not contend otherwise.

[4] Art. VII also provided that "any change in these Plans and Practices which has the effect of reducing or terminating benefits will not be made effective until one (1) year after notice to the UNION by the COMPANY of such change." The judge did not address whether the December 2006 changes to DAP were unlawful on the basis that the Respondent did not provide 1 year's notice, and no party has relevantly excepted. Thus, the parties have waived any potential argument they may have had in this regard. See Sec. 102.46(f) of the Board's Rules and Regulations; see also *Postal Workers Local 64 (USPS)*, 340 NLRB 912, 912 (2003) (stating that the Board should exercise "appropriate restraint by generally limiting [its] review to the issues and arguments raised by the parties").

[5] BCBS was a locally administered (i.e., site-specific) plan at the Spruance facility.

[6] The parties often referred to MEDCAP as the Aetna Plan.

[7] During collective bargaining, the parties often casually referred to the reservation-of-rights clause in the MEDCAP plan document as the "management rights" clause. We do not regard this as an admission on

BCBS plan did not contain a similar provision. For its part, the Respondent adhered to its position that MEDCAP must include the reservation-of-rights language. It explained to the Union that BCBS was a local plan controlled by Spruance facility management, whereas MEDCAP was a companywide plan. When the Union continued to reject the Respondent's proposals because of the reservation-of-rights language, the Respondent firmly declared that it "[would] not present a corporate plan that does not have a Management Rights Clause," and that "employees do not have to choose [MEDCAP] if they are concerned."

In September 1986, the Union changed its position and agreed to accept MEDCAP with the reservation-of-rights clause. The parties then discussed where, in the collective-bargaining agreement, MEDCAP should be referenced. The Union proposed including it in the IRP&P provision, where, the Union stated, it is recognized that the Respondent has the right to make changes unilaterally. The Respondent opposed listing MEDCAP in the IRP&P provision because it did not want to be restricted by the 1-year notice language in that provision. After further discussion, the parties agreed to refer to the MEDCAP plan in the HMS provision, although not explicitly. The relevant language in the HMS provision stated: "The [Respondent] may make available to employees alternate hospital medical-surgical coverage plans, and any employee may elect such alternate coverage in lieu of the coverage described in the above sections of this Article VIII [or XIV]." MEDCAP was the alternate plan.

At all relevant times, article II, section 3 of the CBA contained the following provision: "This Agreement constitutes the entire agreement between the parties hereto as of the execution date hereof. However, any supplement which may hereafter be mutually agreed upon between the parties, when executed in the same manner as this Agreement, shall become and be a part of this Agreement."

In 1991, the Respondent introduced a new corporate-wide cafeteria-style benefit program for active employees called BeneFlex. BeneFlex contained medical and dental benefits that were virtually identical to MEDCAP and DAP. In 1993, the Union agreed to accept BeneFlex, and the parties incorporated BeneFlex in their collective-bargaining agreement in the IRP&P provision. The parties also agreed to remove references to DAP and MEDCAP from the collective-bargaining agreement because active employees would now be covered by BeneFlex instead of DAP and MEDCAP. Significantly, however, DAP and MEDCAP continued to cover all current and future retirees (and their covered dependents), and the DAP and MEDCAP plan documents continued to include the same reservation-of-rights language described above.

During the decades following implementation of DAP and MEDCAP, the Respondent made numerous unilateral changes to those plans. Indeed, since 1987, the Respondent has made at least 50 unilateral changes to the plans, including changes to premiums, co-pays, and deductibles. Most of the changes reduced benefits, but some changes enhanced benefits (such as the addition of a large network of providers to DAP and increased coverage eligibility for an additional class of dependents). The Respondent typically provided the Union with prior notice of the changes; the Respondent also provided information about the changes to employees through various company publications and other forms of communication.

The Union did not file a grievance, unfair labor practice charge or any other objection about any of these unilateral changes. On some occasions, such as when the Respondent announced increases in premiums, the Union requested information about the changes. The Respondent generally responded to requests for information, but also reiterated that it did not have to negotiate over changes to companywide benefit plans. The Respondent never bargained over any of the changes to the plans, and sometimes, in responding to the Union, it explicitly referenced the reservation-of-rights language.[8] Also, the Respondent stated that it was willing to consider the Union's proposals regarding local benefit plans, but not regarding companywide plans such as DAP and MEDCAP.

In August 2006, during the term of the collective-bargaining agreement, the Respondent notified the Union that it was going to eliminate DAP and MEDCAP retirement benefits for new employees hired after January 1, 2007. The Union requested plan documents and demanded a meeting with the Respondent, asserting that the changes were subject to bargaining. The Respondent provided the Union with the requested information and answered other questions posed by the Union, but it refused to bargain over the changes. The Union filed a grievance over the changes, but the Respondent denied it.[9] The Respondent

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the Respondent's part that the terms are synonymous—as, indeed, they are not. See generally *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 20–21 (2017) (Member Kaplan, concurring).

[8] The record establishes that the Respondent never deviated from its position that it was privileged to make changes to DAP and MEDCAP under the reservation-of-rights language in each plan. The record also establishes that until it objected to and filed an unfair labor practice charge regarding the December 2006 changes, the Union never argued otherwise.

[9] The Union grieved changes to several benefit plans, DAP and MEDCAP among them. After the Respondent denied the grievance, the Union demanded arbitration; the Respondent filed an action in federal district court to enjoin arbitration; the Union counterclaimed to compel arbitration. Although the district court ordered arbitration with respect to several other benefit plans, it enjoined the Union from seeking to

implemented the changes on December 20, 2006. The Union filed an unfair labor practice charge.

The General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating DAP and MEDCAP retirement coverage for employees hired after January 1, 2007. The judge found the violation as alleged. In his view, the language of the parties' CBA, the parties' bargaining history, and their past practice with respect to unilateral changes to DAP and MEDCAP failed to establish that the Union had waived its right to bargain regarding the December 2006 changes. He also rejected the Respondent's remaining arguments, including its defense that the Union was equitably estopped from challenging the December 2006 changes. To the contrary, the judge found that the *Respondent* was equitably estopped from making those changes. The Respondent has excepted to the judge's decision. It argues, among other things, that the Union waived its right to bargain over the December 2006 changes. It also contends that the judge erred in finding that it was equitably estopped from making those changes. For the reasons stated below, we find merit in the Respondent's exceptions.[10]

## Discussion

Employers have a duty to bargain in good faith with union representatives about mandatory subjects of bargaining, specifically, wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958). The provision of future retirement healthcare benefits for active bargaining-unit employees is a mandatory subject of bargaining. *Chemical Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 180 (1971). An employer's unilateral change to an employment term constituting a mandatory subject of bargaining violates Section 8(a)(5) and (1) of the Act, absent a valid defense. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

One such valid defense is waiver. A party may waive its right to bargain over a term or condition of employment, in which case unilateral action is permissible. See *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). Precedent requires that any waiver of statutory rights be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).[11] Waiver can be established through the provisions in the parties' collective-bargaining agreement, by the conduct of the parties (including past practice, bargaining history, and action or inaction), or by a combination of the two. *American Diamond Tool*, 306 NLRB 570 (1992); see also *Columbus Electric Co*., 270 NLRB 686 (1984) (holding that clear and unmistakable evidence of an intent to waive bargaining "is gleaned from an examination of all the surrounding circumstances, including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement"), enfd. sub nom. *Electrical Workers Local 1466 v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986). Moreover, the Board has recognized that a clear and unmistakable waiver may be found based on an "amalgam" of factors, "even though none of the factors, standing alone, is sufficient to establish waiver under existing precedent." *Omaha World-Herald*, 357 NLRB 1870, 1870 (2011).

The judge separately considered the parties' contract language, bargaining history, and past practice and found each insufficient to establish waiver under existing precedent. We need not pass on these findings or the precedent on which they rest. Instead, we find that the judge erred in failing to properly consider whether these factors, taken together, establish that the Union waived its right to bargain about the December 2006 changes. Having conducted that analysis, we find that the Union did waive bargaining over those changes. Accordingly, we will dismiss the complaint.[12]

arbitrate changes to DAP and MEDCAP. *E.I. DuPont de Nemours & Co. v. Ampthill Rayon Workers, Inc.*, 516 F. Supp. 2d 588 (E.D. Va. 2007), affd. mem. 290 Fed.Appx. 607 (4th Cir. 2008). Consistent with the court's decision, the parties in the instant case stipulated that neither MEDCAP nor DAP is arbitrable.

[10] In limited cross-exceptions, the General Counsel contends that the healthcare plan the parties negotiated in 1986 was not MEDCAP but a different plan administered by Aetna. Therefore, the General Counsel asserts, the Respondent did not establish that the Union waived its right to bargain over the elimination of MEDCAP for new employees. The General Counsel's contention is without merit. The judge correctly found that MEDCAP and the Aetna Plan were one and the same. Record evidence amply supports the judge's finding. Thus, the Respondent's Human Resources manager testified that MEDCAP was referred to as "the Aetna Plan." Further, during its initial discussions with the Union, the Respondent stated that "Aetna would be the carrier for this program if implemented at Spruance[.]" And the plan was referred to as "MEDCAP/Aetna" in the years following its introduction.

[11] The "contract coverage" standard that has been adopted by several courts of appeals would be inapplicable here because, as described above, the parties' collective-bargaining agreement no longer referred to DAP or MEDCAP at the time of the disputed unilateral changes. See, e.g., *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936–937 (7th Cir. 1992); *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007). We recognize, of course, that the Board has never adopted the "contract coverage" standard. See *Provena St. Joseph Medical Center*, 350 NLRB at 808 (majority adheres to clear-and-unmistakable-waiver standard over the dissent of then-Chairman Battista, who would have adopted contract coverage). Chairman Ring and Member Kaplan intend to revisit this issue in a future appropriate case.

[12] In light of our finding that the Union waived bargaining, we find it unnecessary to pass on the judge's analysis of the Respondent's "status quo" (or "dynamic status quo") defense. See generally *Raytheon Network Centric Systems*, above.

The Respondent also advanced an alternative equitable estoppel defense. The judge rejected that defense and found that the *Respondent*

Contract Language

The Board has long held that express provisions in parties' collective-bargaining agreements can demonstrate waiver of the right to bargain. *American Diamond Tool*, 306 NLRB at 570. A reservation-of-rights clause contained in a plan document, such as the reservation-of-rights clauses in the DAP and MEDCAP plan documents, serves as an express waiver of a union's right to bargain if the parties' collective-bargaining agreement incorporates the plan by reference. See, e.g., *Mary Thompson Hospital*, 296 NLRB 1245, 1249 (1989), enfd. 943 F.2d 741 (7th Cir. 1991).[13]

was estopped from unilaterally terminating DAP and MEDCAP retirement coverage for unit employees hired after January 1, 2007, without providing an alternative coverage plan. Specifically, the judge determined that the Respondent was bound by its June 11, 1987 response to a question posed by the Union: whether a pensioner is guaranteed a medical plan upon retirement. In response, the Respondent stated that (a) it had reserved the right to change, modify, or discontinue the medical plan if needed; (b) the pensioner is covered and is told what insurance he or she has when retiring; and (c) "there has been no plan to discontinue medical coverage for pensioners and [the Respondent] does not visualize that ever happening . . . . The plan may be changed, or the pensioner may be covered by a different plan." The judge found that the Respondent was bound by the latter representation, as there was "no mention at this bargaining session of MEDCAP/DAP's management-rights clauses that would allow the program to be terminated." The judge seems to have found that the Respondent only contemplated making changes, as he put it, "within the framework of an existing future retirement plan."

We disagree with the judge's equitable estoppel finding. Preliminarily, the judge's finding that there was "no mention at this [June 11, 1987] bargaining session of MEDCAP/DAP's management-rights clauses that would allow the program to be terminated" was mistaken. As noted above, the Respondent prefaced its answer to the Union's question by reiterating its reserved right to change, modify, *or discontinue* MEDCAP. In any event, the Respondent's June 1987 statements could not possibly estop the Respondent from terminating MEDCAP, either entirely or, as here, for a subset of employees. An essential element of equitable estoppel is detrimental reliance, see *Red Coats, Inc*., 328 NLRB 205, 206 (1999), and the statements the judge relied on to find the Respondent equitably estopped were made approximately 9 months *after* the Union had agreed to accept MEDCAP subject to its reservation-of-rights clause. Moreover, ERISA applies to both DAP and MEDCAP, and under ERISA employers are free to amend the terms of an ERISA welfare plan or terminate the plan entirely. See, e.g., *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *Gable v. Sweetheart Cup Co*., 35 F.3d 851, 855 (4th Cir. 1994), cert. denied 514 U.S. 1057 (1995). ERISA places great weight on the written terms of the formal plan documents, which cannot be overridden by informal communications. *Gable*, 35 F.3d at 857. In short, the Union had no reasonable expectation of holding the Respondent to any oral representation it might have made that contradicted the plan documents.

The question remains, however, whether the judge could find the Respondent equitably estopped from terminating DAP and MEDCAP coverage without providing an *alternative* retiree healthcare plan. We conclude that he could not, for two reasons.

First, the judge's estoppel finding exceeds the scope of the complaint. The complaint alleged that the Respondent violated Sec. 8(a)(5) of the Act by refusing the Union's request to bargain over termination of DAP and MEDCAP retiree coverage for unit employees hired after January 1, 2007. The allegation is a failure to bargain over that coverage termination, not a failure to provide alternative coverage *if* DAP and MEDCAP coverage is terminated.

Second, and more fundamentally, the judge's estoppel finding exceeds the scope of the Board's remedial authority. If the Board were to find the 8(a)(5) violation as alleged, we would order the Respondent to cease and desist, to rescind the change, and, on request, to bargain with the Union before making any further changes in mandatory subjects of bargaining. Nothing in the order would preclude the Respondent from reimplementing the very change at issue here—termination of DAP and MEDCAP coverage for a subset of unit employees—provided it bargained with the Union to agreement or impasse before doing so. Moreover, we would have *no authority* to order the Respondent to furnish alternative coverage in the event it reimplemented the disputed change. Retiree healthcare benefits for current employees are mandatory subjects of bargaining. *Chemical Workers v. Pittsburgh Plate Glass Co*., supra. It is for the parties to work out, through collective bargaining, what retiree healthcare benefits, if any, are to be provided for current employees. The Board is empowered to oversee the *process* of collective bargaining, but it has no authority to dictate the terms of the parties' agreement. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). This, however, is what the judge effectively did. He held that if the Respondent terminated retiree healthcare benefits under DAP and MEDCAP, it had to provide an alternative plan. Thus, he purported to dictate a term or condition of employment the Respondent had not agreed to provide. (Nobody contends that the Respondent's 1987 statement that it did not visualize discontinuing retiree medical coverage constituted a binding agreement never to do so.) The judge did so by applying equitable estoppel, but he cited no authority, and we are aware of none, for the proposition that this doctrine permits the Board to overstep the limits of its remedial authority.

In light of our waiver finding, we find it unnecessary to address the Respondent's argument that the Union was equitably estopped from demanding bargaining over the December 2006 changes.

[13] The United States Court of Appeals for the District of Columbia Circuit has disagreed with the Board's view regarding what evidence is required to establish that a benefits plan, including reservation-of-rights language contained in a plan document, has been incorporated by reference in a collective-bargaining agreement. See *BP Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000), denying enforcement of *Amoco Chemical Co*., 328 NLRB 1220 (1999); *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350 (D.C. Cir. 2008), denying enforcement in relevant part of *Southern Nuclear Operating Co.*, 348 NLRB 1344 (2006). In the court's view, if a collective-bargaining agreement refers to a benefits plan, the plan is incorporated into the agreement by reference, and "all of the plan's clauses, including any reservation of rights clauses, are also incorporated into the agreement, 'thereby authoriz[ing] [the employer] to unilaterally modify the [plan] without the Union's consent.'" *Southern Nuclear Operating Co.*, 524 F.3d at 1359 (quoting *BP Amoco*, 217 F.3d at 874). To meet the court's standard, contractual references to a benefit plan need not be detailed or specific; brief, general references will suffice. See, e.g., *BP Amoco*, 217 F.3d at 873-874 (finding that contractual references to "Employee Benefit Plans," "Benefits Plan Booklets," and "Benefit plans for the Company" incorporated the benefit plans—including their reservation-of-rights clauses—into the contract by reference). The Board, in contrast, has declined to find reservation-of-rights language contained in a benefits-plan document incorporated by reference into a collective-bargaining agreement unless the agreement specifically incorporates that language by reference, or at least specifically incorporates the plan document or summary plan description that contains the reservation-of-rights language. See, e.g., *Amoco Chemical*, 328 NLRB at 1222 (finding no contractual waiver of the right to bargain where "[t]he local contracts do not specifically incorporate the AMP [Amoco Medical Plan] documents let alone the reservation-of-rights language from the AMP summary plan description"). We would be willing

As discussed above, the DAP and MEDCAP plan documents have long contained provisions specifically granting the Respondent the right to unilaterally modify the terms of those benefit plans or to terminate the plans entirely.[14] In addition, reservation-of-rights language was referenced with respect to DAP in the IRP&P provision of the collective-bargaining agreement in force between the parties at the time DAP was implemented. Thus, the Union agreed that, as with other companywide plans, the unit employees' participation in DAP was "subject to the provisions of such Plans." The collective-bargaining agreement did not expressly reference MEDCAP. However, the CBA granted the Respondent the right to "make available to employees alternate hospital medical-surgical coverage"; and the parties' history of bargaining, during which the Union accepted MEDCAP—*expressly* including its reservation-of-rights language—as just such an "alternate" plan, makes clear that the parties intended to grant the Respondent the same rights to unilaterally change or terminate MEDCAP as it had at its other facilities.[15]

Contractual references to DAP and MEDCAP were deleted following the Respondent's implementation of BeneFlex for active employees, but this merely reflected the parties' agreement that BeneFlex replaced DAP and MEDCAP for active employees. The deletion of these references did not have any substantive effect on the DAP and MEDCAP plans themselves. Neither did it change the fact that retirees and their covered dependents continued to participate in DAP and MEDCAP, and their participation continued to be subject, as it always had been, to the terms of the plan documents, including the reservation-of-rights clauses. Further, after the references to MEDCAP and DAP were deleted from the CBA with the Union's acceptance of BeneFlex in 1993, the Respondent continued to make numerous unilateral changes to DAP and MEDCAP without objection from the Union. In these circumstances, we find that the deletion of references to DAP and MEDCAP from the parties' collective-bargaining agreement when BeneFlex was implemented does not deprive those references of their probative force and value in determining whether the Union waived its right to bargain over the changes at issue here. As the parties' subsequent conduct demonstrates, the deletion of those references had no effect on the parties' understanding of their respective rights and obligations.

We find that the language in the parties' collective-bargaining agreement discussed above supports a finding that the Union waived its right to bargain over the 2006 changes to DAP and MEDCAP. As the Board stated in *Omaha World-Herald*, supra, contractual references to a benefit plan that contains language reserving to the employer the right to act unilaterally with respect to the plan can support a finding of waiver, even if the references would be insufficient, standing alone, to establish waiver under existing Board precedent. In *Omaha World-Herald*, the Board found that the following contract language supported a finding of waiver: "The Company acknowledges that bargaining unit employees are eligible to participate in the retirement plan, group hospital, loss of time and life insurance programs provided the requirements for participation are met." The Board reasoned as follows:

> [The] pension plan is not described in the agreement and thus the reference can only be understood by examining the plan's prior operation and the governing plan documents. . . . [T]he plan documents include reservation of rights language, which expressly provides that the "Employer shall have the right at any time to amend the Plan," including "determin[ing] all questions relating to eligibility of Employees toParticipate or remain a Participant hereunder and to receive benefits under the Plan."

357 NLRB at 1870–1871. The same reasoning applies here. The parties' collective-bargaining agreement identified DAP and (implicitly) MEDCAP, but the terms of those plans can only be understood by referring to the plan documents. Because those plan documents contain language reserving to the Respondent the right to amend or terminate either plan, the collective-bargaining agreement's references to DAP and MEDCAP support a finding of waiver.[16]

to reconsider Board precedent regarding incorporation by reference and contractual waivers of bargaining in light of the court's decisions in *BP Amoco* and *Southern Nuclear Operating Co.* in a future appropriate proceeding. Our finding that the Union waived bargaining over the changes at issue based on an amalgam of factors makes it unnecessary for us to do so here.

[14] The judge found that it is undisputed that the DAP and MEDCAP plan documents contain reservation-of-rights clauses that make them terminable by the Respondent.

[15] As discussed above, Local 992 agreed to have the unit employees at the Spruance facility participate in MEDCAP after lengthy bargaining specifically over MEDCAP's reservation-of-rights language. Indeed, Local 992 suggested that the parties refer to MEDCAP in the IRP&P article of the collective-bargaining agreement precisely because that article contains language granting the Respondent the right to act unilaterally. The Respondent, however, did not want to refer to MEDCAP in the IRP&P article because of the one-year notice language in that provision. Ultimately, the parties agreed to refer implicitly to MEDCAP in the HMS provision discussed above. Viewed in light of the parties' bargaining history, and considering also the past practice evidence discussed below, this contractual evidence bolsters the conclusion that Local 992 clearly and unmistakably waived its right to bargain over the 2006 changes to MEDCAP.

[16] In *Omaha World-Herald,* the Board also relied on contract language excluding disputes over changes to the pension plan from the parties' contractual grievance arbitration procedure. The Board explained that because the plan covered all employees, not just bargaining-unit employees, the exclusion of such changes from grievance arbitration supported

Bargaining History

An employer relying on bargaining history as evidence of waiver must show that the parties fully discussed and consciously explored the matter at issue, and that the union consciously yielded or clearly and unmistakably waived its interest in the matter. See, e.g., *American Diamond Tool*, 306 NLRB at 570; *Johnson-Bateman Co*., 295 NLRB 180, 185 (1989). Applying this standard, we find that the history of the parties' negotiations regarding DAP and MEDCAP strongly supports a finding of waiver.

The parties explicitly discussed the terms under which DAP would be offered to unit employees. When the Union asked the Respondent to bargain DAP on a local basis, the Respondent rejected this request and explained that "since this is a companywide benefit, we cannot agree to change this specific plan. However, if [the Union] wishes to substitute a different plan for this location, Management will seriously consider their proposals." The Union did not offer a site-specific plan, and it agreed to accept DAP on the Respondent's terms and to refer to DAP in the collective-bargaining agreement's IRP&P article.

Regarding MEDCAP, the Union agreed to participate in that plan with its reservation-of-rights language after having strenuously opposed that language during nearly a year's worth of bargaining. Thus, during bargaining sessions in 1986, the Union repeatedly objected to the reservation-of-rights language in MEDCAP, while the Respondent held firm to its position that the plan had to include that language. The Union's agreement to participate in MEDCAP on the Respondent's terms establishes that it "consciously yielded" its position and agreed that the Respondent had the right to act unilaterally with respect to MEDCAP. See *Southern Florida Hotel Assn*., 245 NLRB 561, 567–568 & fn. 22 (1979) (finding that union's final acceptance of amendments expanding a management-rights clause after strenuously resisting the amendments established that the union understood the breadth of its waiver), enfd. in part 751 F.2d 1571 (11th Cir. 1985).[17]

a waiver finding because it suggested that the employer was attempting to "preserve its authority to make uniform changes in the plans as they applied to both represented and unrepresented employees." 357 NLRB at 1871. Similar reasoning applies here even in the absence of an express contract provision like the grievance arbitration provision in *Omaha World-Herald.* The changes to MEDCAP and DAP were not arbitrable—see fn. 8, supra—and the Respondent insisted on the right to make unilateral changes to the plans to preserve its ability to maintain their status as companywide plans offered on a uniform basis to represented and unrepresented employees alike.

Citing *Southern Nuclear Operating Co*., 348 NLRB 1344 (2006), enf. denied in relevant part 524 F.3d 1350 (D.C. Cir. 2008), and *Mississippi Power Co.*, 332 NLRB 530 (2000), enf. denied in relevant part 284 F.3d 605 (5th Cir. 2002), the judge found that the contractual references to the plans were insufficient to establish an express waiver. Contrary to the judge, these cases are distinguishable.

First, these cases did not involve an "amalgam of factors" like those present in this case. The holding in these cases that the contractual language at issue there was insufficient, standing alone, to *establish* waiver does not demonstrate that such language is not *evidence* of waiver. Evidence need not be dispositive in order to be probative.

Second, the cases are also distinguishable on their facts. In *Southern Nuclear Operating Co*., the collective-bargaining agreements did not mention any specific benefits plan or intent to incorporate a plan into the agreement. 348 NLRB at 1353–1354. Here, by contrast, the collective-bargaining agreement expressly referred to DAP. Importantly, it did so in the CBA's IRP&P article, where the Respondent's right to act unilaterally is expressly recognized. The parties did not expressly refer to MEDCAP in their agreement, but the Union bargained extensively over the reservation-of-rights clause in the MEDCAP plan document, the Union agreed to accept MEDCAP subject to that clause, and MEDCAP was referred to implicitly in the parties' agreement.

*Mississippi Power* is even more clearly distinguishable. There, the Board found that retention-of-rights language contained in the employer's medical benefits plan did not constitute waiver of the union's right to bargain, where the union never expressly accepted that provision. Here, the Union expressly accepted the reservation-of-rights provisions in both the DAP and MEDCAP plans, as explained above.

Finally, we observe that neither *Southern Nuclear Operating Co.* nor *Mississippi Power* was enforced by the court of appeals. Again, in denying enforcement in *Southern Nuclear Operating Co*., the United States Court of Appeals for the District of Columbia Circuit held that when a contract refers to a benefit plan, the entire plan document, including the reservation-of-rights clause, is incorporated into the contract. See also the D.C. Circuit's decision in *BP Amoco*, supra. As noted above, we would be willing to reconsider Board precedent regarding incorporation by reference and contractual waivers of bargaining in light of the court's decisions in *BP Amoco* and *Southern Nuclear Operating Co.* in a future appropriate proceeding, but our finding that the Union waived bargaining based on an amalgam of factors makes it unnecessary for us to do so here.

[17] The judge found that the parties' bargaining history did not indicate that the Union consciously relinquished its opposition to MEDCAP with its reservation-of-rights language intact. For the reasons discussed above, this finding is clearly erroneous: after lengthy opposition, the Union capitulated and accepted the Respondent's position regarding the reservation-of-rights language. Further, the judge suggests that the parties did not agree about why MEDCAP was referenced in the HMS article of the CBA. As stated above, however, the Union and the Respondent agreed to include an implicit reference to MEDCAP as an "alternate" plan in the HMS article. Moreover, by the time the parties discussed where in the CBA to refer to MEDCAP, the Union had *already* agreed to accept MEDCAP, including its reservation-of-rights language. The agreement to refer implicitly to MEDCAP in the HMS article in no way changed that.

In support of his counterfactual finding that the parties did not fully discuss and consciously explore the reservation-of-rights language, the judge cited *Davies Medical Center*, 303 NLRB 195 (1991), enfd. 991 F.2d 803 (9th Cir. 1993); *Reece Corp*., 294 NLRB 448 (1989), and *General Electric Co*., 296 NLRB 844 (1989), enfd. 915 F.2d 758 (D.C. Cir. 1990). These cases are distinguishable. They involved either ambiguous bargaining-history evidence and the effect of a contractual zipper clause (*General Electric*), inapposite facts regarding production of requested information during collective bargaining (*Davies Medical Center* (union's past practice of not requiring production of requested information until first bargaining session not a waiver of its right to request production prior to the first session)), or unilateral action outside the scope of the union's bargaining waiver (*Reece Corp.* (union's failure to protest transfer of certain work, consistent with its agreement granting employer right to transfer that work, not a waiver of its right to bargain over

In sum, the parties' bargaining history plainly demonstrates that when it accepted DAP and MEDCAP on behalf of the unit employees it represents, the Union had fully discussed those plans, including their reservation-of-rights provisions, and it consciously agreed to accept the plans subject to those provisions, which reserved to the Respondent the right to change the terms of the plans or to terminate them altogether and to do so unilaterally. Accordingly, we find that bargaining history also supports a finding of waiver.

Past Practice

We recognize that "[a] union's acquiescence in previous unilateral changes," standing alone, "does not operate as a waiver of its right to bargain over such changes for all time." *Owens-Corning Fiberglas*, 282 NLRB 602, 602 (1987). Nonetheless, the Board has held that "[a] clear and unmistakable waiver *may* be inferred from past practice," *California Pacific Medical Center*, 337 NLRB 910, 914 (2002) (emphasis added), and even a single failure to object to a prior unilateral change can serve as a corroborating factor in a waiver analysis, see *Omaha World-Herald*, 357 NLRB at 1872.

As discussed above, the record shows that after the Union accepted DAP and MEDCAP (including the reservation-of-rights language in those benefit plans), the Respondent made over 50 unilateral changes to DAP and MEDCAP, and the Union did not object to any of the Respondent's unilateral changes. The Union's acquiescence in these changes is evidenced by its failure to file a grievance, unfair labor practice charge or other protest over any of these changes until the 2006 change at issue here was announced. The multitude of prior, uncontested unilateral changes to DAP and MEDCAP strongly corroborate our finding of waiver. *Omaha World-Herald*, 357 NLRB at 1872 (union's failure to protest employer's unilateral removal of employees under 50 years old from its pension plan supported a finding that the union waived its right to bargain over employer's unilateral freezing of benefit accruals four years later).[18]

The judge acknowledged this past practice of unilateral changes to benefits, but nonetheless found that the Respondent's reliance on past practice as evidence of waiver was unavailing because the Respondent and the Union had engaged in a "mixed bag of transactions" regarding changes to DAP and MEDCAP. Specifically, the judge stated that while, in some instances, the Union did not request bargaining, in others it asked for information and/or bargaining after the Respondent had implemented the changes.

We disagree with the judge's characterization of the evidence. The record demonstrates that the Respondent never deviated from its position that it had no duty to bargain about changes to DAP and MEDCAP. Significantly, although the judge cited examples of purported "bargaining" between the Respondent and the Union, the examples do not relate to changes to DAP or MEDCAP, let alone any sort of bargaining over such changes. Rather, the examples cited by the judge relate to the BCBS local plan at the Spruance facility or to BeneFlex. Whatever bargaining may or may not have occurred with respect to BCBS or BeneFlex, it has no bearing on the DAP and MEDCAP changes at issue here.[19]

The judge's reliance on information requests is also unavailing. At times, the Union did request information about changes to DAP or MEDCAP, and the Respondent generally provided the requested information. In doing so, however, the Respondent reiterated that it did not have to negotiate over changes to companywide benefit plans, and the Respondent never bargained over any of the changes it made to the DAP and MEDCAP plans. Indeed, the Union's requests for information about changes to DAP and MEDCAP were not requests to bargain about the changes

transfers of other work)). Here, in contrast, the evidence of bargaining history is clear, establishing that the Respondent conditioned participation in DAP and MEDCAP on the Union's acceptance of the terms of those plans, including their reservation-of-rights clauses, and the Union agreed to accept DAP and MEDCAP on those terms. And unlike in *Reece Corp.*, the challenged December 2006 unilateral action was clearly within the scope of the Union's waiver of its right to bargain over changes to DAP and MEDCAP.

[18] Contrary to the judge, neither *Mt. Clemens General Hospital*, 344 NLRB 450 (2005), nor *California Pacific Medical Center*, supra, 337 NLRB at 910, supports a finding that the Union's past practice does not evidence waiver. To the contrary, in *California Pacific Medical Center,* the Board adopted the judge's decision finding that the union's acquiescence in numerous prior layoffs supported a finding that it had waived its right to bargain over layoffs. And in *Mt. Clemens*, the judge similarly found that the union waived bargaining, based in part on the union's prior acquiescence in the employer's unilateral changes. 344 NLRB at 459-460. In any event, *Mt. Clemens General Hospital* is not precedential on the issue of waiver because there were no exceptions to the judge's waiver finding. See 344 NLRB at 450 fn. 2.

*Caterpillar, Inc.,* 355 NLRB 521, 522 (2010), enfd. mem. per curiam 2011 WL 2555757 (D.C. Cir. May 31, 2011), cited by the dissent, is also inapposite. There, the Board considered evidence of an employer's past practice of making unilateral changes to a prescription drug program for the purpose of determining whether the employer had unilaterally changed a term or condition of employment by implementing a "generic first" requirement or, instead, had maintained the status quo. Here, we consider only whether the past practice of unilateral changes to MEDCAP and DAP support a finding of waiver. For the reasons explained above, we find that it does.

[19] The judge erroneously refers to a September 1, 1987 exchange between the Respondent and the Union as evidence of bargaining over proposed changes in DAP coverage. The record establishes, however, that the Respondent was merely proposing a "clearing up of the Plan language[,]" not a change in coverage. Other examples cited by the judge do not involve DAP or MEDCAP at all but the BCBS local plan or BeneFlex.

themselves. Cases in which the Board has found that a request for information was tantamount to a bargaining request have involved employers that had refused to recognize the union making the information request. See, e.g., *Eldorado, Inc.*, 335 NLRB 952, 954 (2001). Here, in contrast, the Respondent has recognized the Union as the unit employees' bargaining representative for decades. Further, after the Respondent provided the Union with the requested information, it proceeded to implement the changes unilaterally. In short, the Respondent's willingness to provide the Union with information regarding changes to DAP and MEDCAP does not support a finding that the Respondent bargained with the Union over those changes.

Response to Dissent

Our dissenting colleague contends that no valid waiver has been shown on these facts. In the dissent's view, the deletion of MEDCAP and DAP from the parties' agreement in 1993 is fatal to any waiver argument. In support, our colleague asserts that article II, section 3 of the contract precludes any reliance on prior agreements or "other extra-contractual documents" in deciding this case. The dissent also finds the bargaining history and past practice evidence wanting, both on their own terms and because some of that evidence predates the deletion of MEDCAP and DAP from the parties' agreement. In sum, the dissent denies that the facts of this case, even taken as a whole, are substantial evidence of "clear and unmistakable" waiver. We respectfully disagree.

First, the evidence in this case overwhelmingly demonstrates that MEDCAP and DAP, as corporatewide plans, were offered subject to the Respondent's reservation of the right to alter or terminate the plans, and that the Union accepted them on that basis. And necessarily so: if the Respondent provided different benefits under MEDCAP and DAP at the Spruance facility than elsewhere, MEDCAP and DAP would cease to be companywide plans. The Respondent could not reasonably offer MEDCAP and DAP under one set of terms for unit employees at Spruance and under a different set of terms for the thousands of employees at its other facilities. The parties well understood the difference between local plans bargained on a local basis and companywide plans offered solely on a companywide basis, and the Union plainly accepted MEDCAP and DAP as companywide plans. Nothing in the parties' dealings remotely suggests that they ever agreed to change their status as companywide plans. Yet that is precisely how the dissent would have it, by insisting that MEDCAP and DAP could not be changed at Spruance without first bargaining with the Union to agreement or impasse. Respectfully, it is the dissent, not we, whose position is unsupported by substantial evidence.

Second, we cannot agree with our colleague that the deletion of MEDCAP and DAP from the parties' agreement had the decisive significance our colleague ascribes to it. References to those plans were removed from the agreement when BeneFlex took their place for active employees. It is undisputed, however, that the Respondent continued to offer MEDCAP and DAP benefits for retirees after the relevant provisions were deleted from the contract.[20] The dissent's position is that the obligation to provide those benefits continued, while the right to make unilateral changes to the plans did not. There is no valid basis for ascribing such dispositive significance to a technical change to the contract language when, as explained above, the parties clearly did not intend it to have that effect.

Nor is there any merit to the dissent's claim that article II, section 3 of the parties' agreement requires a different result. That provision, which the dissent terms an "integration clause," provides that "[t]his Agreement constitutes the entire agreement between the parties hereto as of the execution date hereof" and allows for "any supplement" to become part of the Agreement if "executed in the same manner as this Agreement." Our colleague contends that this provision precludes "reaching back to sweep the DAP and MEDCAP 'reservation-of-rights' clauses into the current agreement" or relying on those clauses "to alter the parties' agreement that was in effect when the Respondent made the changes at issue."

Initially, we observe that no party has advanced this argument, nor was it considered by the judge. There is thus

[20] *Alamo Rent-A-Car,* 362 NLRB 1091 (2015), enfd. sub nom. *Enterprise Leasing Co. of Florida v. NLRB,* 831 F.3d 534 (D.C. Cir. 2016), cited by the dissent, is distinguishable on this basis. There, the employer discontinued a short-term disability (STD) plan referenced in the parties' agreement, then sought to rely on a contractual reservation-of-rights clause that was applicable, by its terms, only to that plan to justify its subsequent elimination of STD benefits altogether. Here, the situation is the reverse: the plans continued in force while the contractual references to them were deleted.

*Tesoro Refining & Marketing Co.,* 360 NLRB 293 (2014), another case cited by the dissent, is also distinguishable. There, the employer sought to rely on reservation-of-rights language in a benefit plan's summary plan description as grounds for unilateral changes to the plan, despite the following language incorporated into the parties' collective-bargaining agreement: "Should future circumstance require substantial benefits plans modifications, the Company agrees to notify the Union and engage in appropriate discussion/bargaining. Should the parties be unable to reach agreement after such bargaining, the Company reserves the right to implement changes which have been subject to negotiation and which are generally effective in the Company." Id. at 293. The Board found that this language—which limited the employer's ability to make changes pursuant to the plan's reservation-of-rights clause—referred to and reinforced the employer's bargaining obligation. Id. at 294. The parties in this case have never agreed to any provision, in their collective-bargaining agreement or otherwise, that similarly limits the Respondent's right to make unilateral changes to MEDCAP and DAP.

no assurance that the parties to the agreement would agree with the interpretation of the integration clause that our colleague advances. Even assuming that the dissent's argument is properly before us, we find it without merit. We have neither altered the parties' CBA nor reinserted the MEDCAP and DAP reservation-of-rights clauses into it. Instead, we have found that the Union's acceptance of those provisions, when it agreed that MEDCAP and DAP would apply to unit employees, supports a finding of waiver under all the circumstances of this case. That finding, in turn, reflects the realities of the parties' entire course of dealing with each other regarding these plans over the past 43 years. Our colleague's effort to confine the analysis to the events and circumstances present in 2006, in contrast, does not.

Conclusion

We find that the parties' agreements, bargaining history, and past practice, taken together, make clear that the Respondent offered, and the Union accepted, MEDCAP and DAP as companywide benefit plans in which unit employees would participate on the same terms as all of the Respondent's other employees, subject to the Respondent's reservation of the right to make changes to or terminate the plans on a companywide basis. Under the reservation-of-rights provisions in those plans, the Respondent had the right to amend or discontinue DAP and MEDCAP unilaterally. The Respondent exercised that right in December 2006 as it had many times before by making changes to DAP and MEDCAP. For the reasons explained above, the Respondent was not obligated to bargain with the Union prior to making these changes because the Union had clearly and unmistakably waived its right to bargain over them. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 21, 2019

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John F. Ring, Chairman

_____

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

In August 2006, the employer here unilaterally eliminated longstanding future dental and healthcare retirement benefits for incoming bargaining unit employees. While the employer had made unilateral benefit changes before, the elimination of these benefits altogether was obviously a first. Not surprisingly, the Union demanded bargaining over this dramatic change, which indisputably concerned a mandatory subject of bargaining under the National Labor Relations Act. The Respondent refused. This case turns on whether the Union clearly and unmistakably waived its right to bargain over the elimination of the benefits. Consistent with the overriding statutory policy favoring collective bargaining, that standard is—or was until today—a stringent one. In finding a waiver, the majority relies on a variety of factors, but as I will explain, even added together they do not amount even to substantial evidence supporting waiver, given the legal standard that must be satisfied. Perhaps most remarkably, the majority relies on so-called "reservation-of-rights" clauses contained in the relevant benefit plan documents, despite the fact there was no reference at all to the plans (much less the plan documents) in the applicable collective-bargaining agreement. This gap, in turn, cannot be bridged here by the evidence related to bargaining history or past practice, which does not show–at least with the required certainty–that the Union gave up its right to bargain over the elimination of benefits. Simply put, a clear and unmistakable waiver must be . . . clear and unmistakable. That is simply not the case here.

I.

This case turns on its facts, and they are essentially undisputed. The key details, spanning decades, are these: (1) the relevant collective-bargaining agreements have not referred to the benefit plans involved here since 1993; (2) the agreements have always contained an integration clause; and (3) the benefits at issue were unilaterally changed many times, but never eliminated altogether – the change that led to this unfair labor practice case.

For over 60 years, the Respondent has had a collective-bargaining relationship with the Union at the Respondent's Ampthill, Virginia facility (the Spruance facility). At all material times, the Union represented two units at the Spruance facility, each of which was covered by a collective-bargaining agreement. The collective-bargaining agreements in effect at the time of the Respondent's unilateral change were the Production and Maintenance (P&M) collective-bargaining agreement (effective September 1, 1999) and the Clerical, Technical, and Office employees (CT&O) collective-bargaining agreement

(effective October 1, 2000). As relevant to the present case, those agreements contained identical provisions.[1]

Generally, the Respondent's *active* employees were covered by a corporate-wide benefit plan called BeneFlex, described in article VII of the collective-bargaining agreement ("Industrial Relations Plans and Practices"). The agreement also contained a so-called "integration" clause, stating: "This Agreement constitutes the entire Agreement between the parties hereto as of the execution date hereof. However, any supplement which may hereafter be mutually agreed upon between the parties, when executed in the same manner as this Agreement, shall become and be part of this Agreement."

By contrast, the parties stipulated that the agreement did *not* address or even reference dental and healthcare benefits afforded to then-current retirees and *future* retirees. As of 2006, then-current retirees and employees hired before January 1, 2007, were receiving or could expect to receive retiree dental and healthcare benefits through the Dental Assistance Plan (DAP) and the Medical Care Assistance Plan (MEDCAP), which had been in place for 30 and 20 years, respectively. It is the Respondent's unilateral elimination of future retirement benefits under DAP and MEDCAP for employees hired on or after January 1, 2007, that is at issue in the present case.

A brief history of the parties' past negotiations and collective-bargaining agreements is useful to better understand how the applicable agreement ended up incorporating BeneFlex, but not DAP or MEDCAP.[2]

A.

In 1976, with the Union's consent, the Respondent introduced DAP at the Spruance facility. The relevant plan document contained a reservation-of-rights clause, also referred to by the parties as a management-rights clause, that stated:

> The Company reserves the sole right to amend or discontinue this Plan at its discretion by action of the Executive Committee. Any change which has the effect of reducing or terminating benefits hereunder will not be effective until one year following announcement of such change by the Company.[3]

On May 13, 1976, the parties agreed to include DAP among the Respondent's corporate-wide benefit plans listed in article VII ("Industrial Relations Plans and Practices") of the then-applicable collective-bargaining agreement, "subject to the provisions of such Plans and Practices and to such rules, regulations and interpretations as existed prior to the signing of this agreement." Article VII further provided that "any change in these Plans and Practices which has the effect of reducing or terminating benefits will not be made effective until one (1) year after notice to the UNION by the COMPANY of such change."

MEDCAP had its origins in the mid-1980s. Until 1985, Spruance employees were covered by a local Blue Cross Blue Shield plan described in the then-applicable collective-bargaining agreement. In September 1985, the parties began to discuss alternative plans that would address the rising costs of healthcare coverage. In February 1986, the Respondent proposed to the Union that unit employees participate in MEDCAP, a corporate-wide medical benefit plan administered by Aetna that the Respondent had introduced at some of its other facilities. Similar to DAP, the relevant plan document contained a reservation-of-rights clause, stating:

> The Company reserves the right to amend any provision of this Program or terminate the Program in its entirety should either course of action be deemed necessary by the Company.[4]

The Union was reluctant to accept MEDCAP because of this clause. The Respondent insisted, however, that the clause was necessary and that it "would not present a corporate plan without [it]." In September 1986, after over 10 months of bargaining, the Union finally accepted MEDCAP with its reservation-of-rights clause.

B.

Thus, as of 1986, the parties' collective-bargaining agreement provided employees the opportunity to participate in both DAP and MEDCAP, although the agreement referenced these benefits in different ways. Article VII of the agreement included DAP and its plan document, which contained the reservation-of-rights clause, in its list of corporate benefit plans subject to a 1-year notice requirement. By contrast, for reasons no longer material, the agreement contained a less specific reference to MEDCAP. After discussing several possibilities, the

[1] As the two units' collective-bargaining agreements are identical with respect to the relevant contract provisions, I will refer to them collectively.

[2] Much of this history is described in far greater detail in the judge's decision.

[3] The reservation-of-rights clause has remained unchanged since 1976, except for the deletion of the reference to Executive Committee action, and is contained in the 2005 DAP Plan Document. Similar language appears in the 2003 version of the DAP's Summary Plan Description (SPD).

[4] 2005 MEDCAP Plan Document, Art. XX (Originally Adopted–January 1, 1983, Last Amended April 21, 2005). Although the Plan Document from 1986 is not in the record, it is undisputed that the reservation-of-rights language in the Plan Document has remained unchanged since the plan was adopted. The judge also noted that similar language appears in the 2005 version of the Summary Plan Description (SPD).

parties agreed to refer to MEDCAP, without naming it, as an "alternate" healthcare benefit plan:

> The Company may make available to employees alternate hospital and medical-surgical coverage plans, and any employee may elect such alternate coverage in lieu of the coverage described in the [agreement].

That remained the status quo for the next 7 years.

In 1993, the parties agreed to remove the references to DAP and MEDCAP from their collective-bargaining agreement because the Respondent had introduced a new corporate-wide dental and medical plan called BeneFlex to cover employees while they remained actively employed.[5] The dental and healthcare of benefits of then-current retirees and of future retirees continued to be covered by DAP and MEDCAP.

C.

The ongoing availability of DAP and MEDCAP did not mean that those benefits continued unchanged, however. Every year from 1987 until 2006, the Respondent changed aspects of both DAP and MEDCAP, all without challenge by the Union. There were changes to premiums, scope of coverage, and related features of the plans. Yet, both DAP and MEDCAP remained in place for all then-current and future retirees.

The availability of DAP and MEDCAP for all future retirees ended abruptly on August 28, 2006. Without consulting or bargaining with the Union, the Respondent notified the Union that it would eliminate DAP and MEDCAP retirement benefits for new employees hired on or after January 1, 2007. The Union responded by demanding bargaining, but the Respondent refused. Instead, the Respondent immediately announced the change to bargaining-unit employees and implemented the change on December 20, 2006. The Union unsuccessfully attempted to pursue a grievance[6] and, subsequently, filed the unfair labor practice charge giving rise to this case.

D.

As indicated above, the Respondent has defended its unilateral action on the theory that the Union waived its right to bargain over the wholesale elimination of future DAP and MEDCAP retirement benefits for newly hired employees. Specifically, the Respondent has relied on the "reservation-of-rights" clauses contained in the DAP and MEDCAP plan documents. The Respondent acknowledges that those clauses do not appear in the applicable collective-bargaining agreement, but it asserts that the Union's waiver nevertheless may be found in its initial agreement to participate in DAP in 1976 and MEDCAP in 1986, the parties' bargaining history, and the Union's acquiescence in the Respondent's various changes to DAP and MEDCAP over the years. My colleagues agree that this "amalgam" of circumstances establishes waiver, but as I will explain, they are mistaken.

II.

The legal principles governing this case are well established and not in dispute. Properly applied to the record evidence, they should result in a finding that the Respondent violated its statutory duty to bargain when it unilaterally eliminated MEDCAP and DAP benefits.

The central policy of the National Labor Relations Act, reflected in Section 1, is to "eliminate the causes of certain substantial obstructions to the free flow of commerce . . .by encouraging the practice and procedure of collective bargaining . . . . 29 U.S.C. Section 151; see also *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967). To further this policy, certain terms and conditions of employment are designated as mandatory subjects of bargaining and so an employer may not change them unilaterally, absent a valid defense. See *NLRB v. Katz,* 369 U.S. 736, 743 (1962). The provision of *futur*e retirement healthcare benefits, such as DAP and MEDCAP, for active employees is one of those mandatory subjects of bargaining. See *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971). This is true even though the collective-bargaining agreement in effect at the time the Respondent made the relevant changes did not specifically provide for DAP and MEDCAP. See *Borden, Inc.*, 196 NLRB 1170, 1175 (1972); *T.T.P. Corp.*, 190 NLRB 240, 244 (1971). The Respondent's duty to bargain remained in force at all relevant times. See *Provena St. Joseph Medical Center,* 350 NLRB 808, 811 (2007). This scheme promotes the peaceful resolution of disputes through bargaining and avoids the potentially destabilizing effects of self-help. Id.

The Board's waiver doctrine, in turn, imposes a heavy burden on an employer seeking to justify unilateral action. As the *Provena* Board explained, "[t]he clear and unmistakable waiver standard . . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." Id. Under this standard, waiver is not lightly inferred. This high bar to bypassing bargaining again "reflects the Board's policy choice, grounded in the Act, in favor of

[5] As did DAP and MEDCAP, the BeneFlex plan document contained its own reservation-of-rights clause.

[6] The parties stipulated that the modifications to MEDCAP and DAP were nonarbitrable because neither MEDCAP nor DAP was referred to in the parties' collective-bargaining agreement.

collective bargaining concerning changes in working conditions that might precipitate labor disputes." Id.[7]

The Board's precedent teaches that a waiver may arise from an express provision in the parties' collective-bargaining agreement, by the conduct of the parties (including bargaining history and past practice), or by a combination of these factors. See, e.g., *Omaha World-Herald*, 357 NLRB 1870 (2011) ("amalgam" of factors supported finding that the union had waived its right to bargain over certain changes to the employer's pension plan). But in this case, even the sort of "amalgam" of factors cited in *Omaha World-Herald*—a decision relied upon by the majority—does not support a waiver finding.[8]

Whether one looks at the parties' collective-bargaining agreement that was in effect in 2006, their bargaining history, their past practices, or any combination of these factors, there has been no similar waiver in the present case.

*A*.

It is undisputed that the collective-bargaining agreement in effect when the Respondent announced its termination of future DAP and MEDCAP benefits for newly hired employees did not reference either of those benefits or their respective plan documents. Board precedent establishes that because the clauses are not in the collective-bargaining agreement, they cannot be relied on to find a clear and unmistakable waiver.[9] Here, all references in the collective-bargaining agreement to DAP and MEDCAP had been removed from the agreement in 1993–13 years *before* the Respondent unilaterally eliminated the benefits.[10] The Respondent has not identified any other provision of the applicable collective-bargaining agreement that authorized it to unilaterally terminate the benefits.

Even so, my colleagues maintain that the applicable collective-bargaining agreement *does* support a waiver finding, relying primarily on the "amalgam" approach discussed in *Omaha World-Herald*, supra. But *Omaha World-Herald* presented a materially different set of circumstances. Most glaringly, in *Omaha World-Herald*, every "contractual" element supporting waiver was found *in the collective-bargaining agreement in effect at the time* the employer changed the pension plan, not in past or deleted contract provisions, such as those my colleagues rely on here. Thus, the applicable agreement in *Omaha World-Herald* specifically referenced "the retirement plan," thereby incorporating the "reservation-of-rights clause" in the plan document. Here, to repeat, the agreement did not reference DAP and MEDCAP at all.

To counter the absence of such references, my colleagues assert that "the deletion of references to DAP and MEDCAP from the parties' collective-bargaining agreement when BeneFlex was implemented does not deprive those [deleted] references of their probative force and value in determining whether the Union waived its right to bargain over the changes at issue here." But the deletion is, of course, crucial, particularly because our precedent clearly holds that waiver cannot be gleaned from silence in the applicable agreement. See *Centura Health St. Mary-Corwin Medical Center*, 360 NLRB 689, 689 & fn.1 (2014); *King Broadcasting Co.*, 324 NLRB 332, 337 (1997); *Elizabethtown Water Co.*, 234 NLRB 318, 320 (1978). The language included in, or omitted from, a collective-bargaining agreement (or any other contract) obviously matters, and the deletion of references to DAP and MEDCAP necessarily has consequences here. If the Respondent wanted to retain its contractual right to make unilateral changes in the plans, then it should have taken care to ensure that references to the plans remained in the agreement.

On that score, the parties' express reference to BeneFlex in the applicable agreement demonstrates that they

[7] See also *Georgia Power Co.*, 325 NLRB 420, 420 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999); *Universal Security Instruments, Inc.*, 250 NLRB 661, 662 (1980), enfd. in part denied in part, 649 F.2d 247, 256 (4th Cir. 1981) (waiver will not be readily inferred).

[8] The *Omaha World-Herald* Board emphasized that the applicable collective-bargaining agreement referenced the pension plan documents and a "reservation-of-rights clause" contained therein; that the agreement expressly excluded pension plan changes from the contractual grievance and arbitration procedure, with an indication that the employer's objective was to preserve its ability to make uniform changes for all represented and unrepresented employees; that the agreement required the employer only to "discuss and explain" changes to the pension plan, signaling that "bargaining" was not contemplated; and that during the term of the agreement the union had not objected to the employer making similar changes to the pension plan. 357 NLRB at 1871–1872. In those circumstances, the Board found a waiver, but emphasized that it had "neither diluted nor abandoned the clear and unmistakable waiver standard." Id. at 1872.

[9] See *Mary Thompson Hospital*, 296 NLRB 1245, 1249 (1989), enfd. 943 F.2d 741 (7th Cir. 1991); *Amoco Chemical Co.,* 328 NLRB 1220 (1999), enf. denied sub nom. *BP Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000). See also *Holiday Inn of Victorville,* 284 NLRB 916, 917 (1987) (waiver is limited to the time during which the contract that contains it is in effect).

[10] Notably, the facts here fail to satisfy the more lenient standard applied by the District of Columbia Circuit (and apparently favored by my colleagues) for determining whether a benefit plan document has been incorporated by reference into a contract. There can be no basis for finding a contractual waiver in the absence of *any* reference to DAP or MEDCAP in the collective-bargaining agreement. See *BP Amoco Corp. v. NLRB,* supra, 217 F.3d at 873–874; *Southern Nuclear Operating Co. v.* NLRB, 524 F.3d 1350, 1359–1360 (D.C. Cir. 2008) (rejecting employer's argument where collective-bargaining agreements contained no language referencing plans that contained a reservation-of-rights clause).

Nor, as my colleagues concede, does this case implicate the "contract coverage" doctrine applied by some courts, because DAP and MEDCAP are not mentioned in the relevant collective-bargaining agreement. See *Provena*, supra, 350 NLRB at 811 fn. 17 (discussing "contract coverage" doctrine and citing *NLRB v. Postal Service,* 8 F.3d 832 (D.C. Cir. 1993)).

understood both how to incorporate a benefit plan into the agreement—and the significance of doing so.[11] Accordingly, as Board precedent illustrates, the parties' deletion of DAP and MEDCAP from their agreement does, indeed, deprive the reservation-of-rights provisions attached to those plans of their probative force and value.[12] A similar scenario arose in *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 2 (2015), enfd. sub nom. *Enterprise Leasing Co. of Florida v. NLRB*, 831 F.3d 534 (D.C. Cir. 2016), in which the collective-bargaining agreement referred to a Comprehensive Group Insurance plan, which included reservation of rights language. At one time, the employer had provided short-term disability (STD) benefits as part of that broader plan. But the employer subsequently decided to provide STD benefits through alternate means, outside the comprehensive insurance plan. Then, 5 months after making that decision, the employer eliminated the STD benefits altogether. In those circumstances, the Board rejected the employer's argument that "reservation-of-rights" language in the Comprehensive Group Insurance plan document authorized it to eliminate the STD benefits without bargaining with the union. As relevant here, the Board explained that because the STD benefits were no longer part of the broader insurance plan, the contract's incorporation of that plan and its "reservation-of-rights" language could not be relied upon as to the STD benefits. Similarly, in this case, the parties' decision to eliminate DAP and MEDCAP from their collective-bargaining agreement means that the Respondent could no longer rely on the "reservation-of-rights" clauses contained in the relevant plan documents.[13]

Similarly, in *Omaha World Herald*, supra, the Board's reliance on the parties' agreement that pension plan changes would not be arbitrable was grounded in the applicable agreement and the recognition that this contractual exclusion signaled the employer's intention to preserve its ability to make uniform changes for all represented and unrepresented employees. The majority attempts to apply the same reasoning here, as changes to DAP and MEDCAP were not arbitrable. But there was no express statement excluding DAP and MEDCAP from arbitration proceedings, nor was there an explanation of intent *in the controlling contract*.[14] In similar circumstances, the Board has found that the mere existence of a provision excluding certain subjects from a contractual grievance and arbitration procedures is insufficient to find a "clear and unmistakable waiver."[15] Moreover, the mere fact that DAP and MEDCAP continued to be available to both represented and unrepresented employees does not, without more, establish waiver, as Board decisions hold.[16]

Finally, in considering all of the surrounding circumstances, there is the matter of the agreement's integration

[11] My colleagues suggest that the deletion of contractual references to DAP and MEDCAP was of no moment because this merely reflected the parties' agreement that BeneFlex replaced those benefit plans. As my colleagues acknowledge, however, this supposed "replacement," even assuming it was one, pertained only to the dental and healthcare benefits of *active* employees *while they were actively working*. The present case concerns only the *future* dental and healthcare benefits when they retired. BeneFlex never covered those future benefits, which were always provided through DAP and MEDCAP. As a result, there is no merit to my colleagues' apparent suggestion that the "reservation-of-rights" clause attached to BeneFlex somehow preserved a contractual reference to those clauses attached to DAP and MEDCAP.

[12] See *Tesoro Refining & Marketing Co.,* 360 NLRB 293, 294 (2014) (finding no waiver because reservation-of-rights clause in plan documents incorporated into collective-bargaining agreement was superseded by subsequent contractual side letter not containing such language). This consequence is consistent, meanwhile, with well-established Board precedent that a management-rights clause or a "reservation-of-rights" clause embodied in an external document does not survive the expiration of the collective-bargaining agreement containing or incorporating by reference the relevant clause, absent evidence of the parties' contrary intent. See *United States Can Co.,* 305 NLRB 1127, 1127 fn.7 (1992), enfd. 984 F.2d 864 (7th Cir. 1993); *Control Services*, 303 NLRB 481, 484 (1991), enfd. mem. 961 F.2d 1568 and 975 F.2d 1551 (3d Cir. 1992); *Omaha World-Herald*, above, 357 NLRB at 1872 (applying principle to external "reservation-of-rights" language that was incorporated by reference into the applicable agreement). The majority's effort to distinguish *Tesoro* merely reinforces the principle that reservation-of-rights language not incorporated in the agreement cannot authorize unilateral changes. The Board's comparison of contractual language in *Tesoro* to that in *Omaha World-Herald* does nothing to change this basic rule. And the majority's argument that because DAP and MEDCAP continued to be offered despite the deletion of references to them in the contract does not prove anything other than that the Union had no occasion before 2006 to object to an unprecedented unilateral change.

[13] The majority also unsuccessfully tries to distinguish *Southern Nuclear Operating Co.*, 348 NLRB 1344 (2006), enf. granted in part, denied in part 524 F. 3d 1350 (D.C. Cir. 2008), and *Mississippi Power Co.*, 332 NLRB 530 (2000), enf. granted in part, denied in part and remanded, 284 F.3d 605 (5th Cir. 2002), by claiming that there is contractual language here that was lacking in those cases–, omitting the key fact that the contractual language expressly referring to DAP and MEDCAP was absent from the agreement in effect when the Respondent made its unilateral changes.

[14] In denying the Union's motion to compel arbitration of the Respondent's 2006 changes to a number of benefit plans, including DAP and MEDCAP, a court recognized that the nonarbitrability of disputes over DAP and MEDCAP may be explained by the simple fact that DAP and MEDCAP were no longer in the parties' collective-bargaining agreements, unlike the other benefit plans listed in art. VII of the collective-bargaining agreement. See *E.I. DuPont de Nemours & Co. v. Ampthill Rayon Workers, Inc.*, 516 F.Supp. 2d 588, 596 (E.D. Va. 2007), affd. mem. 290 Fed.Appx. 607 (4th Cir. 2008).

[15] See *Bonnell/Tredegar Industries,* 313 NLRB 789, 791 (1994), enfd. 46 F.3d 339 (4th Cir. 1995); Cf. *Unit Drop Forge Division,* 171 NLRB 600, 601 (1968) (mere existence of grievance and arbitration procedures will not by itself warrant a finding that the union waived its right to bargain on unilateral changes), enfd. 412 F.2d 108 (7th Cir. 1969).

[16] See *Omaha World-Herald*, above, 357 NLRB at 1871 & fn. 5 (citing *Rockford Manor Care Facility,* 279 NLRB 1170, 1172-1173 (1986)); *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001).

clause, which absolutely negates the majority's effort to find a waiver by reading prior agreements and other extra-contractual documents into the agreement that actually was in effect when the unilateral change was made. The integration clause recites:

> This Agreement constitutes the entire Agreement between the parties hereto as of the execution date hereof. However, any supplement which may hereafter be mutually agreed upon between the parties, when executed in the same manner as this Agreement, shall become and be part of this Agreement.

This provision clearly precludes reaching back to sweep the DAP and MEDCAP "reservation-of-rights" clauses into the current agreement. Those clauses were not "supplement[s] which may *hereafter* [emphasis added] be mutually agreed upon," and neither was "executed in the same manner as th[e] Agreement." To the contrary, after 1993 the "reservation-of-rights" clauses were and remained matters that the parties had deliberately chosen *not* to include in their integrated collective-bargaining agreement. Thus, the clauses cannot be relied upon to alter the parties' agreement that was in effect when the Respondent made the changes at issue.[17]

In sum, viewed in light of Board precedent, the collective-bargaining agreement here provides no substantial evidence supporting the majority's waiver finding. The agreement made no reference to the DAP and MEDCAP plans, much less to the plan documents—and had not contained such a reference for many years. What the agreement did contain, however, was an integration clause, which precludes reliance on extra-contractual documents as evidence of the parties' understanding.

*B.*

The parties' relevant bargaining history provides no more support for the majority's waiver finding. Whatever one makes of the parties' negotiations culminating in DAP in 1976 and MEDCAP in 1986, that bargaining history simply is not relevant to the present case. Just as the agreement that was in effect when the Respondent made the DAP and MEDCAP changes at issue is the only operative document for analyzing whether there was a contractual waiver, only the bargaining history leading to *that* agreement is relevant here. The Board's decisions make clear that the whole point of looking to bargaining history is to shed light on the relevant contract language, when its terms alone may be too ambiguous to establish waiver, but the parties' negotiations demonstrate that the language was, in fact, intended to give the employer the right to act unilaterally (and to waive the union's right to bargain).[18]

To be sure, this means that the Board may look back to the bargaining history of *new* provisions or that of provisions that have been *continuously maintained* in successive agreements.[19] But the parties' bargaining history with respect to DAP and MEDCAP falls into neither category. As described, the parties agreed to delete all contractual references to DAP and MEDCAP in 1993, some 13 years before the Respondent made the unilateral changes at issue here. The history behind those discarded provisions therefore sheds no light on whether the Union waived its right to bargain in the agreement in effect at the operative time. Indeed, to the extent that the bargaining history of *deleted* provisions did support a waiver finding, it would seem only to confirm that the deletion of the provisions was a reassertion of the Union's statutory right to bargain.[20]

At the very least it is clear that, under well-established Board law, any waiver reflected in the deleted provisions expired with the last agreements referencing DAP and MEDCAP. And, of course, the parties' subsequent agreements never renewed or reincorporated either benefit plan, certainly not with respect to active employees' future retirement benefits. As a result, the parties' bargaining history cannot possibly provide even substantial evidence supporting a finding of clear and unmistakable (not cloudy and debatable) waiver.

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[17] Cf. *Carr v. Philips Electronics N. Am. Corp.,* 41 Fed.Appx. 637, 641–642 (4th Cir. 2002) (barring extrinsic evidence where the agreement specifically disavowed supplemental oral agreement.

[18] See *General Electric Co.*, 296 NLRB 844, 844 (1989), enfd. per curiam 915 F.2d 738 (D.C. Cir. 1990) (unpublished decision); *Graymont PA, Inc.,* 364 NLRB No. 37, slip op. at 3 (2016) (finding no evidence that the parties "fully discussed and consciously explored" the subjects "*during bargaining over the current contract language"* (emphasis added)); *Reece Corp*., 294 NLRB 448, 451 (1989) (finding no waiver after evaluating "the prior negotiations"); *Indianapolis Power Co.,* 291 NLRB 1039 (1988) (finding no waiver where bargaining history showed that parties agreed to disagree over the scope of a no-strike clause), enfd. 898 F.2d 524 (7th Cir. 1990); *McDonnell Douglas Corp.*, 224 NLRB 881, 895 (1976) (considering "evidence of the negotiations which resulted in the agreement").

[19] See, e.g., *Lear Siegler*, 293 NLRB 446, 448 (1989) (considering bargaining history of provision, noting its presence in contract since 1960s); *General Tire & Rubber Co.*, 274 NLRB 591, 593 (1985) (finding no bargaining history to interpret contract provision continuously maintained through present; finding no waiver in current contract's silence regarding benefits), enfd. 795 F.2d 585 (6th Cir. 1986).

[20] Compare *American Cyanamid Co.*, 246 NLRB 87 (1979) (examining 25-year-old bargaining history to resolve disagreement on interpretation of a no-strike clause maintained in current collective-bargaining agreement), with *King Broadcasting Co.*, 324 NLRB 332, 337 (1997) (finding no clear and unmistakable waiver in the removal of a contractual restriction in an earlier contract, based on bargaining history of the current contract).

*C.*

Last, urged on by the Respondent, my colleagues mistakenly rely on the parties' past practice.[21] It is undisputed that the Respondent made many unilateral changes to DAP and MEDCAP in the years preceding the changes at issue in this case. But for two independently sufficient reasons, that history does not support finding a waiver with respect to the Respondent's decision to discontinue those future retirement benefits for newly hired employees.

First, it is well settled 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." *Caterpillar, Inc*., 355 NLRB 521, 522 (2010), enfd. per curiam, 2011 WL 2555757 (D.C. Cir. May 31, 2011) (unpublished decision); see also *Olean General Hospital*, 363 NLRB No. 62, slip op. at 3–4 (2015). Second, a history of unilateral changes is material only to the extent that there is a "thread of similarity running through and linking" the changes. *Caterpillar*, 355 NLRB at 522. Here, although the Respondent made changes to the premiums, scope of coverage, and benefits under DAP and MEDCAP, the Respondent has not established that those changes were all similar in scope and magnitude. In any event, the prior changes were certainly not similar in scope and magnitude to the wholesale elimination of these benefits for an entire class of employees.

My colleagues, citing *Owens-Corning Fiberglas,* 282 NLRB 609 (1987), acknowledge the first point: that a union's acquiescence in one prior benefit change, standing alone, does not operate as a waiver of the union's right to bargain over such changes for all time. But they attempt to evade the second point: that there must be a "thread of similarity" linking past changes for there to be a cognizable past practice justifying the present change.[22] For example, they rely on *California Pacific Medical Center*, 337 NLRB 910 (2002), in which the Board held that the employer did not violate the Act by unilaterally laying off employees following a reorganization of its operations. But there the judge had made a specific finding that the employer had a long-running practice of laying off employees without prior bargaining with the union. Id. at 914. Thus, the layoffs at issue were of a piece with the employer's past actions. And, unlike here, the employer's practice of unilaterally laying off employees was also grounded in a *then-applicable* contractual management-rights clause.

My colleagues' reliance on *Omaha World-Herald* is similarly misplaced. As described above, there the Board found that the union had waived its right to bargain over certain pension plan changes based, in part, on the fact during the term of the agreement "the union did not object to a *similar* prior unilateral change." 357 NLRB 1870, 1872 (2011) (emphasis added). And, as in *California Pacific Medical Center*, there were additional factors—all grounded in the applicable collective-bargaining agreement—that supported a waiver finding.

For all of these reasons, the Respondent's asserted past practice cannot support a waiver finding, whether considered alone or with the other factors relied upon by the majority. Notably, the Board has held that where the "the principal factors cited in *Omaha World-Herald* do not establish waiver," past practice is immaterial.[23] This is such a case.

III.

Although the *Omaha World Herald* Board endorsed the notion that an "amalgam" of factors may establish waiver in a particular case, the Board also emphasized that it was not adopting—or endorsing—either a dilution or abandonment of the stringent "clear and unmistakable waiver" standard. Yet that is effectively what the majority does today in holding that the Union waived its statutory right to bargain over the Respondent's unprecedented elimination of longstanding retiree dental and healthcare benefits for incoming bargaining-unit employees. My colleagues cobble together long-abandoned contractual and extra-contractual language, stale bargaining history, and irrelevant past changes to find waiver. But that finding is not supported by substantial evidence, at least applying the "clear and unmistakable waiver" standard as the Board has

[21] Although I agree with the judge's conclusion that that the parties' past practice does not support a finding of waiver, I rely only on the reasons discussed below. Thus, I do not rely on the judge's estoppel analysis or any of his characterizations of the Respondent's history of unilateral changes to DAP and MEDCAP.

[22] The majority attempts to distinguish *Caterpillar, Inc*., 355 NLRB 521 (2010) on the ground that it was not decided on a waiver theory. This is a distinction without a difference–whether a past practice provides corroborative evidence in support of waiver, or establishes a continuation of the status quo, the Board has made clear that it is the employer's burden to show that a past practice of *similar* actions in fact existed. See, e.g., *Caterpillar*, 355 NLRB at 523 & fn. 14 (citing *Owens-Corning Fiberglas,* supra); *Provena St. Joseph Medical Center*, 350 NLRB 808, 815 & fn. 35 (2007); *Lincoln Child Center,* 307 NLRB 288, 317 (1992) (finding respondent failed to establish a past practice of removing entire classifications from the unit); *Johnson-Bateman Co,* 295 NLRB 180, 188 (1989) (union's past acquiescence in certain work rules did not waive its right to bargain about new dissimilar rule); *Owens-Corning Fiberglas,* 282 NLRB at 613 (no waiver because "the historical changes were not the same as this one"); compare *FirstEnergy Generation Corp.*, 358 NLRB 842, 851 (2012) (rejecting argument that the employer's unilateral change wholly unrelated to previous changes "constituted a mere continuation of the status quo"), affd. 362 NLRB No. 585 (2015) (Board reaffirming judge's ruling and incorporating prior Board decision under *NLRB v. Noel Canning*, 573 U.S. 513 (2014)).

[23] See *Tesoro Refining & Marketing Co*., 360 NLRB 293, 294 fn. 9 (2014).

traditionally understood it. Today's decision, then, amounts to lowering the bar to unilateral action in a way that cannot be reconciled with Board precedent and that is detrimental to the Act's policy of encouraging collective bargaining. Accordingly, I dissent.

Dated, Washington, D.C. June 21, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

*Gregory M. Beatty, Esq.,* for the General Counsel.
*Kris D. Meade, Glenn D. Grant* and *Jane Foster, Esqs. (Crowell & Moring LLP),* of Washington, D.C., for the Respondent.
*Kenneth Henley, Esq.,* of Bala Cynwyd, Pennsylvania, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Richmond, Virginia, on May 23–24, 2011. The charge was filed February 15, 2007, and the complaint issued December 28, 2010. The Ampthill Rayon Workers, Inc., International Brotherhood of DuPont Workers (the Union) alleges that E. I. DuPont de Nemours and Company (the Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally eliminating retirement benefits for new employees without bargaining with the Union. The Company does not deny that it refused to bargain with the Union before it eliminated retirement healthcare and dental benefits for new employees at its Spruance facility in Richmond, Virginia. It does, however, assert that the Union waived its right to bargain over the elimination of such benefits for new employees.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, has been engaged in the manufacture of synthetic fibers and related products at its Ampthill, Virginia facility, where it annually sells and ships products, goods, and materials valued in excess of $50,000 directly to points outside the State of Virginia. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

*A. The Parties*

The Company is a Delaware corporation with its principal place of business in Wilmington, Delaware. As of 2006, it employed more than 30,000 employees nationwide, of which more than 4,500 were unionized. This dispute involves the Company's Spruance Fibers Plant (Spruance facility) in Virginia, where it employed more than 1000 hourly workers represented by the Union.[2]

On August 28, 2006, James Borel held the position of Senior Vice President—Human Resources, C.A. Campbell held the position of Human Resources Manager, Anthony Ray held the position of Plant Manager, Rodney Rhodes held the position of Labor Relations Manager for the Spruance Fibers plant, and Dianne Vespucci held the position of Labor Relations Manager at the Niagara facility. All of the aforementioned individuals were supervisors within the meaning of Section 2(11) of the Act and Company agents within the meaning of Section 2(13) of the Act for the duration of time they held the positions described in this paragraph.[3]

The Union represents employees in the Production and Maintenance (P&M) and Clerical, Technical, and Office (CTO) units. It operates through an Executive Committee and two Contract Committees, one for each unit. The Executive Committee meets with Spruance facility management on a regular basis, while the Contract Committees are specifically designated to bargain over changes to the contract. Both entities, however, have been involved in bargaining.[4]

*B. The Collective-Bargaining Agreement*

The Company and the Union have had a bargaining relationship at the Spruance facility for over 60 years.[5] The P&M contract became effective on September 1, 1999; the CTO contract became effective October 1, 2000.[6] Each contract contains a provision recognizing the Union as the exclusive bargaining agent of covered employees and renews each year unless either party gives notice of intent to terminate it. Both remained in effect as

[1] There is very little dispute as the relevant facts. The parties stipulated to 24 sets of facts spanning the last three decades of their collective-bargaining relationship. (Jt. Exh. 1.) In addition, the parties have long followed a custom and practice of relying on the Company's notes of their collective-bargaining meetings. While the General Counsel challenged the admissibility of the notes at trial, there was no subsequent evidence to refute their accuracy. Accordingly, I credit the Company's notes relating to 73 bargaining meetings as fairly and accurately documenting the facts and circumstances that transpired during the relevant time periods. (R. Exh. 3; Tr. 45–47, 104–132.)

[2] The Company conducts business in the United States and abroad. In this decision, however, all references to "corporate-wide" are to the Company's operations in the United States. (Jt. Exh. 1 at 1.)

[3] Jt. Exh. 1 at 22.

[4] The Union's Executive and Contract Committees were each involved in the pertinent events and there is no contention that the statements or actions of one were more significant than the other. Accordingly, in most instances, I simply refer to the actions of either committee as the "Union." (Tr. 33–34, 73, 101–102.)

[5] Bruce Harris, a Company employee for over 39 years, provided credible testimony regarding the custom and practice of the Company and Union over the past four decades. During that time, he served the Union as a Recording Secretary and Contract Committee Chairman before transitioning to Company management and serving as a labor relations manager and site bargainer. (Tr. 99–107.)

[6] Jt. Exhs. 1A and 1B.

of August 2006. Although the contracts differ in several ways, the pertinent provisions are identical.[7]

*C. The Company's Benefit Plans*

The Company offers its Spruance facility employees the opportunity to participate in either corporate-wide benefit plans or local benefit plans. The plans at issue are the Company's Medical Care Assistance Program (MEDCAP) and the Dental Assistance Plan (DAP).[8]

1. MEDCAP

Originally adopted on January 1, 1983, MEDCAP is a corporate-wide healthcare benefits plan governed by ERISA.[9] MEDCAP applies to all of the Company's United States employees and former employees, and their eligible dependants who meet the eligibility requirements of MEDCAP, including certain former employees represented by the Union who otherwise meet the MEDCAP eligibility requirements.[10] Those employees covered by the contract comprise just a small fraction of the total number of individuals who receive benefits from the Company's benefit plans.[11]

Article XIX of the MEDCAP Plan Document describes the Company's rights and authority as Plan Administrator.[12] Article XX of the Plan Document addresses the Company's rights to amend or terminate MEDCAP. The MEDCAP Summary Plan Document (SPD) also addresses the Company's right to suspend, modify, or terminate the plan.[13]

Neither MEDCAP nor DAP, its dental counterpart, are referred to in the contract and are not arbitrable under the contract.[14] The benefits received by retirees are virtually identical to benefits received by active employees, except that active employees receive dental and medical benefits under BeneFlex, while retirees receive them under MEDCAP and the DAP.[15]

2. DAP

DAP is a company-wide benefit plan, maintained by the Company and governed by ERISA, under which dental benefits are provided to all of the Company's United States employees, retired employees, eligible survivors and dependents, and certain former employees represented by the Union who otherwise meet the eligibility requirements.[16]

Article XIII of the DAP Plan Document authorizes the Company to serve as DAP's administrator or to designate one or more persons to serve as the DAP's administrator and describes the rights and authority of the administrator.[17] Article XIV of the DAP Plan Document addresses the Company's right to amend or discontinue DAP. The DAP Summary Plan Document (SPD) addresses the Company's right to suspend, modify, or terminate the plan.[18]

Prior to implementing DAP on September 1, 1976, the parties bargained over member participation in DAP. On May 13, 1976, the parties agreed to include DAP as an additional item under Article VII, the contract's Industrial Relations Plans and Practices (IRP&P) provision.[19] Employee participation in DAP, however, was subject to the Company's reservation of rights:

> RIGHT TO MODIFY PLAN AND BENEFIT SCHEDULES
> A. The Company reserves the sole right to amend or discontinue this Plan at its discretion by action of the Executive Committee. Any change which has the effect of reducing or terminating benefits hereunder will not be effective until one year following announcement of such change by the Company.
> B. The Company also reserves the sole right at any time and without notice to make general and specific revisions in the benefit schedules in effect at any or all employment locations and any such revision of schedules shall not be construed as a reduction, termination or withdrawal of benefits. The designated benefit schedule at any one employment location shall in no way be dependent on or subject to changes because of the designated benefit schedule, or changes in the designated benefit schedule, at any other employment location.[20]

That reservation of rights provision has remained unchanged since 1976, with the exception of its reference to action by Executive Committee, which was eventually removed.[21] The July 2003 DAP SPD contains a similar provision recognizing the Company's right to suspend, modify, or terminate DAP at any time:

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[7] The parties referred collectively to the two collective-bargaining agreements, attached as Exhibits A and B to the stipulation, as the "ARWI CBA." (Jt. Exh. 1 at 2; R. Exh. 5(a)–(b), 6(a)–(b), 7(a)–(b)). I refer to them collectively as "the contract."

[8] The Union did not dispute the testimony of Mary Jo Anderson, a company senior counsel at the relevant times, that the Company's longstanding practice of maintaining a single set of benefit plans covering all of its employees and retirees was beneficial to the Company and its employees for economic, administrative, and other reasons. (Tr. 142–145.)

[9] Copies of the MEDCAP Plan Document, dated April 21, 2005, and the MEDCAP Summary Plan Document), effective January 2005, are attached to the Stipulations as Exhs. C and D, respectively. (Jt. Exh. 1 at 6.)

[10] Jt. Exh. 1 at 7.

[11] Jt. Exh. 1 at 3.

[12] Jt. Exh. 1 at 8.

[13] Jt. Exh. 1 at 9.

[14] As in this case, the parties stipulated during an earlier arbitration that neither MEDCAP nor DAP were arbitrable. (Jt. Exh. 1 at 21.) Nevertheless, the Company introduced evidence of an arbitrator's February 15, 2010 ruling that reservation of rights language contained in five other benefit plans—all mentioned in the contract—constituted a clear and unmistakable waiver of the Union's right to bargain over the 2006 changes to those plans. As a result, he found that the Company was entitled under the contract to unilaterally modify those plans. (R. Exh. 12 at 65.) As neither MEDCAP nor DAP were mentioned in the contract, I have not given any weight to the arbitrator's decision regarding those provisions.

[15] Anderson testified that, with the exception of the eligibility criteria, there is virtually no distinction between the benefits structures of BeneFlex, MEDCAP, and DAP. (Tr. 147–149.) As further discussion of the record demonstrates, however, there were numerous changes to retiree health and dental plan benefits, including caps, premiums and coverages.

[16] Copies of the DAP Plan Document, dated April 21, 2005, and its SPD, effective July 2003, are annexed to the Stipulations as Exhs. E and F, respectively. (Jt. Exh. 1 at 10–11.)

[17] Jt. Exh. 1 at 12.

[18] Jt. Exh. 1 at 13.

[19] R. Exh. 3 at 8309, 8311.

[20] R. Exh. 8 at 8.

[21] Jt. Exh. 1E at 16.

> Future of the Plan
> While the Company intends to continue the benefits and policies described in this booklet, the Company reserves the right to suspend, modify, or terminate this Plan at its discretion at any time.[22]

*D. The 1986 Agreement*

On September 3 and 4, 1985, the parties started a series of discussions relating to the increasing costs of healthcare coverage.[23] At the time, the contract contained a Hospital, Medical, and Surgical (HMS) coverage provision at Article VIII providing employees with basic hospital and medical-surgical coverage through Blue Cross/Blue Shield of Virginia (BCBS). A separate provision, Article VII, listed the other benefit plans and noted that those benefits were subject to the various plan documents.[24] On October 10, 1985, the Company rolled-out examples of alternative coverages, noting that it "does visualize a health care plan with the same provisions as MEDCAP."[25] Discussions continued on October 18, 1985, with the Company noting that MEDCAP was not being proposed at that meeting.[26]

On November 26, 1985, the Company proposed 30 days written notice of any changes to HMS coverage, subject to bargaining prior to implementation. The Union disagreed with the Company's proposed Article XIV for the P&M contract concerning HMS coverage. While discussing the CT&O contract, the Company Union rejected any MEDCAP proposal, while the Company reiterated that there was no MEDCAP proposal on the table, but that one would be forthcoming.[27]

By February 26, 1986, the Company began unveiling proposals for the Union's members to participate in MEDCAP. Included in the proposal was a reservation rights clause:[28]

> Accordingly, the Company reserves the right to amend any provision of the Aetna Plan (for example, co-pay, "stop-loss", and deductible features) or terminate the Program in its entirety should either course of action be deemed necessary by the Company.[29]

The Union, however, repeatedly expressed concern about the Company's desire to include a reservation of rights provision in the MEDCAP SPD. In objecting to inclusion of a reservation of rights clause in the MEDCAP SPD, the Union stressed that the BCBS plan did not contain a similar provision. The Company explained that BCBS was a local plan controlled by Spruance facility management, while MEDCAP was a corporate-wide plan. Accordingly, the Union rejected any proposal revising the HMS provision during the term of the contract and asked for another proposal.[30] The Company responded with a proposal to include an alternative Aetna plan within the HMS provision. Once again, the Company's proposal included a reservation of rights provision allowing it to amend or terminate the plan.[31]

On March 4, 1986, the Union rejected the proposed HMS proposal because of its inclusion of the reservation of rights provision.[32] The parties discussed the issue again on March 12, 1986, but the reservation of rights provision remained the stumbling block to an agreement.[33] The parties discussed the HMS proposal again on March 21, 1986. At this meeting, the Company made another proposal, but the Union rejected the proposal as well because of the Company's insistence on including a reservation of rights provision in exchange for the rights to participate in MEDCAP.[34] On May 14, 1986, the Union once again rejected the Company's proposal for the same reason.[35]

On September 5, 1986, the Union objected to references to the new Aetna plan in the contract. The Company responded that "it would draft two proposals–one with a general reference, the other with a specific reference" to the new Aetna plan. The Union's preference was to omit it entirely, but its second choice was a "general reference" in the IRPP provision at article VII, with a footnote similar to the one in DAP containing the reservation of rights clause.[36]

After further discussions on September 15 and 26, 1986, the Union agreed to participation in the new Aetna plan (MEDCAP), including the reservation of rights clause contained in the Plan Document:[37]

> The Company reserves the right to amend any provision of the Program or terminate the Program in its entirety should either course of action be deemed necessary by the Company.[38]

On September 15, 1986, the Company suggested removing the HMS provision from the contract. The Union responded that "HMS should be mentioned where everything else is that is involved in Management's Rights (IRP&Ps)." The Company rejected that request and the Union responded that "there is a need for [HMS] to be placed in the Labor Agreement where people recognize Management has a right to change without Union agreement." The Company rejected that proposal on the ground that it did not want the new Aetna Plan (i.e., MEDCAP) listed under Article VII, as that provision's 1-year notice restrictions "would present a bar" to the Company's ability to make necessary changes to medical coverage.[39]

On September 26, 1986, the Union agreed to include new, general language in the HMS articles, rather than the IRPP provisions that referenced an alternative to BCBS coverage. It did not, however, explicitly mention either MEDCAP or the Aetna Plan:[40]

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[22] Jt. Exh. 1F at 23.
[23] R. Exh. 3 at 8363-8365, 8367–8368.
[24] R. Exh. 5.
[25] R. Exh. 3 at 8370–8380.
[26] R. Exh. 3 at 8382–8384.
[27] R. Exh. 3 at 8387, 8389, 8391.
[28] Reservation of rights clauses are also commonly referred to in labor-management relations as management rights clauses. (R. Exh. 3 at 8393–8399, 8405–8434.)
[29] Id. at 8434.
[30] R. Exh. 3 at 8436–8437, 8451–8452, 8477, 8481.
[31] R. Exh. 3 at 8393–8394, 8398–8399.
[32] R. Exh. 3 at 8437.
[33] R. Exh. 3 at 8450–8452.
[34] R. Exh. 3 at 8476.
[35] There are no notes of the May 14 meeting, but the discussions during that meeting are recounted in the notes for the May 28, 1986 meeting. (R. Exh. 3 at 8480–8482.)
[36] R. Exh. 3 at 8492.
[37] It is undisputed that the reservation of rights clause has not changed since the plan document was adopted. (R. Exh. 3 at 8499–8504.)
[38] Jt. Exh. 1C, p. 23.
[39] R. Exh. 3 at 8499–8503.
[40] R. Exh. 3 at 8504.

> The Company may make available to employees alternate hospital medical-surgical coverage plans, and any employee may elect such alternate coverage in lieu of the coverage described in the above sections of this Article VIII [or XIV].[41]

*E. Benefit Plan Changes Since 1986*

1. Union requests for information

In virtually every instance, the Company has provided the Union with prior notice of benefits changes since the latter agreed to participate in MEDCAP in 1986. The Company communicated the information to the Union at Executive or Contract Committee meetings before disseminating it to Spruance facility employees through assorted Company publications and other communications.[42]

In many of those instances, the Union requested information and/or requested bargaining over the changes. The Company responded on numerous occasions by providing the information and agreeing to bargain. The Union frequently requested information when premium increases were announced.[43] In 1988, 1996, 1999, 2000, and 2003, the Union requested and the Company agreed to provide, information relating to announced premium increases in order to research alternative insurers.[44] In 2001 and 2002, the Union requested similar premium rate increase information and the Company did not deny the requests.[45]

There were also periodic requests for information relating to coverage issues. In 1995, the Company agreed to follow up on the Union's concerns regarding a limitation on certain types of coverage at a local hospital.[46] In 1996, the Company responded to a union inquiry relating to outpatient surgery by an in-network gynecologist.[47] In 1998, the Union questioned why the Company switched coverage to Cigna and the Company responded.[48] In 2000, the Union asked the Company if its announced changes to BeneFlex were bargaining or simply the dissemination of information. The Company responded that "it is here to review the 2001 BeneFlex plan changes."[49]

In some instances, the Company refused to provide employee benefit information and/or bargain on the ground that it would not negotiate over specific changes to its corporate-wide IRP&P plans, including MEDCAP and DAP.

On June 11, 1987, there was a notable exchange on the issue of retiree benefits. At this meeting, the Union asked whether retirees are guaranteed a medical plan when they retire. The Company responded that pensioners are covered and told what insurance they have when retiring. The Company added that it "has reserved the right to change and modify or discontinue the plan if needed." It further proclaimed that "there has been no plan to discontinue medical coverage for pensioners and does not visualize that ever happening . . . The plan may be changed or, or the pensioner may be covered by a different plan." (Emphasis added.)[50]

2. Union requests to bargain

In some instances since 1986, the Company acknowledged an obligation to bargain or agreed to the Union's request to bargain over changes. In an interoffice memorandum, dated September 1, 1987, the Company recognized that proposed changes to definitions of dependent coverage in DAP, among several items, "must be bargained with Union(s) before implementation; therefore, discussion must be limited to exempt employees until bargaining is initiated."[51] On September 9, 1987, the Company presented to the Union a "proposal" to change the DAP, which it characterized as "clearing up of the Plan language."[52]

On September 22, 1987, the Company agreed to bargain over proposed BCBS premium increases.[53] In 1992 and 1993, it announced that bargaining over increases to healthcare premiums already occurred or would be taking place.[54] On July 21, 1993, the Union asked "if healthcare premiums would remain the same over the life of the contract. The Company said it reserves the right to modify the plan, and premiums would be changed as necessary yearly."[55]

In 1993, the Union accepted the Company's offer to have its active union members participate in medical and dental plans covered under BeneFlex. All retirees and their survivors remained eligible to participate in, and continued receiving benefits under, MEDCAP and DAP.[56] Medical and dental benefits offered under BeneFlex were virtually identical to those available to union members under MEDCAP and DAP, with the exception that MEDCAP and DAP would continue to cover pensioners and laid-off employees covered by the Company's transition program. Moreover, the reservation of rights language contained in MEDCAP and DAP remained unchanged.[57]

Notwithstanding the changeover to BeneFlex, the course of dealing between the parties, however, remained the same. On October 2, 1997, the Union complained that the merger between Aetna and US Healthcare was causing a major health provider to leave the network. The Company explained that the insurers were still negotiating with the provider. The Union responded that the effects of the merger impacted its members and should

[41] R. Exhs. 6(a), p. 15, and 6(b), p. 36.

[42] The General Counsel did not dispute the effectiveness of the various company communications in informing employees of the changes. (Tr. 74, 134, 169–184.)

[43] Irvin credibly testified as to the Union's practice of requesting information, verifying the information the Company provided, and acquiescing to favorable changes. (Tr. 38.)

[44] GC Exh. 47 at 8584; R. Exh. 3 at 8719–8720, 8822–8824, 8840-8841, 8931–8933.

[45] There is no indication that the Company denied these information requests. (R. Exh. 11 at 8847; GC Exh. 14 at 17850–17851; GC Exh. 15 at 15556–15557.)

[46] GC Exh. 4 at 15378.

[47] GC Exh. 5 at 15413.

[48] R. Exh. 3 at 8795.

[49] R. Exh. 3 at 8840.

[50] R. Exh. 3 at 8511.

[51] GC Exh. 3 at 15270.

[52] GC Exh. 3 at 15265.

[53] Linda Derr, a former labor relations representative for the Company, conceded that the Company agreed to meet and discuss this issue. (Tr. 249–250; GC Exh. 2 at 15277–15278.)

[54] R. Exh. 4 at 9072–9074.

[55] R. Exh. 3 at 8691.

[56] The testimony of Anderson and Irvin was fairly consistent regarding the events leading to bargaining unit members enrolling in BeneFlex. (Tr. 65–68, 147–149.)

[57] There is no dispute as to the similarity between the provisions in the MEDCAP and BeneFlex plans. (R. Exh. 3 at 8695, 8697–8698; Tr. 69–79.)

have been bargained. The Company agreed to investigate the matter.[58] Similarly, on December 18, 1997, while the contract was open, the Company notified the Union of changes of the health and welfare plans. The Union insisted on bargaining over these changes and the Company agreed.[59] On October 13, 1999, the Union suggested consideration of a local health plan for the Spruance facility. The Company agreed to consider any such proposal, but reminded the Union of the advantages of participating in a corporate-wide plan with its larger enrollment.[60]

3. The Company's unilateral changes

Notwithstanding the parties' history of bargaining over the Company's numerous changes to its benefit plans, the Company has implemented MEDCAP and DAP changes every year since 1987. On more than 50 occasions, the Company has announced changes to health care premiums, deductibles, co-pays and annual plan limits, benefit options, terms of coverage, and participant eligibility relating to working spouses and dependents through age 24.[61]

Dealings between the parties were not affected in any noticeable manner by the changeover of actively employed union members to BeneFlex in 1993. As it had ever since the Union agreed to participate in MEDCAP in 1986, the Company continued making unilateral changes to MEDCAP and DAP. Theses included changes to premiums, co-pays and deductibles for retirees, and eligibility criteria under MEDCAP and DAP.[62]

Some of the unilateral changes increased coverage. In 2004, for example, the Company added a network of 58,000 dentists.[63] That same year, the Company announced coverage eligibility in its corporate-wide benefit plans for an additional category of dependents—the same-sex domestic partners of employees.[64] Mostly, however, the Company's unilateral changes tended to reduce or restrict benefits.

On April 12, 1988, the Company reiterated the distinction between local and corporate-wide benefit plans. On that date, the Union requested the Company bargain over schedule changes to DAP. The Company refused, explained that the plant manager could replace a corporatewide plan with a local plan, and expressed a willingness to consider such a proposal.[65] The Company reiterated the distinction between local and corporate-wide health plans and, when the Union expressed an interest in proposing health plan changes, the Company responded that "it has said in the past that it would not bargain these changes locally."[66]

On October 15, 2002, the Company announced, for the first time, that it would impose an annual limitation, or cap, on its contributions to retiree healthcare; once retirees reached the newly-imposed caps, all additional costs of their medical coverage would be borne by retirees. The Company also announced a change to the way in which it calculated costs for retiree medical coverage. Pursuant to the change, retirees would pay 50 percent of their healthcare costs.[67] In addition, on October 28, the Company announced that retirees would, for the first time, pay a premium for certain types of dental work.[68]

Finally, some changes constituted amounted to a coordination of benefits that neither enhanced nor reduced them. In 1993, the Company expanded medical precertification to 14 medical and surgical procedures in order to save employees "unnecessary time and effort, and help eliminate doubt when you're faced with any one of 14 medical or surgical procedures."[69] That same year, since active employees were to receive medical and dental coverage through BeneFlex, the Company proposed, and the Union agreed to delete the HMS provisions in the contract and replace it with a BeneFlex plan provision.[70] They were replaced by a provision incorporating BeneFlex into the IRPP article, effective July 1, 1993, as well as the successor contract, effective February 1, 1995:

> Section 3. In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, employees shall also receive benefits as provided by the Company's BeneFlex Plan, subject to all terms and conditions of said Plan, provided, however, that as long as this Plan is in effect at any other Plant within the Company, it shall not be withdrawn from the employees covered by this Agreement.[71]

*F. The 2006 Unilateral Changes to MEDCAP and DAP*

At no time prior to 2006 did the Union file a grievance or unfair labor practice regarding any of the MEDCAP or DAP changes. In 2006, without consulting the Union, the Company decided to eliminate participation by new employees in its retiree benefit plans.[72] On August 28, 2006, Rhodes informed the Union of the Company's intention to modify seven benefit plans. The most significant changes were the elimination of MEDCAP and the DAP for new employees hired after January 1, 2007.[73] Irvin requested the plan documents, asserted that the legibility changes to MEDCAP and the DAP were bargainable, and demanded a meeting to bargain over the change. Rhodes agreed to provide the plan documents and responded to several other questions

[58] R. Exh. 3 at 8737.

[59] GC Exh. 8 at 15456–15457.

[60] R. Exh. 3 at 8822.

[61] The Company introduced a summary chart of records documenting the changes as R. Exh. 11. There is no dispute, however, that the Company made numerous and regular unilateral changes aspects of the benefit plans, including terms of coverage, dependent and spousal eligibility, deductibles, co-pays, and annual caps, since the Union agreed to participate in MEDCAP and DAP in 1993. (Tr. 86–89.).

[62] Irvin conceded this point. (Tr. 70–71, 88–89.)

[63] R. Exh. 3 at 8932.

[64] The Union voiced concern over the limitation of the new eligibility of same-sex partners, while excluding opposite-sex domestic partners. (R. Exh. 3 at 8955–8956.)

[65] R. Exh. 3 at 8569–8570.

[66] GC Exh. 6 at 18155.

[67] R. Exh. 11, Tab 37 at 2443.

[68] Irvin conceded Anderson's point that the premium cost increases were significant. (R. Exh. 3 at 8859; Tr. 75–83, 187–188.)

[69] Anderson reluctantly testified that this change was both positive and insignificant. (R. Exh. 11, Tab 7 at 676; Tr. 211).

[70] R. Exh. 3 at 8693.

[71] R. Exhs. 7(a) at 17129, and 7(b) at 16419.

[72] Anderson credibly explained that the Company made these changes after reviewing the health benefits being offered by competitors. (Tr. 158.)

[73] Irvin and Rhodes provided fairly consistent testimony regarding discussions between the parties on this date. (Tr. 34–36, 158, 270; Jt. Exh. 1 at 5, 17–18; GC Exh. 50.)

posed by the Union. Notwithstanding Irvin's demands that the Company bargain over the changes, the Company's President announced them to all employees later that day.[74]

When the August 2006 changes were announced, the Company acknowledged its obligation to furnish information relevant to bargaining. The confidential "Union Notification Guidelines" memorandum that was circulated contained the following instruction:

> Union Information Requests
>
> Unions may be entitled to requested information in order to bargain. Management negotiators are cautioned to avoid flat refusals to information requests. If the union makes a request for information beyond what has been forwarded to the site, Management negotiators should develop a clear understanding of the request and consult with their assigned PRS consultant.[75]

On November 7, 2006, the Union grieved the Company's unilateral changes to seven benefit plans, including MEDCAP and DAP.[76] The Company denied that grievance on November 30, 2006.[77]

The Company implemented the MEDCAP and DAP eligibility changes on December 20, 2006. These amendments applied corporate-wide to all employees, former employees, and their eligible dependents, including bargaining unit members. The practical effect of this change was to eliminate *any* retirement health and dental coverage for employees hired after January 1, 2007.[78]

Legal Analysis

The General Counsel contends that the Company violated Sections 8(a)(5) and (1) of the Act when it unilaterally eliminated future retirement healthcare benefits for new employees without bargaining with the Union on the grounds that: (1) the management-rights provision specifically reserving the right to terminate MEDCAP and/or DAP was not included in the collective-bargaining agreement; (2) the Company had a scattered history of imposing unilateral changes and bargaining with the Union following the ratification of the contract; and (3) even if the Company established a history of making unilateral changes to the MEDCAP/DAP programs, the elimination of these programs without providing some form of alternate coverages constituted a material departure from past practice that violated the Act. The Company denies the allegations and asserts that the bargaining history, as well as the history of imposing unilateral changes to the programs, amount to a clear and unmistakable waiver of the Union's right to bargain over these changes.

The parties focused on the issue of whether the Company was entitled to eliminate MEDCAP and DAP for new employees without bargaining with the Union. The issue, however, is actually much broader—whether the Company is entitled to unilaterally eliminate *all* retiree health care.

Section 8(a)(5) of the Act makes it unlawful for an employer to make unilateral changes to benefits that are a mandatory subject of bargaining without bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). An employer has a statutory duty to bargain over changes to retiree health care coverage where bargaining unit employees may be entitled to receive future retirement benefits as a term and condition of their employment. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 180 (1971). An employer, therefore, may not make unilateral changes to this subject of bargaining unless the union expresses a clear and unmistakable waiver of its right to bargain. *American Broadcasting Co*., 290 NLRB 86, 88 (1988*); California Pacific Medical Center*, 337 NLRB 910 (2002).

I. EXPRESS WAIVER

A waiver occurs when a union "knowingly and voluntarily *relinquishes* its right to bargain about a matter. . . . [W]hen a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require 'clear and unmistakable' evidence of waiver and have tended to construe waivers narrowly." *Dept. of the Navy, Marine Corps Logistics Base v. FLRA,* 962 F.2d 48, 57 (D.C.Cir.1992).

The Board has relied upon several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties' intent. See *Johnson-Bateman*, 295 NLRB 180, 184–187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992). The party asserting the waiver bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1984).

Pursuant to the contract, the Union has a right to bargain on behalf of retirees, as well as active employees. It is undisputed that MEDCAP and DAP Plan Documents contained management-rights clauses that made them terminable by the Company. The contract does not, however, mention either plan. Notwithstanding the absence of an express waiver in the contract, the Company contends that the Union waived its right to bargain over these changes in clear and unmistakable terms as evidenced by the bargaining history surrounding the contract and the Company's well-established past practice of unilaterally changing the plan terms.

The Board has been hesitant to imply waivers that are not explicitly mentioned within parties' collective-bargaining agreements. In *Southern Nuclear Operating Co*., 348 NLRB 1344 (2006) enfd. in part, remanded in part 524 F.3d 1350 (D.C. Cir. 2008), an employer unilaterally terminated full health care coverage and altered its life insurance payment policy for retirees. The Court of Appeals rejected the Company's contention that the unions incorporated the benefit plans' reservation of rights clauses into the contract based upon their "course of conduct":

> For instance, the Companies suggest that because the unions have copies of the benefit plans and have relied on the benefits provided by those plans, the unions have also incorporated the reservation-of-rights clauses in those plans into the collective-

[74] Jt. Exh. 1 at 23–24 and Exh. 1J.
[75] GC Exh. 36 at 5274.
[76] Jt. Exh. 1 at 14, Exh. G.
[77] Jt. Exh. 1 at 15, Exh. H.
[78] Irvin also noted that a potential coverage gap would arise by eliminating MEDCAP and DAP for employees retiring at the age of 58, the earliest potential age for full retirement, until they qualify for Medicare at the age of 65. (Jt. Exh. 1 at 16, 19–20; Tr. 40–41.)

> bargaining agreements. Our cases, however, imply that it is only express language in the collective-bargaining agreement that incorporates a reservation-of-rights clause. Id. at 1359.

A similar result is found in *Mississippi Power Co.*, 332 NLRB 530 (2000), enfd. in part 284 F.3d 605 (5th Cir. 2002). In that case, a management-rights provision was contained in the employee benefits plan, but not in the collective-bargaining agreement. The Court refused to find a waiver of the union's bargaining rights because the management-rights clause was only in an employer-created document that contained no explicit reference to the union.

The Company contends in its reply brief that *Southern Nuclear* and *Mississippi Power* are inapposite since no evidence was presented in either case that the parties specifically discussed during bargaining the reservation of rights language contained in the benefit plans at issue. Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been "fully discussed" and "consciously explored" during negotiations. *Davies Medical Center*, 303 NLRB 195, 204 (1991). Furthermore, The Company must demonstrate that the Union consciously yielded or clearly and unmistakably waived its interest in the matter. *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982). Failure to mention a mandatory subject of bargaining does not constitute a waiver of the right to bargain; rather, the Board requires "a conscious relinquishment by the union, clearly intended and expressed." *Elizabethtown Water Co*., 234 NLRB 318, 320 (1978), citing *Perkins Machine Co*., 141 NLRB 98, 102 (1963).

In applying the "fully discussed" and "consciously explored" standard in *Davies*, the Board refused to find a waiver of the right to information even though the union had not previously requested information prior to preliminary bargaining sessions. In arriving at that conclusion, the Board noted the absence of evidence establishing that the Union clearly relinquished and, therefore, waived its statutory right to the production of relevant information.

The Board followed a similar standard in *Reece Corp*., 294 NLRB 448 (1989). In that case, it found no waiver because the employer expressed a belief that the contract did not allow it to transfer work without bargaining. See also *General Electric Co*., 296 NLRB 844 (1989) (neither the language of the employer's bargaining notes or its subsequent bargaining history suggested that the Union made a conscious relinquishment that clearly intended and expressly bargained away its statutory right).

The Company proffered extensive bargaining notes at trial detailing the 1985 and 1986 contract negotiations. While the Company correctly notes that the incorporation of a management-rights provision in the contract was discussed at length, the notes did not evidence a conscious relinquishment by the Union that was clearly intended and expressed during negotiations. If anything, the bargaining history documents the Union's continued aversion to incorporating a management-rights provision within the contract. Furthermore, it is far from clear that there was a meeting of the minds as to what the removal of the management-rights clause from the pertinent part of the contract meant. While the Company contends that the provision was excluded from the contract because it did not want to be bound by the 1-year layover provision in article VII, the bargaining notes do not reveal the Union to have been operating under the same pretenses.

Based on the foregoing, the express language of the contract, as well as the parties' past dealings and bargaining history with respects to the terms and conditions contained therein, fail to reveal the existence of an express waiver by the Union permitting the Company to unilaterally eliminate retiree health coverage.

## II. IMPLIED WAIVER

Notwithstanding the absence of an express waiver, the Company advances several additional theories demonstrating that the Union waived its objection to the elimination of retiree healthcare—a general waiver based on past practice, the existence of a longstanding practice as the continuation of the status quo, and estoppel. The General Counsel denies the applicability of these theories and relies on the argument that the changes were material and more substantial than any unilateral changes implemented over the past 20 years.

### *A. Waiver Based on Past Practice*

The Company's alternative theory is premised on the concept that its 20-year period of imposing unilateral changes to MEDCAP and DAP terms of coverage constitutes a waiver. There is precedent for the notion that a waiver may be inferred from extrinsic evidence of contract negotiations and/or past practice. *Mt. Clemons General Hospital*, 344 NLRB 450, 460 (2005). In *Litton Microwave Cooking Products v. NLRB,* 868 F.2d 854 (6th Cir. 1989), the Sixth Circuit reversed the Board's decision that an employer violated Section 8(a)(5) "given the explicit reference to layoffs and production methods in the management-rights clause, the history of uncontested work relocation and layoffs, and the unfavorable assessment by the administrative law judge of the credibility of a witness relied upon by the Board." Id. at 858; See also *Kiro, Inc.*, 317 NLRB 1325, 1328 (1995).

*Litton* is distinguishable, however, because there the employer's past practices of unilateral changes were bolstered by a management-rights clause in the contract that the union official himself admitted had afforded the company the right to do whatever it wanted. *Litton*, 868 F.2d at 858. Furthermore, the Union never challenged the loss of bargaining unit jobs that resulted from the employer's unilateral actions, nor did it request bargaining over the company's relocation of work while the collective-bargaining agreement was in effect. Id. Not only was the management-rights clause incorporated into the collective-bargaining agreement in *Litton*, but the Union failed to proffer evidence countering the Company's history of imposing similar unilateral changes without any requests for bargaining or information. The employer, therefore, was able to establish a waiver through a broadly phrased management-rights clause supplemented by a history of uncontested unilateral changes.

Similarly, in *California Pacific Medical Center*, 337 NLRB 910, 914 (2002), the Board found lawful an employer's unilateral action in laying off employees based on an established history of similar actions and an absence of union requests to bargain. Moreover, the applicable collective bargaining agreement contained a management-rights clause found to have provided management with the unfettered right to lay-off employees as

necessary.

More recently, in *Mt. Clemons General* Hospital, supra at 460, an employer made unilateral changes to a tax shelter annuity program that downsized the program from five providers to one. The change was not explicitly authorized in the contract, but referenced only in a general waiver clause. As such, the Board found that clause insufficient to constitute an express waiver for specific terms not listed in the contract. Nevertheless, the Board recognized the existence of an implied waiver from the employer's 20-year record of making similar unilateral changes without any requests by the union to bargain over them.

In contrast to *Mt. Clemons, Litton* and *California Pacific*, there is a history here that presents a mixed bag of transactions—unilateral changes without requests to bargain, as well as changes followed by requests for information and/or requests to bargain. The instances in which the Company unilaterally changed benefit terms without requests to bargain outnumber the instances in which the Union requested information or sought to bargain. Nevertheless, under the circumstances, the transactional history makes it less than certain that the Union waived its right to bargain over the elimination of retiree health benefits.

Moreover, neither *Mt. Clemons*, nor *Litton* nor *California Pacific* addressed unilateral changes that substantially deviated from past practices. Both *Mt. Clemons* and *Litton* involved disputes that arose from unilateral changes such as layoffs that the companies implemented frequently prior to the filing of charges. *Mt. Clemons* involved the downsizing of an annuity program, not its total and irrevocable termination. None of these changes strayed considerably from the companies' similar past practices, which they had implemented openly and with the acquiescence of their respective unions.

*B. Longstanding Practice as Continuation of the Status Quo*

The Company also contends that the 2006 changes were merely part of the status quo of a longstanding practice that spanned a 20-year period of unilateral changes to MEDCAP and DAP. The General Counsel contends, however, that these changes were scattered among numerous information requests over the years that constituted requests for bargaining and counter any semblance of a well-established past practice.

The Board has found that a unilateral change made pursuant to longstanding practice is essentially a continuation of the status quo and not a violation of Section 8(a)(5). *The Courier-Journal*, 342 NLRB 1093, 1095 (2004). In *Courier-Journal*, the employer negotiated a provision in its contract that reserved to the employer "the right to modify or terminate" the health care plan. Over a 10-year period, the employer made unilateral changes in costs and benefits for both union and nonunion employees under the plan. Some of these changes were made while the contract was in effect and others were made during hiatus periods between contracts. After 10 years of such a practice, the employer announced another increase in employee premiums during a hiatus period, to which the union objected. The Board dismissed the union's charge, finding that these changes were consistent with the employer's history of making these changes for the past 10 years without union objection, noting that this finding was grounded not in waiver but "in past practice, and the continuation thereof."

The Board refused to extend the *Courier-Journal* holding to unilateral changes made to benefit plans during hiatus periods between collective-bargaining agreements in *E.I. DuPont de Nemours*, 355 NLRB 1084 (2010). The employer in *DuPont* failed to carry its burden because its asserted past practice was limited to changes made while a contract which included a management-rights clause was in force. Unlike the employer in *Courier-Journal*, who had a history of making changes both while the contract was in force and during hiatus, the employer in *DuPont* could only point to past practice while the contract was in force, and therefore, could not substantiate a claim that its past practices also extended to hiatus periods.

The Company relies heavily on the *Courier-Journal* holding in its post-hearing brief and argues that this case falls squarely within its holding because its 2006 changes "represent nothing more than [the Company's] consistent, 30-year practice of making unilateral changes to the [DAP] and MEDCAP."[79] The Company further contends that the only reason the Board rejected the employer's past practice argument in *DuPont* was because "DuPont did not offer sufficient evidence to establish a past practice of unilateral changes during periods when a contract authorizing the changes was not in force"[80] In this case, however, the Company engaged in a decades-long practice of corporate-wide unilateral changes that are not contained in the collective-bargaining agreement. Instead, they have been based upon the plans' reservation of rights language that has never expired/been on hiatus and remains in full force. Nevertheless, the Company believes that its actions here fall within the parameters of both holdings.

While the Company asserts that *Courier-Journal* was distinguished in *DuPont*, the General Counsel contends that *DuPont* restricted *Courier Journal* to unilateral changes made to benefit plans during hiatus between collective-bargaining agreements. The Board noted that it was "in tension with previously settled principles concerning waiver." *E.I DuPont* at fn. 5. The Board's language in *DuPont* suggests that it is distinguishable from *Courier-Journal* because the employer had not established a longstanding practice of unilateral changes throughout all phases of the life of the collective-bargaining agreement. The Company correctly observes that the contract has been in effect through the entire course of the Company's unilateral changes to MEDCAP and DAP. Nonetheless, the Company failed to meet its burden in establishing that the Union expressed a clear and unmistakable waiver of its right to bargain. Thus, *Courier-Journal* is ultimately inapposite. The Company's unclear history of implementing unilateral changes to the health plans, interspersed with the Union's requests for information, fails to establish a status quo that meets the requirements of *Courier-Journal*. Furthermore, the Company's unilateral termination of future retirement plans, without offering alternate coverage, cannot be sensibly considered a continuation of the status quo. Although the Company established a history of unilateral changes to health benefits, there is no evidence of the Company ever terminating health coverage for retirees.

[79] R. Br. at 41–42.

[80] R. Br. at 43.

*C. Equitable Estoppel*

The Company also argues that the Union is equitably estopped from demanding to bargain. A union's constant acquiescence to an employer's unilateral action for sustained periods of time can equitably estop a union from demanding bargaining on that subject. *Manitowec Ice Co.*, 344 NLRB 1222 (2005); *Tucker Steel Corp.*, 134 NLRB 323, 333 (1961). The General Counsel contends, however, that a union's failure to request bargaining on a topic does not constitute a clear and unmistakable waiver of its right to bargain on that topic at a later time. *Brewers and Malsters*, enfd. D.C. Cir. at 45 (even if union waived its right to bargain over prior changes, union has not waived its right to bargain over future changes); *Midwest Power Systems* (not enough to show at most a union's silent acquiescence to certain prior changes in retiree benefits). Unlike the union in *Manitowoc*, which was equitably estopped from bargaining because there was a history of unilateral changes without bargaining requests, information requests, or other objections from the union, the Union here made numerous information requests throughout the years, to which the Company acquiesced. Information requests sent to employers constitute requests for bargaining. *Eldorado*, 335 NLRB 952, 954 (2001).

To the contrary, the Company's assertions, past practices, and manifestations to the Union estop it from unilaterally terminating MEDCAP/DAP without providing an alternative coverage plan. The Company's bargaining notes, customarily shared with the Union, indicate that the Company had no intention of terminating the retiree benefit plans, thus causing employees to rely on the Company's representations to their eventual detriment.

n June 11, 1987, the Union raised the subject of medical insurance for retirees, specifically, whether pensioners are guaranteed a medical plan when they retire. The Company responded that pensioners are covered and told what insurance they have when retiring. The Company added that it "has reserved the right to change and modify or discontinue the plan if needed." The Company added that "there has been no plan to discontinue medical coverage for pensioners *and does not visualize that ever happening . . . The plan may be changed or, or the pensioner may be covered by a different plan*." (Emphasis added.)[81]

The Company is, therefore, bound by its representations to the Union. There is no mention at this bargaining session of MEDCAP/DAP's management-rights clauses that would allow the program to be terminated. This establishes that the Company itself considered unilateral changes to the status quo insofar as they occurred within the framework of an existing future retirement benefits plan. The bargaining history demonstrates that even the Company was operating under the assumption that a retirement healthcare and dental plan would always exist. The Company's history of imposing unilateral changes to the terms of the coverage is understandable within this framework. However, terminating the entire retiree healthcare and dental program far exceeds the expectations of the parties based on a 30-year bargaining record.

*D. Material Departure from Past Practice*

The Company's reliance on a 20-year period of unilateral changes to MEDCAP and DAP is also undermined by the materiality of the 2006 changes. An employer violates Section 8(a)(5) if the unilateral change at issue constitutes a material departure from well-established past practice. *Caterpillar, Inc*., 355 NLRB 521 (2010). In *Caterpillar*, the Board found that an employer's unilateral implementation of a generic-first prescription drugs program violated Section 8(a)(5). The employer contended that it had a longstanding practice of unilaterally implementing changes to its health care plan and that implementation of the generic first policy was a continuation of this practice. The Board first found that the Company failed to show "that the practice occurred 'with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." The Board elaborated:

> In addition, even assuming regularity and frequency, there was no *practice*. Other than the fact that they each altered the Respondent's prescription-drug plan, there is no thread of similarity running through and linking the several types of change at issue here. The three types of past change—preauthorization requirements, drug quantity limits, step therapies—are each dissimilar; and the Respondent does not contend that "generic first" falls into any one of these categories of past practice. And it does not: "generic first" is not a preauthorization requirement; it has nothing to do with drug-quantity limits; and Labor Relations Consultant Stevens expressly acknowledged that it is not a step therapy.

The Board then proceeded to explain that "even assuming that the past changes were sufficiently similar among themselves to constitute a "practice," the implementation of "generic first" represented a material departure from that past practice. The past changes were limited in scope, involving only certain drugs or families of drugs. "Generic first," by contrast, involved *all* brand-name drugs that have generic equivalents. Moreover, and significantly, unlike "generic first," the past changes did not alter express terms of the Group Insurance Plans."

Finally, the Board concluded: "[m]aking a series of disparate changes without bargaining does not establish a "past practice" excusing bargaining over future changes. Rather, it shows merely that, on several past occasions, the Union waived its right to bargain. It is well settled, however, 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." Id. at 522–523. (quoting *Owens-Corning Fiberglas*, 282 NLRB 609 (1987)).

The Company has failed to establish that the Union waived its right to bargain based on its bargaining history and past practice. Furthermore, based on the *Caterpillar* holding, the elimination of MEDCAP/DAP constituted a material departure from any past practices that DuPont may have established. Imposing unilateral changes to premium rates and the scope of coverage is substantially different from terminating a plan in its entirety, especially when the Union has operated under a reasonable assumption for over 20 years that the plan would not be terminated. DuPont's actions are therefore distinguishable from the employers in *Mt. Clemons General Hospital, Litton*, and *Courier-*

[81] R. Exh. 3 at 8511.

*Journal* because the unilateral changes at issue in those cases were within the bounds of similar past practices and did not amount to a material departure. In none of those cases was a healthcare program terminated in its entirety without a back-up proposal or replacement program for current employees. The downsizing of a health benefits program differs substantially from the complete elimination of healthcare program for future retirees, especially when the union and employees have been lead to believe that some form of health insurance would be available to them in the future. The Company has failed to carry its burden in establishing an implied waiver through its bargaining history or past practice, and its elimination of MEDCAP and DAP without providing any alternative healthcare and dental plan coverages for future retirees constitutes a material departure from past practice.

For the foregoing reasons, Respondent engaged in an unfair labor practice in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act.

## CONCLUSIONS OF LAW

1. E. I. DuPont de Nemours and Company (the Company) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Ampthill Rayon Workers, Inc., International Brotherhood of DuPont Workers (the Union) is a labor organization within the meaning of Section 2(5) of the Act and is the recognized collective-bargaining representative of a bargaining unit composed of the production, maintenance, clerical, technical, and office employees employed by the Company at its Spruance facility in Ampthill, Virginia.

3. On or about December 20, 2006, the Company violated Section 8(a)(5) and (1) by failing to bargain upon request by the Union and unilaterally terminating retirement healthcare and dental benefits for all unit employees hired after January 1, 2007.

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Company has violated Section 8(a)(5) of the Act by failing to bargain with the Union concerning the termination of retirement healthcare and dental benefits for all unit employees hired after January 1, 2007, we shall order the Company to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act, including the posting of an appropriate notice to employees. Specifically, we shall order the Company to rescind, for the bargaining unit employees, the change in its retiree healthcare and dental program, implemented December 20, 2006, terminating MEDCAP and DAP for such employees. The Company shall, upon demand by the Union, bargain in good faith regarding with respect to any Company proposal to completely eliminate retirement healthcare and dental benefits for bargaining unit employees hired after January 1, 2007.[82]

In the event that this Remedy is not adhered to, bargaining unit employees hired after January 1, 2007, over time, will be adversely affected by the lack of retirement healthcare and dental benefits. In that case, the Company shall make whole its bargaining unit employees who have retired for any loss of healthcare or dental benefits suffered as the result of the Company's unlawful termination of retiree health and dental benefits for employees hired after January 1, 2007. Payments for lost benefits are to be computed in the manner set forth set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

## ORDER

The Company, E. I. DuPont de Nemours and Company, Ampthill, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally announcing and terminating employees' retirement health and dental benefits.

(b) Making material, substantial, and significant changes to retirement health and dental benefits of unit employees without first notifying the Union and affording it an opportunity to bargain concerning such changes and their effects.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral material change to retirement healthcare and dental plans implemented on December 20, 2006, as it relates to the elimination of all retirement healthcare and dental coverage for all unit employees and former unit employees hired after January 1, 2007, restore the unit employees' retirement health and dental benefits to the terms that existed prior to December 20, 2006, and maintain those terms in effect until the parties have bargained and agreed to material changes.

(b) Make any unit employees and former unit employees whole by reimbursing them, with interest as prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra, for any loss of benefits suffered as a result of the unilateral implemented changes in benefits.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to compliance with the terms of this Order.

(d) Within 14 days after service by the Region, post at its Ampthill, Virginia facility copies of the attached notice marked "Appendix."[83] Copies of the notice, on forms provided by the

[82] Given an extensive history that includes unilateral changes by the Company to certain aspects of employees' retirement healthcare and dental coverage (premiums, deductibles, co-pays, annual caps, and dependent and spousal eligibility), the remedy is limited solely to the material change by the Company in terminating retirement healthcare and dental coverage for employees hired after January 1, 2007.

[83] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

Regional Director for Region 5, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees hired at any time after January 1, 2007.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C. August 22, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT unilaterally implement material, substantial, and significant changes to our employees' retiree healthcare program without providing the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

WE WILL rescind the unilateral material change to retirement healthcare and dental plans implemented on December 20, 2006, as it relates to the elimination of all retirement healthcare and dental coverage for all bargaining unit employees and former unit employees hired after January 1, 2007, restore the unit employees' eligibility for retirement health and dental benefits, specifically, the Medical Care Assistance Program (MEDCAP) and the Dental Assistance Plan (DAP), to the terms that currently exist with respect to unit employees hired on or before January 1, 2007.

WE WILL, if requested by the Union, bargain in good faith over any material change in the eligibility of employees or former employees hired after January 1, 2007, for retirement healthcare and dental benefits and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make whole, with interest, any employee hired after January 1, 2007, who loses retirement healthcare and dental benefits as a result of our unlawful termination of healthcare and dental coverage for such employees on December 20, 2006.

E. I. DUPONT DE NEMOURS AND COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-033461 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E. Washington, D.C. 20570, or by calling (202) 273-1940.

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."