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**E. I. Dupont De Nemours & Co., Inc. and United Steelworkers International Union and its Local 6992.**  
Case 03–CA–096616

September 13, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN  
AND KAPLAN

This case involves certain annual unilateral changes to Beneflex, a corporate-wide employee cafeteria-style benefits plan maintained by the Respondent, E. I. DuPont de Nemours and Company. Upon a charge filed January 18, 2013, by United Steelworkers International Union and its Local 6992 (the Union), the General Counsel issued a complaint on March 21, 2013, alleging that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act in 2013, following expiration of its collective-bargaining agreement (CBA), by implementing several unilateral changes in this benefits plan as applied to bargaining-unit employees at the DuPont plant in Tonawanda, New York. The Respondent filed an answer denying that it violated the Act.

On December 27, 2013, the Respondent, Union, and General Counsel filed a joint motion to waive a hearing before an administrative law judge and to submit this case directly to the Board for a decision based on a stipulated record. On June 30, 2014, the Board granted the parties' motion. Thereafter, the Respondent and General Counsel each filed a brief and a responsive brief.

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

In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), the Board analyzed essentially the same allegation as in this case, i.e., that the respondent there violated Section 8(a)(5) of the Act following expiration of its CBA when it unilaterally modified employee medical benefits and related costs consistent with what it had done unilaterally in the past. In that decision, the Board, relying on *NLRB v. Katz*, 369 U.S. 736, 746 (1962), and Board cases dating back to 1964, held that "actions constitute a 'change' only if they materially differ from what has occurred in the past." *Raytheon*, slip op. at 10. The Board also held this principle applies regardless whether a CBA was in effect when the past practice was created, and regardless whether no CBA existed when the disputed

actions were taken. *Id.*, slip op. at 13. Finally, the Board found that actions consistent with an established practice do not constitute a change requiring bargaining simply because they may involve some degree of discretion. *Id.*, slip op. at 16. Accordingly, the Board dismissed the complaint's allegation that the respondent violated Section 8(a)(5) by making benefit plan modifications without giving prior notice and opportunity to bargain to the union representative of affected bargaining-unit employees.

*Raytheon* overruled *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont 2016*), where a divided Board held that an employer's actions consistent with an established past practice constitute a change, and therefore require the employer to provide the union with notice and an opportunity to bargain prior to implementation, if the past practice was created under a management-rights clause in a CBA that has expired, or if the employer's challenged actions involved any discretion. On October 11, 2018, the Board applied *Raytheon* in the aforementioned DuPont case, on remand from the United States Court of Appeals for the District of Columbia Circuit, to find that post-contract expiration unilateral modifications of Beneflex plan benefits at two other DuPont plants were lawful. *E.I. DuPont de Nemours (Edgemoor)*, 367 NLRB No. 12 (2018).

The Beneflex plan benefit changes at issue in this case are indistinguishable as a legal matter from those made in the *Edgemoor* case. They were made at the same time as in past years, applied to unit and nonunit employees alike, and did not materially differ in terms of discretion from actions taken in past years. Accordingly, as in the *Edgemoor* case, *Raytheon* controls and compels a finding that the Respondent did not violate the Act by making the Beneflex plan changes at issue here without providing the Union advance notice and the opportunity for bargaining.<sup>1</sup>

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 13, 2019

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John F. Ring,

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Chairman

<sup>1</sup> Our dissenting colleague briefly reiterates and relies on the arguments previously made in the *Raytheon* and *DuPont (Edgemoor)* dissents. For the reasons fully set forth in the majority opinions in each of

the cited decisions, we adhere to that precedent and find no merit in the arguments raised in the dissenting opinions.

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Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The majority treats this case as governed by two recent Board decisions—*Raytheon*<sup>1</sup> and *DuPont (Edgemoor)*,<sup>2</sup> applying *Raytheon*—which mistakenly gave employers broad power to make unilateral changes in employees’ terms and condition of employment, pursuant to a supposed past practice established under a contractual management-rights provision, although that provision expired with the collective-bargaining agreement. I dissented in both cases, and so I dissent here as well. In my view, this case should be decided under the precedent overruled in *Raytheon*, *DuPont 2016*.<sup>3</sup> And under that decision, it is clear that the Respondent violated Section 8(a)(5) of the Act in making the unilateral changes at issue here.

The stipulated issue presented is whether the Respondent had a duty to bargain with the Union before implementing several changes in January 2013 to its corporate-wide employee Beneflex benefits plan, as applied to bargaining-unit employees at the DuPont plant in Tonawanda, New York. In *DuPont 2016* the Board found unlawful unilateral changes made in the Beneflex plan benefits for union-represented employees at two other DuPont plants. The Board rejected the argument that an employer’s supposed past practice of discretionary unilateral changes, made pursuant to a contractual management rights clause, authorized the employer to continue making such changes even after expiration of the contract. The

Board there specifically responded to questions that had been posed earlier by the United States Court of Appeals for the District of Columbia, reaffirming Board precedent defining the status quo that an employer must maintain—without change—when a contract expires and while the parties negotiate a successor bargaining agreement.

*Raytheon*, however, overruled *DuPont 2016*, and in this case the Board majority again applies the *Raytheon* “past practice” rationale to dismiss unilateral change allegations with respect to broad and discretionary postexpiration changes in the Beneflex plan for bargaining unit employees at the DuPont Tonawanda plant. As then-Member Pearce and I explained in our *Raytheon* dissent,<sup>4</sup> the majority’s holding is flatly contrary to the Supreme Court’s decision in *NLRB v. Katz*, 369 U.S. NLRB 736 (1962),<sup>5</sup> and it represents an impermissible policy choice—frustrating, instead of encouraging, the collective-bargaining process. That result reflects the arbitrary and unfair process by which the *Raytheon* majority reached its decision and applied it in both *DuPont* cases.<sup>6</sup>

For all of the reasons offered here, and in the *DuPont (Edgemoor)* and *Raytheon* dissents, I believe that the Board should not—and, indeed, cannot—apply those decisions here. Instead, following *DuPont 2016*, the Board should find that the Respondent violated Section 8(a)(5), as alleged.

Dated, Washington, D.C. September 13, 2019

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Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

<sup>1</sup> *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).

<sup>2</sup> *E.I. DuPont de Nemours (Edgemoor)*, 367 NLRB No. 12 (2018).

<sup>3</sup> *E.I. DuPont de Nemours*, 364 NLRB No. 113 (2016).

<sup>4</sup> *Raytheon*, supra, 365 NLRB No. 161 slip op. at 21–34 (dissent).

<sup>5</sup> Under the status quo doctrine as set forth in *Katz*, the Respondent had the statutory obligation under Sec. 8(a)(5) of the Act to adhere to the terms and conditions of employment that existed at the expiration of the 2008–2012 contract, until it bargained to a new agreement or reached a valid impasse in overall bargaining for a new collective-bargaining agreement. Until such time, the Beneflex benefits in effect at the contract’s expiration were the status quo subject to this statutory bargaining obligation.

<sup>6</sup> As fully discussed in the *Raytheon* and *DuPont Edgemoor* dissents, the current Board has impermissibly abandoned a past practice of providing advance notice and inviting responsive briefing prior to reconsidering precedent on issues of major significance to the public we serve. The majority gave no such notice and opportunity to the parties and public in *Raytheon*. It failed to give such notice and opportunity to the unions who were at that time parties to litigation of *DuPont 2016* before the U.S. Court of Appeals for the District of Columbia Circuit, and it failed to give notice and opportunity to the different union representing the bargaining unit employees in this proceeding, which was pending before the Board during consideration of *Raytheon*.