**E.I. Du Pont De Nemours, Louisville Works *and* Paper, Allied-Industrial, Chemical and Energy Workers International Union And its Local 5-2002.**

**E.I. Du Pont De Nemours and Company *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) and its Local 4-786.** Cases 09–CA–040777, 09–CA–041634 and 04–CA–033620

October 11, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN AND EMANUEL

These consolidated proceedings, again before the National Labor Relations Board on remand from the United States Court of Appeals for the District of Columbia Circuit, have a lengthy litigation history. For reasons discussed below, we hold that the Board's recent decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), controls here and requires dismissal of the consolidated cases in their entirety.

The issue has remained the same throughout this litigation: whether E.I. du Pont de Nemours, Louisville Works and E.I. du Pont de Nemours and Company (collectively, the Respondents) violated Section 8(a)(5) and (1) of the National Labor Relations Act by implementing annual unilateral changes to unit employees' benefits after expiration of collective-bargaining agreements (CBAs) that contained a reservation of rights provision permitting widespread and varied unilateral changes. The same changes were made for nonunit employees whose benefits were also covered by the company-wide, self-funded Beneflex Plan. For many years preceding the changes at issue here, during the terms of successive CBAs, the Respondents had announced Beneflex Plan changes in the fall and implemented them on January 1 of the new year without objection from the Unions representing unit employees at the Louisville, Kentucky and Edge Moor, Delaware DuPont facilities. However, annual post-contract-expiration unilateral changes made in 2004 at Louisville and in 2005 at both Louisville and Edge Moor gave rise to the refusal-to-bargain complaint allegations at issue here.

On August 27, 2010, the Board issued separate decisions and orders finding that the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the Louisville and Edge Moor unit employees' Beneflex benefit plan.[1] In each case, the Board concluded that these unilateral changes were impermissible because the reservation of rights provision waiving the Union's right to demand bargaining did not survive contract expiration. The Respondents petitioned for review of the Board's Orders with the United States Court of Appeals for the District of Columbia Circuit, and the Board cross-petitioned for enforcement.

On June 8, 2012, the court granted the Respondents' petitions for review, denied the Board's cross-petitions for enforcement, and remanded the cases to the Board for further proceedings consistent with the court's opinion. *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012) (*DuPont* remand). The court concluded that the Board had departed without reasoned justification from Board precedent in finding the unilateral changes to Beneflex unlawful.[2] Specifically, the court interpreted that precedent as defining the issue as one of past practice, not "whether a contractual waiver of the right to bargain survives the expiration of the contract."[3] Further, the court concluded as a factual matter that the post-expiration Beneflex Plan changes at issue were similar in scope to annual changes previously made and, by making them, the Respondent maintained the status quo expressed in its past practice.[4]

The court recognized, however, that the Board's view was consistent with earlier precedent.[5] Accordingly, the court remanded the present cases for further consideration with a specific direction that the Board "conform to its precedent in *Capitol Ford*[6] and in the 2006 iteration of *Beverly Health and Rehabilitation Services*[7] or explain its return to the rule it followed in its earlier decisions." 682 F.3d at 69.

Accepting the court's remand, the Board consolidated the Louisville and Edge Moor proceedings and issued a new decision and order in which the majority affirmed the prior findings of violations. *E.I. du Pont de Nemours*, 364

[1] *E.I. du Pont de Nemours, Louisville Works (DuPont-Louisville)*, 355 NLRB 1084 (2010); *E.I. du Pont de Nemours and Company (DuPont-Edge Moor)*, 355 NLRB 1096 (2010), enf. denied 682 F.3d 65 (D.C. Cir. 2012).

[2] The court found the Board's rationale to be inconsistent with precedent set in the *Courier-Journal* cases, 342 NLRB 1093 (2004) (*Courier-Journal I*), and 342 NLRB 1148 (2004) (*Courier-Journal II*), *Capitol Ford,* 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319 (2006) (*Beverly 2006*).

[3] 682 F.3d at 69 (quoting *Courier-Journal I*, 342 NLRB at 1095).

[4] Id. at 68.

[5] E.g., *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636–637 (2001) (*Beverly 2001*), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003), and *Register-Guard*, 339 NLRB 353, 355–356 (2003).

[6] 343 NLRB 1058 (2004).

[7] See fn. 2, supra.

NLRB No. 113 (2016) (*DuPont 2016*). In so doing, the majority "[chose] the second option identified by the court, and return[ed] to the rule followed in *Beverly 2001* and *Register-Guard*: that unilateral, post-expiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause." 364 NLRB No. 113, slip op. at 4. The Respondents petitioned the D.C. Circuit Court of Appeals for review, and the Board filed a cross-application for enforcement.

While the *DuPont* proceeding was once again pending before the court, the Board reconsidered the rationale of *DuPont 2016* in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). The Board majority expressly overruled the majority's holding in *DuPont 2016* and the precedent upon which that holding relied, and it returned to the rule of law from the *Courier-Journal* cases, *Capitol Ford*, and *Beverly 2006* that employers do not have to bargain over "changes" to employment terms as long as those changes are consistent with past practice. In keeping with other Board cases dating back to 1964,[8] the Board held that actions do not constitute a change if they are similar in kind and degree to an established past practice consisting of comparable unilateral actions. *Raytheon*, slip op. at 13. Although an employer may not unilaterally change the status quo as to a mandatory subject of bargaining, "actions constitute a 'change' only if they materially differ from what has occurred in the past." Id., slip op. at 10. The *Raytheon* majority also held that this principle applies regardless of whether (i) a collective-bargaining agreement was in effect when the past practice was created, and (ii) no collective-bargaining agreement 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 merely because they may involve some degree of discretion. Id., slip op. at 16. The relevant consideration is whether the particular challenged action constitutes a material departure from past practice, regardless of how that past practice developed.

Applying this standard, the Board in *Raytheon* held that the employer did not violate Section 8(a)(5) when, after the expiration of the parties' collective-bargaining agreement and while negotiating a new contract with the union, it made unilateral changes to the bargaining-unit employees' health benefits in January 2013, as it had done every year from 2001 to 2012. The Board majority held that the employer's 2013 modifications to employee healthcare benefits did not constitute a "change" requiring notice and an opportunity to bargain under *NLRB v. Katz*, 369 U.S. 736 (1962), because the 2013 benefit plan modifications did not vary materially from the changes made in prior years, the changes were made at the same time of the year as in past years, and they applied to unionized and nonunionized employees alike (as had been the case in prior years). *Raytheon,* slip op. at 18. Thus, the changes were consistent with the employer's established practice and did not trigger a duty to bargain simply because some employer discretion was involved. The Board majority also emphasized that even when past practice permits an employer to take the same or similar unilateral actions, an employer is nevertheless required under Section 8(a)(5) to bargain with the union over mandatory subjects of bargaining upon the union's request to do so. Id., slip op. at 18–19.

In view of the Board's express overruling of *DuPont 2016* in *Raytheon*, the Board filed a motion requesting that the court remand this case back to the Board so that it could reconsider the case in light of its current precedent established in *Raytheon*. Neither Union involved in this proceeding opposed the motion. By Order dated January 9, 2018, the court remanded the case back to the Board.

In effect, the proceeding before us now stands in the same posture as after the court's 2012 remand. This time, however, *Raytheon* stands as a reaffirmation of the precedent from which the court found the Board's 2010 decisions departed without explanation. Taking the remand choice of applying that precedent—the choice rejected by the *DuPont 2016* majority—we now hold that the Respondents' 2004 and 2005 changes to the unit employees' Beneflex Plan benefits were consistent with a long-standing past practice of annual changes established over several years of the parties' collective-bargaining relationship. The changes did not materially vary in kind or degree from the changes made in prior years. They were made at the same time—January—as in past years, and they applied to unit and nonunit employees alike. Therefore, as the D.C. Circuit had already concluded in its earlier decision, the Respondent, "by making unilateral changes to Beneflex after the expiration of the CBAs, maintained the status quo expressed in the Company's past practice,"[9] which warrants a conclusion that the changes were lawful under the Supreme Court's decision in *Katz*.

For these reasons, we find that the Respondents did not violate the Act by making the changes described above without providing the Unions advance notice and the opportunity for bargaining.[10]

[8] *Shell Oil Co.*, 149 NLRB 283 (1964); *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965).

[9] *DuPont* remand, 682 F.3d at 68.

[10] Our dissenting colleague acknowledges that the substantive arguments she briefly raises here are the same as those raised by her and former Member Pearce in *Raytheon*. For the reasons fully set forth in the

ORDER

The complaints are dismissed.

Dated, Washington, D.C. October 11, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

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MEMBER MCFERRAN, dissenting.

In the recent *Raytheon* decision,[1] a divided Board overruled the Board's immediately prior decision in *this* case,[2] even though the case was awaiting oral argument in the United States Court of Appeals for the District of Columbia Circuit[3] and the Board no longer had jurisdiction over it.[4] The *Raytheon* Board took this step without providing any prior notice and opportunity to be heard to the *DuPont* parties (or anyone else). In principle, of course, the *Raytheon* decision necessarily controls this case. But not only was *Raytheon* wrongly decided for the reasons explained in the dissent there, but the *Raytheon* majority also violated administrative due process in overruling the Board's earlier *DuPont* decision. The Unions here, which had prevailed before the Board, were stripped of their victories, with no process at all.

This case thus presents the same due-process problem implicated in the recent *Boeing* decision.[5] In that decision, as explained in the dissent, the Board majority violated the basic tenets of administrative due process by depriving the prevailing party in a prior case of the benefits of a favorable decision without providing notice and opportunity to be heard "at a meaningful time and in a meaningful manner."[6] I cannot condone my colleagues' decision to make the same mistake again by casting aside the principles of due process in this case.

I.

The majority's opinion recites the complicated – indeed, tortured – history of this case, which involves events in 2004 and 2005, more than 13 years ago. The issue is whether *after* the expiration of a collective-bargaining agreement that authorized the employer to make discretionary, unilateral changes in employees' terms and conditions of employment, the employer may keep making such changes, even as the employer and union are trying to negotiate a new agreement. As the majority recounts, the Board previously has found such changes unlawful, issuing decisions twice before, first in 2010 and then again (after a 2012 remand from the District of Columbia Circuit[7]) in 2016. Perhaps this third time will be a charm, but there are reasons to think not.

The latest decision is necessitated by *Raytheon*. But *Raytheon* itself was deeply flawed, with respect to both process and substance. To begin, the *Raytheon* majority's decision to revisit and overrule *DuPont 2016* was unjustified and unnecessarily destabilized Board law. The District of Columbia Circuit's 2012 remand decision had made clear that the Board was free to choose the approach taken in *DuPont 2016*.[8] But the *Raytheon* majority started from the mistaken premise that the Board's decision was *improper*: "inconsistent with Section 8(a)(5)" of the National Labor Relations Act" (which establishes an

majority opinion in *Raytheon*, we reject those arguments. Similarly, our colleague raises the same alleged administrative due process objections to the overruling of the prior *DuPont 2016* decision that she and former Member Pearce raised in dissent with respect to the *Boeing* majority decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), and to the majority's denial of a nonparty's motion to intervene and for reconsideration in *The Boeing Co.*, 366 NLRB No. 128 (2018). Those objections were not raised by the Unions in this case before the court prior to remand and have not been raised by the Unions before us on remand. For the same reasons fully set forth by the majority in the *Boeing* decision and in the *Boeing* order denying the motion to intervene, we find no merit in the dissent's procedural objections here.

[1] *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). Then-Member Pearce and I dissented. See id., slip op. at 21 (dissenting opinion).

[2] *E.I. DuPont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont 2016*).

[3] *E.I. du Pont de Nemours & Co. v. NLRB*, No. 16-1357 (D.C. Cir.)

[4] Under Sec. 10(e) of the Act, the Board loses jurisdiction over a case once the record is filed in a reviewing federal court of appeals. 29 U.S.C. §160(e).

[5] *The Boeing Co.*, 366 NLRB No. 128 (2018) (denying motion to intervene). Member Pearce and I dissented. See id., slip op. at 4. See also *The Boeing Co.*, 365 NLRB No. 154 (2017) (reversing *Rio All-Suites Hotel & Casino*, 362 NLRB 1690 (2015)). Member Pearce and I dissented, separately. See id., slip op. at 23 (Pearce dissent), 29 (McFerran dissent).

[6] 366 NLRB No. 128, slip op. at 8 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[7] *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012).

[8] Id. at 70 (explaining that Board had "failed to give a reasoned justification for departing from its precedent" and that "[o]n remand, the Board must either conform to its precedent . . . or explain its return to the rule it followed in its earlier decisions").

employer's duty to bargain) and impossible to "reconcile[] with the Board's [statutory] responsibility."[9]

As Member Pearce and I explained in our *Raytheon* dissent, however, it is the majority position that is flatly contrary to the Supreme Court's decision in *NLRB v. Katz*, 369 NLRB 736 (1962),[10] and impermissible as a policy choice, given the stated aim of the National Labor Relations Act to "encourage the practice and procedure of collective bargaining."[11] Permitting employers to make discretionary unilateral changes, without a union's prior binding consent, undermines collective bargaining under any circumstances—regardless of what previously may have been permissible by mutual agreement.

II.

It serves no purpose now, however, to reargue the merits of *Raytheon*. I adhere to my dissenting view there. My focus today is on a distinct aspect of *Raytheon*: its overruling of *Dupont 2016* without first providing the union parties in *this* case with notice and opportunity to be heard. Just like the majority's approach in *Boeing*, the approach taken by the *Raytheon* majority violated administrative due process—and so *Raytheon* should be revisited, instead of being applied here.[12]

The Board is undeniably required to observe due process, as defined by the Constitution and Section 554(c) of the Administrative Procedure Act (APA), which requires federal agencies to "give all interested parties opportunity for . . . the submission of facts [and] arguments . . . and hearing and decision on notice."[13] Notice and an opportunity to be heard are essential requirements of due process, as an early Supreme Court decision involving the Board illustrates.[14] And charging parties in a Board case, such as the Unions here, have a protectable due-process interest, as illustrated by the Supreme Court's *Scofield* decision, which held that the charging party is entitled to seek judicial review of an adverse Board order and to intervene in an appellate reviewing proceeding in order to defend a favorable Board order.[15]

The Unions in this case, then, were entitled to know that the *Raytheon* Board contemplated overruling *DuPont 2016* (and stripping the Unions of their victory in that case) and were entitled to be heard by the Board before it reached its decision. The "right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'"[16] The Board could easily have issued a notice and invitation to file briefs, as it has done in many cases.[17] Similarly, nothing prevented the Board from seeking a remand of this case from the District of Columbia Circuit before (not after) *Raytheon* was decided, which would have given the *DuPont* parties notice that the issue was under reconsideration and an opportunity to defend their position.[18] Alternatively, the *Raytheon* majority could have opted to make their new interpretation of the law prospective only in its effect, so as not to disturb the vested interests of the parties in *DuPont* while the case remained active and under consideration by the Court of Appeals.[19] Instead, the *Raytheon* majority cut corners and secretly readjudicated the rights of the parties in *DuPont*—not just unwisely and unfairly, but improperly.

III.

For all of the reasons offered here, and in my *Raytheon* dissent with Member Pearce, I would adhere to the Board's 2016 decision in this case and find that the Respondent violated Section 8(a)(5), as alleged.[20]

[9] *Raytheon*, supra, 365 NLRB No. 161, slip op. at 1.

[10] In Katz, the Supreme Court rejected the argument that an employer's discretionary, unilateral merit wage increases were *not* a violation of the statutory duty to bargain, because they were consistent with the employer's longstanding past practice. 369 U.S. at 746–747. A "continuation of the status quo" of discretionary unilateral action, the Court explained, was "tantamount to an outright refusal to negotiate … and therefore a violation of [Sec.] 8(a)(5)" of the Act. Id.

[11] National Labor Relations Act, Sec. 1, 29 U.S.C. §151.

[12] See, e.g., *Enloe Medical Center*, 346 NLRB 854, 855–856 (2006) (granting reconsideration in part, based on due process grounds).

[13] 5 U.S.C. §554(c). See, e.g., *Independent Electrical Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 552 (5th Cir. 2013) (applying principles of "administrative due process, reflecting constitutional standards," and citing APA to find that respondent employer was entitled to notice of legal theory of liability applied by Board). See also *International Telephone & Telegraph Corp. v. Local 134, Int'l Broth. of Electrical Workers*, 419 U.S. 428, 448 (1975) (the "Board's procedures are, of course, constrained by the Due Process Clause of the Fifth Amendment").

[14] *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 218–219 (1938) (Board violated due process by invalidating collective-bargaining agreement without first making signatory union party to Board proceeding). See generally *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 797 fn. 4, 799 (1996).

[15] *International Union, UAW v. Scofield*, 382 U.S. 205 (1965).

[16] *Richards v. Jefferson County, Alabama*, supra, 517 U.S. at 799, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

[17] See *Boeing*, supra, 365 NLRB No. 154, slip op. at 31 (dissenting opinion) (collecting cases).

[18] See, e.g., *E.I. du Pont de Nemours*, 274 NLRB 1104, 1104 (1985) (subsequent history omitted) (Board decision reconsidering prior decision: Board requested remand from court of appeals, case was remanded, charging party was permitted to intervene, and parties were invited to file statements of position).

[19] See, e.g., *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. at 11–12 (2016); *American Baptist Homes of the West d/b/a Piedmont Gardens*, 362 NLRB 1135, 1140 (2015); *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 1127, 1139–1140 (2014).

[20] The majority observes that the Unions did not raise a due-process objection in the District of Columbia Circuit before this case was remanded. But in *Boeing*, supra, an analogous case, the majority actually seized on the charging party union's opposition to remand from the Ninth

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Lauren McFerran, Member

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Circuit as a reason not to permit the union to intervene before the Board. 366 NLRB No. 128, slip op. at 2–3. Surely, then, the majority must concede that the Unions should be free to raise the due-process objection before the Board. On that score, the Board apparently failed to solicit statements of position from the parties here, following the remand, as is frequently done. In any case, the Unions remain free to raise the due-process issue to the Board on a timely motion for reconsideration of this decision under Sec. 102.48(c) of the Board's Rules and Regulations.