E.I. Du Pont De Nemours and Company *and* Ampthill Rayon Workers, Inc., Local 992 International Brotherhood of Dupont Workers.

E.I. Du Pont De Nemours and Company *and* Freon Craftsman Union, Local 788, International Brotherhood of Dupont Workers.

E.I. Du Pont De Nemours and Company *and* International Brotherhood of Dupont Workers (IBDW), Local 593, Old Hickory Employees Council. Cases 05–CA–090984, 09–CA–091793, and 26–CA–092629.

September 4, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On January 1, 2013, the Respondent implemented certain unilateral changes to its company-wide Dental Assistance Program (DAP) and Medical Care Assistance Program (MEDCAP) retirement benefit plans. These changes affected coverage for the Respondent's Medicare-eligible retirees (MERs) and their covered dependents. At the time, DAP and MEDCAP covered all of the Respondent's employees nationwide hired before January 1, 2007,[1] including the approximately 1400 employees represented in separate bargaining units by the Charging Party Unions[2] in this consolidated proceeding. One of the conditions on which the Respondent had offered, and the Unions had accepted, the unit employees' participation in DAP and MEDCAP was that the Respondent reserved the right to make changes to the plans or to terminate them entirely. Exercising that reserved right, the Respondent made at least 50 unilateral changes to DAP and MEDCAP over the years, without objection by the Unions. Nevertheless, the Unions challenged the 2013 changes, and the judge found that the Respondent violated Section 8(a)(5) of the Act by implementing them unilaterally.

In *DuPont I*, supra, we found that the Respondent's December 2006 unilateral changes to MEDCAP and DAP at its Ampthill, Virginia facility were lawful because Local 992 waived its right to bargain over those changes. As explained below, the record in this case similarly establishes, based on the language of the parties' collective-bargaining agreements, the parties' bargaining history and their past practice, that Local 992 and the other Charging Party Unions in this proceeding waived their right to bargain over the changes implemented by the Respondent in 2013. Accordingly, the Respondent made those changes lawfully, and we shall dismiss the complaint.[3]

FACTS

Background

The Respondent manufactures synthetic fibers and related products at various facilities throughout the United States. In 2013, one or another of various unions represented approximately 3700 of the Respondent's 34,000 employees nationwide.

The three facilities involved in this case are located in Richmond, Virginia; Nashville, Tennessee; and Louisville, Kentucky.[4] The Respondent employs approximately 2500 employees at the Richmond facility, of which approximately 1170 are hourly production and maintenance (P&M) workers and clerical, technical and office (CT&O) workers that Local 992 has represented in separate bargaining units for over 50 years. In 2013, the collective-bargaining agreement between the Respondent and Local 992 for the P&M unit had been in effect since September 1, 2012, and the agreement for the CT&O unit had been in effect since October 1, 2000. So far as this proceeding is concerned, the provisions of these agreements are identical. Accordingly, for the sake of convenience, we shall refer to the two agreements at the Richmond facility in the singular.

[1] Effective December 20, 2006, the Respondent limited eligibility for retiree benefits under DAP and MEDCAP to employees hired before January 1, 2007, and their covered dependents. See *E.I. DuPont de Nemours and Co.*, 367 NLRB No. 145, slip op. at 3 (2019) (*DuPont I*).

[2] The Charging Party Unions are Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers (Local 992); Freon Craftsman Union, Local 788, International Brotherhood of DuPont Workers (Local 788); and International Brotherhood of DuPont Workers (IBDW), Local 593, Old Hickory Employees Council (Local 593).

[3] On December 16, 2013, 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.

[4] The Richmond facility is located in Ampthill, Virginia, which is close to Richmond. That plant is sometimes referred to as the Spruance facility. The Nashville facility is located in the Old Hickory section of Nashville and is sometimes referred to as the Old Hickory plant. We will refer to the facilities as the Richmond, Nashville, and Louisville facilities.

The Respondent employs approximately 170 individuals at its Louisville facility. Approximately 96 of these employees are hourly production, maintenance, and clerical employees represented by Local 788. A predecessor union to Local 788, the Neoprene Craftsmen's Union (NCU), represented production and maintenance employees at this facility for approximately 50 years. In June 2002, the NCU voted to affiliate with the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) and became PACE Local 5-2002. In April 2005, PACE merged with the United Steelworkers of America and became USW. Then, in May 2010, the production and maintenance employees at the Louisville facility voted to disaffiliate from the USW and form Local 788. Local 788 adopted its predecessor's collective-bargaining agreement with the Respondent, effective September 7, 2010.

Finally, the Respondent employs approximately 240 individuals at its Nashville facility. Approximately 120 of these employees are hourly production and maintenance workers in a bargaining unit that has been represented for more than 50 years by Local 593. The most recent collective-bargaining agreements between the Respondent and Local 593 are dated April 7, 1976; February 13, 1987; and July 25, 1995. The 1995 collective-bargaining agreement is still in effect.

At all relevant times, the Respondent has maintained company-wide employee benefit plans (as opposed to site-specific or regional plans)[5] for all its employees in the United States, regardless of whether they are represented by a labor organization. Approximately 80,000 retirees and their covered dependents also participate in the Respondent's company-wide benefit plans. This company-wide system of benefits allows all of the Respondent's employees, regardless of location, job title, or union affiliation, to receive the same benefits based on years of service and other criteria. Also, this benefit system makes it easier for the Respondent to administer the plans and comply with applicable legal requirements, and it provides significant economies of scale that allow the Respondent to offer plan participants lower premiums and better service. Nevertheless, the Respondent has regularly informed the Unions that it would negotiate separate plans for union-represented employees if requested to do so. The Unions, however, have consistently agreed to participate in the company-wide plans.

Each of the Respondent's company-wide benefit plans contains a "reservation-of-rights" provision. These provisions state that the Respondent retains the right to modify or terminate the benefit plan at its discretion. The collective-bargaining agreements applicable to the Respondent's union-represented worksites contain an "Industrial Relations Plans and Practices" (IRP&P) article. Section 1 of the IRP&P article lists company-wide benefit plans available to employees at the worksite. Consistent with the reservation-of-rights provisions in those plans, the IRP&P article recognizes the Respondent's right to make changes to the listed benefit plans and to do so unilaterally, subject to certain restrictions set forth in the IRP&P article and the benefit plan documents themselves.

DAP and MEDCAP

The Respondent created DAP in 1976 and offered it nationwide to eligible employees and retirees. The DAP plan document and accompanying summary plan description both contained reservation-of-rights provisions that reserved to the Respondent the right to suspend, modify, or terminate DAP at any time. Subsequent versions of the DAP plan document and summary plan description have included virtually identical reservation-of-rights provisions. Specifically, the reservation-of-rights language in the DAP plan document stated: "The Company reserves the sole right to amend or discontinue the 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."

At the Richmond, Nashville, and Louisville facilities, the Respondent presented the Unions with the DAP plan document and offered the unit employees the opportunity to participate in DAP on the same basis as nonunion employees, subject to the terms of the DAP plan document. Each of the Unions accepted this offer. More specifically, at the Richmond facility, Local 992 agreed to accept DAP on the Respondent's terms after the Respondent rejected Local 992's proposal to bargain DAP on a local basis.[6] DAP was then added to the list of plans in the IRP&P article of the parties' contract. Similarly, at the Louisville facility, Local 788's predecessor union agreed to participate in DAP, and DAP was added to the list of available benefit plans in the IRP&P article of the parties' 1976 collective-bargaining agreement. And at the Nashville facility, DAP was added to the list of IRP&P plans in the 1976 agreement between the Respondent and Local 593.

[5] Before MEDCAP was introduced at the Richmond facility in the 1980s, however, the unit employees at that facility were covered by a site-specific hospital and medical-surgical plan.

[6] During a meeting in March 1976, a Local 992 representative asked the Respondent whether Local 992 could bargain over DAP on a local basis. A representative of the Respondent stated that since DAP is a company-wide plan, the Respondent could not agree to change the plan. The Respondent told the Union that it would be willing to seriously consider and bargain over local plan alternatives.

Again, the IRP&P article in each of these contracts included language acknowledging the Respondent's right to make unilateral changes to benefit plans listed in that article.

Local 788's predecessor and Local 593 used the following language in Section 1 of their IRP&P articles: "All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the Company shall continue, *subject to the provisions of such Plans*" (emphasis added). Local 992 used similar language in its IRP&P article, but added a provision stating 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 DAP reservation-of-rights language has remained virtually unchanged since 1976, and the Respondent's union-represented employees have participated in DAP on the same basis as the Respondent's nonunion employees.

In 1983, the Respondent created MEDCAP, a company-wide healthcare plan, and offered it to its employees and retirees nationwide. Each iteration of the MEDCAP plan document and summary plan description has included the same reservation-of-rights provision, 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." Further, the MEDCAP summary plan description states: "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."

The Respondent offered Local 593, 992, and 788's predecessor the opportunity to participate in MEDCAP subject to the above-stated reservation of rights, and each Union accepted. Specifically, in 1983, Local 593 agreed to participate in MEDCAP, and MEDCAP was added to the Hospital and Medical-Surgical (HMS) article of the parties' collective-bargaining agreement through a supplemental agreement. The HMS article required the Respondent to provide coverage to employees and their covered dependents "as set forth in the terms and conditions of the Summary Plan Description," which included the reservation-of-rights clause. Local 788's predecessor reached a similar agreement in 1984 regarding MEDCAP coverage; MEDCAP was added to the HMS provision of the collective-bargaining agreement; and the HMS article similarly required the Respondent to provide coverage "as set forth in the terms and provisions of the Summary Plan Description," which again contained the reservation-of-rights clause.[7]

As described more fully in *DuPont I*, supra, slip op. at 2, 6, the Respondent and Local 992 bargained specifically over MEDCAP's reservation-of-rights clause. During a meeting in March 1986, Local 992 proposed to delete that clause and retain the plan without it. The Respondent rejected this proposal, stating that the reservation-of-rights clause "is standard language in all corporate plans" and that it would not present a corporate plan without the clause, but adding that employees did not have to choose "the Aetna plan" if they were concerned.[8] At another meeting, Local 992 asked the Respondent why MEDCAP included a reservation-of-rights clause when the Blue Cross-Blue Shield Plan did not have one. The Respondent replied that MEDCAP was a company-wide plan and Blue Cross-Blue Shield was a local plan. After some 10 months of negotiations, Local 992 finally accepted MEDCAP, including its reservation-of-rights clause.

Local 992 and the Respondent then discussed where to refer to MEDCAP in their collective-bargaining agreement. Local 992 proposed including it in the IRP&P article, where it is recognized that the Respondent has the right to make changes unilaterally. The Respondent rejected this proposal because it did not want to be restricted by the 1-year notice language in the IRP&P article. 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 that the Respondent "may make available to employees alternate hospital medical-surgical coverage plans, and any employee may elect such alternate

[7] At all relevant times, art. II, sec. 3 of Local 992's collective-bargaining agreement with the Respondent 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 part of this Agreement." Further, Local 788's collective-bargaining agreement with the Respondent contained the following provision: "This Agreement supersedes all previous agreements, understandings, practices, and interpretations which are incompatible or inconsistent with any provisions herein contained and this Agreement constitutes the entire Agreement between the parties hereto as of the execution date thereof. However, any amendment 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."

[8] Record evidence shows that, at the Richmond facility, the parties often referred to MEDCAP as the Aetna Plan because Aetna was the plan administrator for the Richmond facility. The parties also 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 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).

coverage in lieu of the coverage described in the above sections of this Article."

BeneFlex

In 1991, the Respondent created a new cafeteria-style benefits plan for active employees called the BeneFlex Flexible Benefits Plan (BeneFlex). BeneFlex contains several subplans, including medical and dental benefit plans. In the early 1990s, the Respondent offered the Unions the opportunity for unit employees to participate in BeneFlex on the same basis as nonunion employees, subject to the terms of the BeneFlex documents. Local 992, 593, and 788's predecessor all agreed to have their members participate in BeneFlex.

Following the Unions' agreement to participate in BeneFlex, the Respondent and the Unions deleted references to MEDCAP and DAP from their collective-bargaining agreements. Locals 593 and 992 deleted their HMS articles and the references to DAP in their IRP&P articles. Local 788's predecessor deleted the reference to MEDCAP in its HMS article, and deleted the reference to DAP in its IRP&P article sometime between 1997 and 2006. Once unit employees began receiving dental and medical benefits under BeneFlex, they became ineligible to continue receiving benefits through DAP and MEDCAP. However, DAP and MEDCAP continued to cover all current and future retirees (and their covered dependents), provided they continued to meet the eligibility requirements in the respective plans, and the DAP and MEDCAP plan documents continued to include the same reservation-of-rights language described above.[9] The medical and dental benefits offered through BeneFlex mirror those under MEDCAP and DAP, and changes to the BeneFlex dental and medical plans have been carried over and implemented in DAP and MEDCAP.

The Respondent's Unilateral Changes to DAP and MEDCAP Prior to 2013

The Respondent assesses its company-wide benefit plans and plan offerings on an ongoing basis and modifies the plans or plan offerings as it deems warranted. The Respondent typically announces changes to benefit plans in the late summer or fall of each year, prior to the open enrollment period when employees and retirees may select their benefit options for the upcoming year. The changes become effective on January 1 of the next year. Before the Respondent makes these modifications, it will typically meet with each union at an impacted worksite. During these meetings, the Respondent will notify the union of its intention to make the changes and will discuss the changes and attempt to answer questions. However, the Respondent has not sought the agreement of any of the Charging Party Unions before implementing the changes. To the contrary, the Respondent has often informed these Unions that it would not bargain over changes to its company-wide plans (including DAP and MEDCAP) because company-wide plans apply uniformly to all employees, nonunion and union alike. However, the Respondent has consistently expressed a willingness to bargain over employee benefits and to consider any site-specific benefit plan proposals that the three Unions wished to make.

From 1976 to 2012, the Respondent announced and implemented numerous company-wide changes to DAP and MEDCAP. Indeed, since 1987, the Respondent has made at least 50 such changes, including changes in premiums, deductibles, co-pays, annual plan limits, benefit options, terms of coverage, and participant eligibility for working spouses and dependents. Some of the changes increased benefits, but for the most part, the changes reduced or restricted benefits.

On some occasions, the three Unions requested information from the Respondent about the changes and demanded to bargain about them. As more fully detailed in the judge's decision, the Respondent often provided the requested information. In a few instances, it agreed to discuss changes. However, the Respondent rebuffed bargaining demands on the ground that it was entitled to make the changes under the applicable collective-bargaining agreement and plan documents. For many years, the Unions did not challenge these refusals to bargain by filing grievances or unfair labor practice charges or by objecting in any other way. Local 992 filed an unfair labor practice charge in 2007 regarding December 2006 unilateral changes to MEDCAP and DAP.[10] Between 2001 and 2007, Local 788's predecessors filed unfair labor practice charges against the Respondent, but as the judge found, these charges related to changes to BeneFlex, not to DAP or MEDCAP. Finally, the record does not conclusively establish that Local 593 previously filed a charge about changes to MEDCAP or DAP: there is conflicting record evidence as to whether it did, including testimony that it did not.

The Respondent's January 2013 Changes

In 2012, the Respondent decided to make additional changes, effective January 1, 2013, to DAP and MEDCAP for Medicare-eligible retirees and their covered dependents. Specifically, the Respondent decided to provide secondary medical and dental benefits to its MERs and their

[9] As discussed in *DuPont I*, however, in 2006 the Respondent limited DAP and MEDCAP retiree coverage to employees hired before January 1, 2007.

[10] We have found those changes lawful. See *DuPont I*, above.

covered dependents through a Health Reimbursement Agreement (HRA). Instead of providing those benefits directly through DAP and MEDCAP, the Respondent would now provide each Medicare-eligible retiree with funds to be used to purchase secondary coverage on the open market.[11]

The Respondent gave Locals 593, 788, and 992 advance notice of these changes. Each Union objected. In October 2012, each Union wrote to the Respondent to demand that the changes be rescinded. The Respondent rejected these requests and stated that it believed it was not required to bargain with the Unions about the changes. Subsequently, the Unions filed unfair labor practice charges, which resulted in a consolidated complaint containing the instant 8(a)(5) and (1) allegations. The parties stipulated, and accordingly it is undisputed, that the 2013 changes to MEDCAP and DAP are not covered by the parties' contractual grievance arbitration procedures.

The Judge's Decision and the Parties' Exceptions

The judge found that the Respondent violated Section 8(a)(5) and (1) with respect to each Union by unilaterally implementing the January 2013 changes to MEDCAP and DAP. In his view, neither the provisions of the applicable collective-bargaining agreements, the parties' bargaining history, or their past practice was sufficient to establish that Locals 593, 788, and 992 had clearly and unmistakably waived their right to bargain over the January 2013 changes. The Respondent relevantly excepted. For the reasons stated below, we find merit to these exceptions.[12]

DISCUSSION

Employers have a duty to bargain in good faith with union representatives about mandatory subjects of bargaining, specifically, wages, hours, and 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 under the Act. *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), 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).[13] 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 the parties' 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

[11] With this change, which applied company-wide, beginning January 1, 2013, and on January 1 of each year thereafter, each MER in MEDCAP and DAP would have his or her HRA account credited $1,200 for medical benefits and $200 for dental benefits. The retirees' Medicare-eligible spouses or partners would have the same amounts credited to the HRA account. The HRA proceeds would then be available to these individuals to purchase medical and dental insurance on the open market through a third-party broker (a separate entity not owned or operated by the Respondent). Thus, pursuant to the 2013 changes, MERs would enroll in coverage of their choice within the options provided under MEDCAP and DAP, as amended. The third-party broker, Extend Health, would assist retirees in selecting an insurance company and plan. Unused amounts in MERs' accounts would roll over and be available in subsequent years.

The coverage purchased through HRA proceeds is "secondary" because primary coverage is available through Medicare. These changes do not apply to retirees and their covered dependents until they become eligible for Medicare. Retirees and dependents not yet eligible for Medicare continue receiving medical and dental coverage under MEDCAP and DAP under the same terms as existed prior to the implementation of the 2013 changes.

[12] We find no merit to the General Counsel's exception to the judge's factual finding that Local 992 agreed to participate in MEDCAP in 1986. The General Counsel argues that Local 992 only agreed to participate in the "Aetna Plan," but, as noted above, the record reflects that the parties referred to MEDCAP as the "Aetna Plan." The General Counsel also contends that the judge erred in finding that Local 788's predecessors' unfair labor practice charges from 2001 to 2007 only challenged the Respondent's unilateral right to change BeneFlex, not MEDCAP and DAP. This contention is also without merit. Although the Respondent often implemented the same changes to MEDCAP and DAP as it did to BeneFlex, the parties' relevant stipulations do not mention MEDCAP or DAP, and they demonstrate that the 2001–2007 charges related solely to BeneFlex.

[13] 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 agreements 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.

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 consider whether these factors, taken together, establish that the Unions at each of the three facilities clearly and unmistakably waived their right to bargain over the 2013 changes to DAP and MEDCAP. Having conducted that analysis, we find that the Unions did waive bargaining over those changes. Accordingly, we will dismiss the complaint.[14]

Contract Language

The Board has long held that express provisions in parties' collective-bargaining agreements can demonstrate waiver. *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).[15]

As discussed above, the MEDCAP and DAP plan documents and summary plan descriptions all included provisions specifically granting the Respondent the right to unilaterally modify the terms of those benefit plans. That reservation-of-rights language was referenced in the collective-bargaining agreements in force between the parties at the time MEDCAP and DAP were implemented. Thus, Local 593, Local 992, and the predecessor to Local 788 all agreed that unit employees' participation in DAP (and other company-wide plans) was "subject to the provisions of such Plans."[16] In addition, all three Unions agreed to include DAP among the plans listed in the IRP&P article of the respective collective-bargaining agreements, and

[14] 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. We also find it unnecessary to pass on the Respondent's equitable estoppel defense.

[15] 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 collective-bargaining agreement 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 expressly incorporates that language by reference, or at least expressly 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 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 Unions waived bargaining over the changes at issue based on an amalgam of factors makes it unnecessary for us to do so here.

[16] The judge erred insofar as he found that the Local 992 agreements never referenced DAP. To the contrary, the Local 992 agreement included DAP among the company-wide plans listed in the IRP&P article.

Contrary to the judge, the contractual waiver of bargaining rights established by the agreements covering the Louisville facility applied to Local 788 after it became the bargaining representative and, critically, adopted its predecessor's collective-bargaining agreement with the Respondent. See *University of Pittsburgh Medical Center*, 325 NLRB 443, 443 fn. 2 (1998), enfd. 182 F.3d 904 (3d Cir. 1999); see also *Atrium Plaza Health Care Center*, 317 NLRB 606, 606 (1995), enfd. 101 F.3d 107 (2d Cir. 1996). *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 284 fn. 8 (1972), and *American Seating*, 106 NLRB 250 (1953), cited by the judge, are not to the contrary. The issue addressed there was whether a successor union was *automatically* bound by a predecessor union's unexpired collective-bargaining agreement, not whether, as here, a successor union that agrees to adopt the predecessor union's agreement is bound. *Eugene Iovine, Inc.*, 356 NLRB 1056, 1056 fn. 3 (2011), is also distinguishable, as the issue addressed there was whether a successor union was bound by the predecessor union's past practice of acquiescing in unilateral changes. The issue we address here is express waiver.

We recognize that Local 788's contract with the Respondent has never mentioned MEDCAP or DAP. Nevertheless, we find that, in the circumstances of this case, the prior contracts between the Respondent and Local 788's predecessors are probative evidence of waiver, especially because Local 788 continued to participate in DAP and MEDCAP without ever seeking to renegotiate those plans. We also note that there was substantial carryover of union leadership going as far back as the first predecessor Union; Local 788's predecessors had acquiesced in the Respondent's pre-2013 changes to DAP and MEDCAP; and Local 788 acquiesced in all of the Respondent's changes to DAP and MEDCAP between 2010 (when it disaffiliated from its immediate predecessor, the Steelworkers Union) and 2012.

that article contains language recognizing the Respondent's right to act unilaterally with respect to the listed plans. Regarding MEDCAP, the agreements between the Respondent and both Local 593 and the predecessor to Local 788 stated that unit employees' participation in MEDCAP was "subject to" the provisions of the MEDCAP summary plan description. The pertinent agreement between Local 992 and the Respondent broadly granted the Respondent the right to "make available to employees alternate hospital medical-surgical coverage plans," and the parties' bargaining history makes clear that they intended this provision to grant the Respondent the same right to make changes to MEDCAP that it made at its other facilities and to do so unilaterally pursuant to the reservation-of-rights provisions in the MEDCAP plan document and summary plan description, which Local 992 accepted after prolonged bargaining specifically over those provisions.[17] See *DuPont I,* above.

Contractual references to MEDCAP and DAP were deleted following the Unions' agreement to participate in BeneFlex, 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 these plans, 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 collective-bargaining agreements with the Unions' acceptance of BeneFlex, the Respondent continued to make numerous unilateral changes to DAP and MEDCAP without objection from the Unions. In these circumstances, we find that the deletion of references to DAP and MEDCAP from the parties' collective-bargaining agreements when BeneFlex was implemented does not deprive those references of their probative force and value in determining whether the Unions waived their 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.[18] See *DuPont I*, above.

[17] As discussed above, Local 992 agreed to have its members participate in MEDCAP after lengthy bargaining over the MEDCAP reservation-of-rights language. Local 992 suggested that the parties refer to MEDCAP in the IRP&P article of their collective-bargaining agreement, where, Local 992 stated, "people recognize Management has a right to change without Union agreement." The Respondent, however, did not want to refer to MEDCAP in the IRP&P article because of the 1-year notice language in that article. Ultimately, the parties agreed to refer implicitly to MEDCAP in the HMS article, as explained above and in *DuPont I*. 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 2013 changes to MEDCAP.

[18] Citing *Southern Nuclear Operating Co*., 348 NLRB 1344 (2006), enf. denied in relevant part 524 F.3d 1350 (D.C. Cir. 2008), *Mississippi Power Co.*, 332 NLRB 530 (2000), enf. denied in relevant part 284 F.3d 605 (5th Cir. 2002), and *Amoco Chemical Co*., 328 NLRB 1220 (1999), enf. denied 217 F.3d 869 (D.C. Cir. 2000), the judge found that the contractual references to the plans' reservation-of-rights terms were insufficient to establish an express waiver. Contrary to the judge, these cases are distinguishable.

First, none of these cases involved 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. That is not the case here. The (pre-BeneFlex) collective-bargaining agreements at all three facilities referred to DAP, and they did so in the IRP&P article, where the Respondent's right to act unilaterally is expressly recognized. As for MEDCAP, two Unions' agreements expressly referred to MEDCAP and provided that coverage under MEDCAP was subject to the terms and conditions of the summary plan description, which contained a reservation-of-rights clause. The reference to MEDCAP in Local 992's agreement was implicit, but the evidence that Local 992 consciously waived its right to bargain over changes to MEDCAP is compelling, as explained above.

In *Mississippi Power*, 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, in contrast, all three Unions expressly accepted the Respondent's reservation of the right to change DAP unilaterally; Local 992 bargained over and expressly accepted the reservation-of-rights clause in the MEDCAP plan; and MEDCAP was accepted by Local 593 and Local 788's predecessor subject to the terms and conditions of the summary plan description, which contains a reservation-of-rights clause.

In *Amoco Chemical Co*., the Board found that the reservation-of-rights clause contained in the plan document did not constitute a waiver of the unions' right to bargain. The Board observed that the labor contracts did not specifically incorporate the plan documents, only three of the contracts even mentioned the plan documents, there was no evidence that the parties ever bargained about the reservation-of-rights language, and there was little evidence that the unions were even aware of the language. Here, in contrast, the parties specifically agreed to include DAP and MEDCAP in the contracts; they agreed to refer to DAP in the contract article (IRP&P) that recognizes the Respondent's right to act unilaterally; two Unions accepted MEDCAP subject to the terms and conditions of the summary plan description (including the reservation-of-rights clause); and Local 992 was clearly aware of, and specifically bargained over, MEDCAP's reservation-of-rights language.

Finally, we observe that none of the Board decisions cited above was enforced by the court of appeals. In denying enforcement in *Southern Nuclear Operating Co*. and *Amoco Chemical Co*., the United States Court of Appeals for the District of Columbia Circuit held that when a contract refers to a benefit plan, the plan document, including the reservation-of-rights clause, is incorporated into the contract. See fn. 15, supra. Again, while 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*

We find that the language in the parties' agreements discussed above supports a finding that the Unions waived their right to bargain over the 2013 changes to MEDCAP and DAP. As the Board recognized 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 reference 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 the eligibility of Employees to participate 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 agreements identified MEDCAP and DAP, 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 agreements' references to MEDCAP and DAP support a finding of waiver.[19]

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 each Union's negotiations with the Respondent over DAP and MEDCAP supports a finding of waiver.

First, for the reasons fully explained in *DuPont I*, bargaining history strongly supports a finding that Local 992 waived its right to bargain over DAP and MEDCAP. Local 992 sought to bargain over DAP on a local basis, the Respondent refused to do so,[20] and Local 992 agreed to accept DAP on the Respondent's terms. 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. Local 992's agreement to participate in MEDCAP and DAP, including the reservation-of-rights provisions in the plan documents and summary plan descriptions, establishes that it "consciously yielded" its position and agreed that the Respondent had the right to act unilaterally with respect to both MEDCAP and DAP. See *Southern Florida Hotel Assn*., 245 NLRB 561, 567–568 & fn. 22 (1979) (finding that a 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).[21]

The Respondent's bargaining history with the other Unions involved in this case also supports a finding of waiver. As explained above, the Respondent offered Local 593 the opportunity to have the employees it represents

Operating Co. in a future appropriate proceeding, our finding that the Unions waived bargaining based on an amalgam of factors makes it unnecessary for us to do so here.

[19] 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 plans covered all employees, not just bargaining-unit employees, the exclusion of such changes from grievance arbitration supported 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.* As noted above, the parties stipulated that the 2013 changes to MEDCAP and DAP are not covered by the parties' contractual grievance arbitration procedures. Thus, the 2013 changes to MEDCAP and DAP were not arbitrable, and the Respondent insisted on the right to make unilateral changes to the plans to preserve its ability to maintain their status as company-wide plans offered on a uniform basis to represented and unrepresented employees alike.

[20] The Respondent explained that "since [DAP] 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."

[21] Contrary to the judge, Local 992's bargaining history is evidence of waiver even though the parties did not agree to include the reservation-of-rights provision in their collective-bargaining agreement. (As a factual matter, the parties did effectively include DAP's reservation-of-rights provision in the CBA by adding DAP to the contract's IRP&P article, where the Respondent's right to make changes unilaterally is expressly recognized.) As stated above, the Respondent offered DAP and MEDCAP to Local 992 subject to the condition that the Respondent reserved the right to make changes as described in the plan documents, and Local 992 agreed to participate in those plans on that basis after the parties fully discussed the issue.

at the Nashville facility participate in DAP on the same basis as nonunion employees, subject to the terms of the DAP plan document, which contained the reservation-of-rights clause. Local 593 agreed, and the parties added DAP to the IRP&P article of their collective-bargaining agreement, where the Respondent's right to act unilaterally is expressly recognized. The same process took place with Local 788's predecessor at the Louisville facility: the Respondent offered Local 788's predecessor the opportunity to participate in DAP subject to the terms of the DAP plan document, Local 788's predecessor agreed, the parties' collective-bargaining agreement noted that participation in DAP was subject to the provisions of the plan, and DAP was added to the IRP&P article of the parties' agreement.[22] Regarding MEDCAP, Local 593 agreed to participate in MEDCAP, and MEDCAP was added to the HMS article of the parties' collective-bargaining agreement, which stated that MEDCAP coverage was provided "as set forth in the terms and conditions of the Summary Plan Description," which included the reservation-of-rights clause. A similar agreement was reached with Local 788's predecessor, and MEDCAP was similarly added to the HMS provision of the parties' agreement, subject to "the terms and provisions of the Summary Plan Description (SPD)," with its reservation-of-rights language.

In sum, the parties' bargaining history makes clear that the Unions, in accepting DAP and MEDCAP, fully and consciously agreed to accept these plans subject to plan documents that included reservation-of-rights clauses reserving to the Respondent the right to change the terms of the plans or to terminate the plans altogether and to do so unilaterally. Accordingly, we find that bargaining history also supports a finding of waiver.[23]

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 609, 609 (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 prior failure to object to a unilateral change can serve as a corroborating factor in a waiver analysis, see *Omaha World-Herald*, supra, 357 NLRB at 1872. We find these principles are applicable here.[24]

As discussed above, the record shows that, for decades, the Respondent implemented numerous changes to MEDCAP and DAP,[25] the Respondent made these changes unilaterally, and the Unions did not object to the Respondent's unilateral actions. The parties stipulated that the Respondent did not seek the Union's agreement before making changes to DAP and MEDCAP, and witnesses testified that the Respondent never bargained about these matters. The Unions' acquiescence in the unilateral changes is evidenced by their failure to file a grievance, an unfair labor practice charge or other protest over any of these changes from 1976 until, at the earliest, 2007 (when Local 992 filed what appears to have been its only charge). The multitude of prior, uncontested unilateral changes to MEDCAP and DAP strongly corroborate our finding of waiver. *Omaha World-Herald*, 357 NLRB at 1872

[22] The judge found that the history of bargaining between Local 788's predecessors and the Respondent could not support a finding of waiver as to Local 788. We disagree. Even though Local 788 did not itself bargain with the Respondent over DAP and MEDCAP when the Respondent introduced those plans (Local 788 did not then exist), its predecessor did so; Local 788 voluntarily bound itself to its predecessor's contract; there was substantial carryover of union leadership going as far back as the first predecessor Union; the unit employees represented by Local 788 continued to receive benefits under DAP and MEDCAP; and Local 788 never sought to renegotiate the terms of its participation in either benefit plan. Moreover, we are unaware of any precedent holding that a union, in such circumstances, could not be bound by the bargaining history of one of its predecessors. In these circumstances, we find that Local 788's predecessor's bargaining history supports our finding that Local 788 waived bargaining over the changes at issue here.

In finding that Locals 593 and 788 did not waive bargaining, the judge also relied on the fact that the record does not include relevant bargaining notes. We reject this finding because the record as a whole sufficiently describes the negotiations between the parties.

[23] Cases cited by the judge to support his contrary finding are distinguishable. They involve either ambiguous evidence of bargaining history and the effect of a contractual zipper clause (*General Electric Co*., 296 NLRB 844 (1989), enfd. 915 F.2d 738 (D.C. Cir. 1990)), inapposite facts regarding production of requested information during collective bargaining (*Davies Medical Center*, 303 NLRB 195 (1991) (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), enfd. 991 F.2d 803 (9th Cir. 1993)), or unilateral action outside the scope of the union's bargaining waiver (*Reece Corp*., 294 NLRB 448 (1989) (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 transfers of other work). Here, in contrast, the evidence of bargaining history is clear, establishing that the Respondent, at each facility, conditioned its offer to permit the unit employees to participate in DAP and MEDCAP on the Unions' acceptance of the terms of those plans, which included a reservation of the Respondent's right to modify or terminate each plan, and the Unions (or, in Local 788's case, its predecessor) agreed to accept DAP and MEDCAP on those terms, i.e., subject to plan documents that included a waiver of the right to bargain over changes to, or termination of, those benefit plans. And unlike in *Reece Corp.*, the challenged 2013 unilateral action was clearly within the scope of the Unions' waiver of their right to bargain over changes to DAP and MEDCAP.

[24] With respect to Local 788, we rely solely on its acquiescence to unilateral changes to MEDCAP and DAP after it became the bargaining representative of the unit employees in 2010. We find this past practice, in combination with the other factors cited above, sufficient to establish waiver.

[25] From 1987 to 2013, the Respondent made over 50 changes to DAP and MEDCAP.

(union's failure to protest employer's unilateral removal of employees under 50 years old from its pension plan supported a finding that union waived its right to bargain over employer's unilateral freezing of benefit accruals 4 years later).[26]

The judge found that although the Unions had acquiesced in most of the prior changes to MEDCAP and DAP, the parties had bargained about a few of those changes, and these "fluctuations" preclude a finding of waiver. We need not decide whether the judge's legal premise was correct—i.e., that a few "fluctuations" in an overall pattern of acquiescence would preclude a waiver finding—because he is wrong on the facts. There were no "fluctuations."

First, the judge erred in finding that the Respondent and Local 992 bargained over two "major . . . proposals to change healthcare coverage from 1985 to 1987." The exhibits cited by the judge in support of this finding show that the bargaining he referred to involved whether Local 992 should participate in the local Blue Cross-Blue Shield Plan instead of MEDCAP. It did not involve bargaining over changes to MEDCAP. Indeed, the record shows that when the Respondent announced changes to company-wide benefit plans, it would answer questions from Local 992, but it did not bargain with Local 992.

Second, the judge also erred in finding that Local 788 requested bargaining over changes to DAP and MEDCAP. Again, the meeting notes cited by the judge in support of his finding concern a different matter: Local 788's proposal to have its members participate in a different healthcare plan.[27]

Finally, the judge erred in finding that the Respondent bargained with Local 593 over changes to DAP and MEDCAP based on bargaining notes from 1984 regarding a proposed increase in premiums and changes to enrollment and claims forms. To the contrary, these bargaining notes indicate only that the Respondent *explained* why premiums increased and *notified* the union that employees needed to fill out enrollment forms by a certain date (and that more forms would be available). Nothing about the Respondent's conduct can reasonably be characterized as bargaining, let alone bargaining that would undercut its reservation of the right to unilaterally change company-wide benefits.[28]

At times, the Unions did request information about changes to DAP or MEDCAP, and the Respondent generally provided the information. However, the Unions' information requests were not requests to bargain, and the Respondent's willingness to furnish information about MEDCAP or DAP changes is not evidence that the Respondent bargained about the changes themselves. Cases in which the Board has found that an information request was tantamount to a bargaining request, 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 not refused to recognize any of the Unions. Further, after the Respondent provided the Unions with the requested information, it proceeded to implement the changes unilaterally. Thus, the Respondent's willingness to provide the Unions with information regarding changes to DAP and MEDCAP does not support a finding that the Respondent bargained with the Unions over those changes.

Response to Dissent

Our dissenting colleague acknowledges that this case is closely related to *DuPont I,* where the Board found that a waiver had been established as to the 2006 changes to MEDCAP and DAP, and she concedes that the same analysis is applicable here. Relying on her dissenting view in *DuPont I*, our colleague finds that no waivers have been shown on the facts presented here as well. Specifically, the dissent finds the contractual evidence wanting because the parties deleted references to MEDCAP and DAP from their agreements following the Unions' agreement to participate in BeneFlex; the current agreements do not refer to DAP and MEDCAP; and for Locals 992 and 788, certain contractual language, she contends, precludes any reliance on prior agreements or other "extra contractual documents." Further, the dissent finds the bargaining history

[26] Contrary to the judge, neither *Mt. Clemens General Hospital*, 344 NLRB 450 (2005), nor *California Pacific Medical Center*, 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.

[27] The meeting notes also memorialize a proposal put forward by the Respondent to have employees participate in a long-term insurance plan.

[28] Bargaining notes from 1993, cited by the judge, are also unavailing. That year, the Respondent announced to Local 593 that healthcare premiums would be split 80/20, but this did not demonstrate that the Respondent "recognized its bargaining obligation regarding the proportionate share of plan costs to be borne by the [Respondent] and employees," as the judge mistakenly found. To the contrary, this was simply an announcement of a change, not an invitation to bargain over the change. The judge also stated that the Respondent and Local 593 bargained over the elimination of "Prucare, a local health plan." This is irrelevant: the fact that the parties bargained regarding a local health plan does not support a finding that the Respondent bargained over changes to DAP or MEDCAP.

and past practice evidence wanting, both on its own terms and because some of that evidence predates the deletion of MEDCAP and DAP from the parties' agreements. In short, the dissent denies that the facts relating to each Union, even taken as a whole, are substantial evidence of "clear and unmistakable" waiver with respect to any of the Unions. We respectfully disagree, for the reasons stated above and in *DuPont I* and those set forth below.

As in *DuPont I,* our dissenting colleague fails to grapple with the reality that MEDCAP and DAP, as corporate-wide plans, were offered to the Unions at each of the three facilities subject to the Respondent's reservation of the right to alter or terminate the plans, and that the Unions accepted them on that basis. As we explained in *DuPont I,* this was necessarily so: if the Respondent provided different benefits under MEDCAP and DAP at the three facilities than elsewhere, MEDCAP and DAP would cease to be company-wide plans. Nothing in the parties' dealings remotely suggests that they ever agreed to alter the status of those plans as company-wide plans. Yet, when the Respondent made the company-wide changes to MEDCAP and DAP at issue here, the dissent insists that it could not lawfully implement those changes in the Richmond, Nashville and Louisville units without first bargaining with the Unions to agreement or impasse. Respectfully, it is the dissent, not we, whose position is unsupported by substantial evidence.

The dissent omits any mention of the Respondent's clearly stated position that while MEDCAP and DAP were offered solely as company-wide plans, the Respondent stood ready to negotiate separate benefit plans for its represented employees if the Unions so desired. We therefore reject the dissent's claim that the Respondent has "undermined the Unions' effectiveness as a bargaining representative by removing a mandatory subject of bargaining—future retirement health benefits—from the bargaining table." There is no basis for the dissent's implication that the Respondent would refuse to discuss site-specific plans should the Unions propose them. If anything, the Respondent's prior expressions of willingness to negotiate separate plans strongly suggest that the Respondent would agree to do so.

Second, we cannot agree with our colleague's assertion that the deletion of MEDCAP and DAP from the Respondent's agreements with each of the three Unions had the decisive significance she ascribes to it. As described in the facts, the parties at each of the three facilities agreed to delete references to DAP and MEDCAP from their agreements when BeneFlex took the place of these plans for active employees. It is undisputed, however, that the Respondent, at each of the three facilities, continued to offer MEDCAP and DAP benefits for retirees after the switch to BeneFlex for active employees.[29] 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 in 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, with respect to the Richmond and Louisville facilities, Article II, Section 3 of the parties' agreements requires a different result. That provision, which the dissent terms an "integration clause," generally provides that "[the] Agreement constitutes the entire agreement between the parties hereto as of the execution date hereof." Our colleague contends that these provisions preclude "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."

Initially, we observe that no party has advanced this argument, nor was it considered by the judge. There is thus 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' CBAs nor reinserted the MEDCAP and DAP reservation-of-rights clauses into them. Instead, we have found that the Unions' acceptance of these provisions, when they agreed that MEDCAP and

[29] *Tesoro Refining & Marketing Co.,* 360 NLRB 293 (2014), a case cited by the dissent, is plainly 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.

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 described above, we find that it does.

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' dealings with one another regarding these plans over the course of 43 years. Our colleague's effort to confine the analysis to the events and circumstances present in 2013, in contrast, does not.[30]

CONCLUSION

Here, as in *DuPont I*, we find that the parties' agreements, bargaining history, and past practice, taken together, make clear that the Respondent offered, and the Unions accepted, MEDCAP and DAP as company-wide 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 company-wide 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 2013 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 Unions prior to making these changes because the Unions had clearly and unmistakably waived their right to bargain over the changes. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 4, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting

This case is closely related to *E.I. DuPont de Nemours & Co.,* 367 NLRB No. 145 (2019) (*DuPont I*) (Member McFerran, dissenting), in which the Respondent eliminated future dental and healthcare retirement benefits known as DAP and MEDCAP for all incoming employees in 2007 without bargaining with Local 992 at the Respondent's Spruance facility in Richmond, Virginia.[1] In that case, a majority of the Board found, over my dissent, that the employees' union, Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of Dupont Workers (Local 992) had clearly and unmistakably waived its right to bargain over the elimination of those benefits—a mandatory subject of bargaining under the National Labor Relations Act.

The present case concerns the Respondent's further dismantling of active employees' future dental and healthcare retirement benefits. In 2013, the Respondent unilaterally eliminated future DAP and MEDCAP retirement benefits for *all* active employees upon becoming Medicare-eligible, including employees working at the Respondent's Richmond facility as well as employees working at the Respondent's Louisville, Kentucky, and Nashville, Tennessee facilities. In place of DAP and MEDCAP, the Respondent implemented a completely different system of providing such benefits to future retirees; essentially, for each employee, upon becoming eligible for Medicare, the Respondent would deposit into a Health Reimbursement Agreement (HRA) account $200 for dental benefits and $1200 for medical benefits, which the employee would then use to enroll in one of 75 participating insurance plans. In effect, the Respondent unilaterally extricated itself from the business of providing and administering employees' future dental and medical benefits and transferred those responsibilities to the employees themselves and third-party providers.

The Unions representing the Respondent's employees at its facilities in Richmond (again, Local 992), Louisville (Local 788), and Nashville (Local 593) objected to those unilateral changes. The Respondent, however, refused the Unions' demands to rescind the changes, claiming that the reservation-of-rights clauses in the applicable benefit plan documents authorized it to make the changes. The Unions then filed the unfair labor practice charges underlying this case. The majority, as it did in *Dupont I*, dismisses the complaint, finding that the Unions waived their right to

[30] The policy of encouraging the practice and procedure of collective bargaining referenced in Sec. 1 of the Act provides no support for the dissent's position in these circumstances. The parties bargained over the subject of health benefits for active employees and retirees, and they agreed that those benefits would be provided under company-wide plans, subject to the Respondent's reservation of the right to modify or terminate the plans. In our view, it is fully consistent with the policies of the Act to find waiver under these circumstances.

[1] Local 992, one of the Charging Party unions representing employees at the Richmond (Spruance) facility in this case, filed charges against the Respondent for failing to bargain on the 2006 change. The Board found, contrary to the judge, that Local 992 had waived its right to bargain over what indisputably concerned a mandatory subject of bargaining under the National Labor Relations Act. *E.I. DuPont de Nemours and Company,* 367 NLRB No. 145 (2019) (*DuPont I*) (Member McFerran, dissenting).

bargain over the 2013 changes. As in *DuPont I*, I disagree—finding waiver in this case is a misapplication and erosion of the "clear and unmistakable" waiver standard.

I.

As this case so closely resembles *DuPont I*, the same analytic framework set forth in my dissenting opinion in *DuPont I* necessarily applies. Under that framework, it is clear to me that the Respondent has not established that any of the Unions clearly and unmistakably waived its right to bargain over the Respondent's 2013 elimination of DAP and MEDCAP for all Medicare-eligible future retirees. As I explain in more detail below, the majority mistakenly 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 agreements. The absence of contractual evidence of waiver, moreover, cannot be compensated for by the evidence related to bargaining history or past practice, which does not show—at least with the required certainty—that the Unions gave up their right to bargain over the Respondent's dramatic restructuring of its longstanding approach to providing dental and medical benefits to future retirees.

Below, I briefly set forth the relevant background facts, many of which are the same for all three Unions. Then, for each of the three Unions, I explain why, for many of the same reasons given in my dissent in *Dupont I*, the Respondent has not carried its heavy burden to demonstrate a "clear and unmistakable waiver."

II.

The Respondent began offering DAP in 1976 and Locals 992 (Richmond) and 593 (Nashville) agreed to incorporate DAP into their respective collective-bargaining agreements at that time. Local 788 (Louisville) was not the Louisville employees' representative at the time, but one of its predecessors had also agreed to incorporate DAP into the agreement covering those employees. Similarly, the Respondent began offering MEDCAP beginning in 1983 and the parties began extending that benefit as well to employees, although by varying means. Again, though, Local 788 was not on the scene yet.[2]

In 1993, or at some point thereafter, after the Respondent introduced a new corporate-wide dental and medical plan called BeneFlex to cover employees while they remained actively employed,[3] the parties removed all references to DAP and MEDCAP from their collective-bargaining agreements. But DAP and MEDCAP remained in place to provide the employees' *future* dental and healthcare benefits in retirement.

As described in *DuPont I,* the ongoing availability of DAP and MEDCAP did not mean that those benefits continued unchanged. Every year the Respondent changed aspects of both DAP and MEDCAP, such as premiums, scope of coverage, and related features of the plans, all without challenge by the Unions. Yet, both DAP and MEDCAP remained in place for future retirees, at least for employees hired before January 1, 2007.[4]

On August 15, 2012, the Respondent announced to the Unions and employees that, effective January 1, 2013, the Respondent would eliminate DAP and MEDCAP retirement benefits for *all* future retirees when they became eligible for Medicare and replace those benefit plans with a completely new system for providing retiree dental and medical benefits. In sum, the Respondent would deposit $200 for dental benefits and $1200 for medical benefits for each employee (and each of her covered dependents) into an HRA account.[5] The employee would then use those funds to enroll in one of the plans offered by 75 insurance carriers on the open market using a third-party broker.[6]

Upon learning of the Respondent's announced changes, the Unions demanded their rescission, but the Respondent refused.

III.

As indicated above, the Respondent has defended its unilateral action on the theory that the Unions waived their respective rights to bargain over the wholesale elimination of future DAP and MEDCAP retirement benefits and the restructuring of secondary insurance for all future retirees once they became eligible for Medicare. Specifically, the

[2] The parties stipulated that at the Richmond facility MEDCAP has never been expressly referenced in any collective-bargaining agreement.

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

[4] As described, in *Dupont I*, a majority of the Board found that in 2006 the Respondent lawfully eliminated future DAP and MEDCAP benefits for employees hired on or after January 1, 2007.

[5] The HRA funds were to be used to obtain "secondary coverage" once the employees became eligible for Medicare.

[6] Not surprisingly, the Respondent's wholesale change in its overall approach to providing secondary dental and medical benefits to Medicare-eligible retirees meant there would be significant on-the-ground changes for each employee in the future. Under the new approach, for example, the claims procedure differed by requiring more information to be submitted and claims and appeals were to be decided by the third-party administrator instead of the Respondent. The time limit for submitting claims, formerly 2 years, ended on March 31 following the plan year of the service. Other changes included the removal of a stop-loss provision that previously entitled an employee to up to $1.5 million per year toward covered medical expenses after annual benefit maximums had been reached, the potential denial of coverage for pre-existing conditions after the first year, and the possibility that employees would not be able to keep their current dental or medical providers once they became eligible for Medicare.

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 agreements, but it asserts that the Unions' waivers nevertheless may be found in their initial agreements to participate in DAP and MEDCAP, the parties' past bargaining histories, and in each Union's acquiescence in the Respondent's various changes to DAP and MEDCAP over the years. The majority finds that this "amalgam" of circumstances establishes waiver, but for the same reasons explained in my dissenting opinion in *DuPont I*, they are mistaken.

A.

There is no dispute about the applicable legal principles—only about their application and whether the majority's conclusion is supported by substantial evidence. In *DuPont I*, I explained how the central policy of the Act is "to encourag[e] the practice and procedure of collective bargaining," 29 U.S.C. Section 151, and, to that end, that an employer may not unilaterally make changes to mandatory subjects of bargaining, which include the provision of *active* employees' *future* retirement benefits, without a valid defense. *Chemical Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 180 (1971); *NLRB v. Katz,* 369 U.S. 736, 743 (1962). I also emphasized previously well settled precedent holding that where, as here, an employer has asserted a waiver defense, the employer has a heavy burden to demonstrate that the union has "clearly and unmistakably" waived its statutory bargaining rights, and that such a waiver will not be lightly inferred. See *Provena St. Joseph Medical Center,* 350 NLRB 808, 811 (2007).[7] Evidence of waiver may arise from an express provision in a collective-bargaining agreement, the conduct of the parties (including bargaining history and past practice), or by a combination of these factors, in short, "all the surrounding circumstances including . . . the completeness of the collective-bargaining agreement." *Omaha World-Herald*, 357 NLRB 1870, 1871–1872 (2011) (citation omitted). Applying the same analysis as in my dissenting opinion in *DuPont I* to the facts surrounding the Respondent's 2013 change, the variations of which are explained below as to each Union, I cannot agree with the majority's conclusion, relying on *Omaha World-Herald,*[8] that an "amalgam" of factors supports a finding of waiver.

B. Local 992 (Richmond)

The reasons I would find that Local 992 has not waived its right to bargain over the 2013 changes are the same as in my dissenting opinion in *DuPont I,* which I incorporate by reference and briefly summarize here: (1) the relevant collective-bargaining agreements have not referred to the benefit plans involved here since 1993; (2) the applicable agreements have always contained an integration clause;[9] and (3) the benefits at issue were unilaterally changed many times, but never on a scale comparable to eliminating employer-provided secondary insurance and restructuring it as a voucher system administered by a third party.

I explained in *DuPont I* that there is no support for a waiver in the applicable collective-bargaining agreement. The Respondent and Local 992 stipulated that the agreement did *not* address or even reference active employees' *future* dental and healthcare benefits. 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 in the applicable agreement stands in stark contrast to the express reference to BeneFlex, which demonstrates that the parties understood both how to incorporate a benefit plan into the agreement—and the significance of doing so.[10]

[7] *Ozanne Construction Co*., 317 NLRB 396, 398 (1995) (waiver of statutory right must be "clearly and unmistakably established and is not lightly to be inferred"), enfd. 112 F.3d 219 (6th Cir. 1997); *Universal Security Instruments, Inc.*, 250 NLRB 661, 662 (1980) (same), enfd. in part denied in part, 649 F.2d 247, 256 (4th Cir. 1981).

[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] The collective-bargaining agreement between the Respondent and Local 992 that was in effect in 2013 contained the following integration clause: "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."

[10] See *DuPont I*, slip op. at 13–14 & fn. 12 (citing *Tesoro Refining & Marketing Co.,* 360 NLRB 293, 294 (2014)). The majority's attempt to distinguish *Tesoro* merely reinforces the principle that reservation-of-rights language not incorporated in the agreement cannot authorize unilateral changes. See below, fn. 11. In *Tesoro,* even though the collective-bargaining agreement incorporated the reservation-of-rights clause from the plan documents, a side letter limited the employer's right to rely on that clause by requiring "appropriate discussion/bargaining" before any changes could be implemented. While the majority states that the parties in this case have never agreed to any contractual provision similarly limiting the Respondent's right to make unilateral changes to MEDCAP and DAP, they overlook the fact that in *Tesoro*, both the reservation-of-rights clause and the limitation on that authority were incorporated in the

Accordingly, as Board precedent illustrates, the parties' deletion of DAP and MEDCAP from their agreement deprives the reservation-of-rights provisions attached to those plans of their probative force and value, and the Respondent could no longer rely on the "reservation-of-rights" clauses contained in the relevant plan documents.[11] I also explained how my colleagues' reliance primarily on the "amalgam" approach discussed in *Omaha World-Herald*, above, ignores the fact that every "contractual" element supporting waiver in that case 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. See *DuPont I,* slip op. at 13–15 (citing cases). Similarly, I addressed my colleagues' misinterpretation of the *Omaha World Herald* Board's reliance on the nonarbitrability of the plan at issue, which, again, was grounded in the language of the applicable agreement. *DuPont I*, slip op. at 14 & fn. 14.

Further, as explained in *DuPont I,* the integration clause 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 Respondent has not identified any other provision of the applicable collective-bargaining agreement that authorized it to unilaterally terminate the benefits. In sum, viewed in light of Board precedent, the collective-bargaining agreement here provides no substantial evidence supporting the majority's waiver finding.

The parties' relevant bargaining history provides no more support for the majority's waiver finding. As I explained in *DuPont I*, the majority wrongly relies on the parties' negotiations that culminated in Local 992's acceptance of DAP in 1976 and MEDCAP in 1986. The parties agreed to delete all contractual references to DAP and MEDCAP in 1993, some 20 years before the Respondent made the unilateral changes at issue here. The history behind those discarded provisions therefore is irrelevant and sheds no light on whether Local 992 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 Local 992's statutory right to bargain. 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 substantial evidence supporting a finding of clear and unmistakable waiver.

Last, urged on by the Respondent, my colleagues mistakenly rely on the parties' past practice,[12] which for two independently sufficient reasons, does not support finding a waiver with respect to the Respondent's decision to discontinue DAP and MEDCAP for future Medicare-eligible retirees, and to replace them with an entirely different system of benefits. 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, without objection by Local 992, except when it filed the unfair labor practice charge relating to the 2006 change, resolved by *DuPont I*.

My colleagues admittedly recognize the well-settled principle 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."[13] But they fail to

collective-bargaining agreement, unlike in these cases. Thus, consistent with well-established Board precedent, deleted contractual language matters. See below, fn. 11, and *DuPont I,* slip op. at 14 fn. 12. 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.

My colleagues also 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 the employees would retire and become Medicare-eligible. 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.

[11] 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). See also *DuPont I,* slip op. at 13 & fn.10 (even the more lenient standard of "incorporation by reference" and "contract coverage" applied by the District of Columbia Circuit, would not be satisfied where there is no reference at all to the benefit plans in the collective-bargaining agreement.)

[12] 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.

[13] *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).

acknowledge that there must be a "thread of similarity running through and linking" past changes for there to be a cognizable past practice justifying the present change.[14]

Here, although the Respondent made changes to the premiums, scope of coverage, and benefits under DAP and MEDCAP, it has not established that those changes were all similar in scope and magnitude, and thus established a pattern. In any event, the prior changes were certainly not similar in scope and magnitude to the wholesale elimination and restructuring of these benefits for all future Medicare-eligible retirees. Exceeding even the 2006 change, the 2013 changes affected *all* employees expecting secondary coverage under DAP and MEDCAP in the future, not just a subset of new employees. And, as described, those changes were significant. The Respondent shifted the burden of choosing a health plan to the individual employee upon becoming Medicare eligible and removed its responsibility to provide and administer that coverage, as it had done in the past for decades. Worse, as a practical matter, the Respondent effectively undermined the Unions' effectiveness as a bargaining representative by removing a mandatory subject of bargaining—future retirement health benefits—from the bargaining table, because the third-party administrator of the new system, with whom the Unions had no bargaining relationship, controlled the information and appeals process. Such total abdication of responsibility over a mandatory subject of bargaining bears no resemblance to routine plan-specific changes the Respondent had made in the past, such as reducing benefits or coverage, or increasing premiums.[15]

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.[16] The facts involving Local 992 establish that this is such a case. In sum, the collective-bargaining agreement, the bargaining history, the past practice, when considered individually or together, do not amount to a "clear and unmistakable waiver."

C. Local 788 (Louisville)

The undisputed facts involving Local 788 weigh even more heavily against finding that it waived its right to bargain over the Respondent's 2013 changes. The key details are as follows: (1) after a history of changing representation, the applicable collective-bargaining agreement, which Local 788 adopted from its immediate predecessor (the United Steelworkers Union (USW)), did not refer to DAP or MEDCAP; (2) the applicable collective-bargaining agreement contained an integration clause that specifically stated that it superseded all previous collective-bargaining agreements; (3) Local 788 took no part in the negotiation of DAP and MEDCAP, and there is no bargaining history of such initial negotiations in the record; and (4) Local 788 had only represented the Respondent's employees for 2 years during which there were unilateral changes—but none that resembled the elimination of DAP and MEDCAP for all future Medicare-eligible retirees.

For approximately 50 years, one of Local 788's early predecessors, the Neoprene Craftsmen's Union (NCU) represented production and maintenance employees at the Respondent's facility in Louisville. For a time, NCU did agree to incorporate both DAP and MEDCAP into its collective-bargaining agreements with the Respondent. But

[14] See *DuPont I*, slip op. at 16 & fn. 22, discussing *Caterpillar, Inc.*, 355 NLRB 521 (2010). The majority attempts to distinguish *Caterpillar* 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 585 (2015) (Board reaffirming judge's ruling and incorporating prior Board decision under *NLRB v. Noel Canning*, 573 U.S. 513 (2014)).

In *DuPont I,* I also explained the majority's misplaced reliance on *California Pacific Medical Center*, 337 NLRB 910 (2002), and *Omaha World-Herald*, 357 NLRB 1870, 1872 (2011), both cases in which the Board found that the union had waived its right to bargain over certain changes that were *similar* to those previously made by the employer, unlike the 2013 changes in this case. And, in *California Pacific Medical Center*, there were additional factors—all grounded in the applicable collective-bargaining agreement—that supported a waiver finding. *DuPont I*, slip op. at 16.

[15] The majority denies that the 2013 changes undermined the Unions' effectiveness, speculating that the Respondent stood ready to negotiate a separate site-specific plan for its represented employees upon request. Whether the parties could have bargained over a different plan is beside the point. Without evidence of waiver analyzed under current precedents, the Respondent could not lawfully unilaterally change its employees' future health insurance benefits without bargaining. *NLRB v. Katz*, 369 US 736, 746–747 (1962). And the fact that DAP and MEDCAP were companywide plans, which the majority claims would not be the case if they could not change them without bargaining with the Unions, has not previously persuaded the Board otherwise. *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).

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

that ended in 1992. The 1992 collective-bargaining agreement between NCU and the Respondent was the last to incorporate both DAP and MEDCAP. The 1994 and 1997 collective-bargaining agreements between NCU and the Respondent incorporated BeneFlex for active employees, although those agreements did continue to list DAP as a benefit.

Then began a series of changes to the employees' representative. In short, in 2002 NCU voted to affiliate with PACE, and became PACE Local 5-2002. Then, in 2005, PACE merged with the United Steelworkers of America and became USW. Significantly, USW's 2006 collective-bargaining agreement with the Respondent contained *no references to either DAP or MEDCAP*, and referred only to BeneFlex. Finally, in May 2010, the production and maintenance employees at Louisville voted to disaffiliate from USW and form Local 788. Thus, Local 788 was three-times removed from the collective-bargaining representative that originally agreed to DAP and MEDCAP and, as explained in more detail below, by the time Local 788 did become the employees' representative, neither of those plans—or their underlying plan documents—was a part of the collective-bargaining agreement Local 788 inherited.

The collective-bargaining agreement executed on September 7, 2010, which Local 788 adopted from USW, is the one that was in effect at the time of the Respondent's 2012 announcement of its unilateral changes. As stated, that agreement expressly referenced BeneFlex, but made no mention of DAP or MEDCAP. Further, just like the agreement applicable to Local 992, Local 788's agreement contained an integration clause that stated:

> This Agreement supersedes all previous agreements, understandings, practices, and interpretations which are incompatible or inconsistent with any provisions herein contained and this Agreement constitutes the entire Agreement between the parties hereto as of the execution date thereof. However, any amendment 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.

Article II, Section 3 (emphasis added).

Finally, although for many years the Respondent had been making the same types of limited changes to DAP and MEDCAP as described above, it is worth noting again that Local 788 had been the representative for only 2 years preceding the Respondent's announced elimination of DAP and MEDCAP at issue here. And, in any event, none of those prior changes fundamentally altered DAP or MEDCAP.

On those particular facts, the majority's rationale for accepting the Respondent's argument that Local 788 waived its right to bargain is even weaker than its argument for finding that Local 992 waived its bargaining rights.

The majority essentially repeats the same analysis it employed in *DuPont I,* but ignores the additional fact that Local 788 was *not* the party that agreed to DAP and MEDCAP, and *never* signed a collective-bargaining agreement incorporating either of those benefit plans or the plans' respective underlying documents. That fact further undermines the majority's reliance on past collective-bargaining agreements as proof of waiver (which, as explained, are irrelevant in any event). There simply is no basis for holding Local 788 to the terms of agreements that were negotiated (and expired) years beforehand by a different union.

Further, as explained, even if Local 788 could somehow be assigned responsibility for its predecessors' agreements, the fact remains that the parties' 2010 agreement—*the only one in effect when the Respondent made the changes at issue here*—was the operative agreement and it did not refer to DAP, MEDCAP, or to their plan documents containing the reservation-of-rights clauses. Accordingly, for the reasons I explained in *Dupont I*, any bargaining history pertaining to past agreements is irrelevant.[17] Finally, the 2010 agreement is also significant insofar as it *does* reference BeneFlex. That shows the parties knew how to refer to a benefit plan and knew the significance of doing so.

Finally, the scant alleged past practice engaged in by the Respondent since Local 788's certification included only 2 years of changes to premiums, scope of coverage, and benefits under DAP and MEDCAP; all prior changes, including the 2006 change presented in *Dupont I*, occurred prior to Local 788's representation and therefore are irrelevant.[18] The Respondent simply has not established that the changes that occurred during that limited period were sufficiently similar in scope and magnitude to establish a past practice in the first instance, or to permit the wholesale elimination and restructuring of employees' future benefits when eligible for Medicare. For these and other reasons explained above in relation to Local 992, the Respondent's asserted past practice cannot support a waiver finding, whether considered alone, or with the other factors relied on by the majority. See *Tesoro*, above

[17] *DuPont I* at 15 & fn. 18–20; *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), citing *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989)).

[18] *Eugene Iovine, Inc.*, 356 NLRB 1056 (2011) (citing *Eugene Iovine, Inc*., 328 NLRB 294 (1999)).

(distinguishing *Omaha World-Herald*, above). See *DuPont* I slip op., at 16.

D. Local 593 (Nashville)

None of the particular facts relating to Local 593, individually or collectively, support a finding of waiver. The key facts are similar to those applicable to Locals 992 and 788 above: (1) the relevant collective-bargaining agreement does not refer to DAP or MEDCAP; (2) the bargaining history does not support a finding of waiver; if anything, it shows that the Respondent did not envision the reservation-of-rights clause in the plan document to encompass changes like the 2013 changes; (3) the benefits at issue were unilaterally changed many times, but the changes never resembled the elimination of DAP and MEDCAP for all future Medicare-eligible retirees.

The Respondent has had a collective-bargaining relationship with Local 593 at its Nashville facility for over 50 years. When the Respondent first introduced DAP there it was incorporated into the parties' 1976 collective-bargaining agreement. After Local 593 agreed to participate in MEDCAP, the parties entered into a supplemental agreement in 1983 that added a reference to MEDCAP to the collective-bargaining agreement. The parties' 1987 agreement, however, was the last one to reference both DAP and MEDCAP. As stipulated by the parties, neither DAP, MEDCAP, nor their plan documents were referred to in any agreement after that time, including the 1995 agreement that was in effect when the Respondent made the changes at issue here.[19]

Once again, Board precedent establishes that because the reservation-of-rights clauses were not in the relevant collective-bargaining agreement, they cannot be relied on to find a clear and unmistakable waiver. References to DAP and MEDCAP had been removed by the time the parties' executed their 1995 agreement—18 years beforehand. And for reasons explained above, the parties' express inclusion of BeneFlex in that agreement demonstrates that the parties understood both how to incorporate a benefit plan into the agreement—and the significance of doing so. Again, the deletion of references to DAP and MEDCAP deprives those deleted provisions of their probative value in determining whether Local 593 waived its right to bargain over the 2013 changes in the benefit plans.

Nor does bargaining history contribute to a finding of waiver. As the judge noted, the record does not contain bargaining notes "relating to the inclusion of a management-rights provision in MEDCAP or DAP." As discussed above, and in *DuPont I*, even if such bargaining history were in the record, it is simply not relevant to this case.[20]

Finally, as in the cases of the other Unions, the Respondent's pre-2013 changes to DAP and MEDCAP do not establish a waiver based on past practice. Again, those changes in and of themselves did not constitute a past practice, and there certainly was no "thread of similarity" linking the past changes to the 2013 change. The Respondent's statements made in bargaining in January 1994, noted above, only serve to reinforce that the 2013 changes differed markedly in scope and magnitude from those that the Respondent envisioned or that had been accepted in the past by Local 593 without objection.

In sum, the collective-bargaining agreement, bargaining history, and past practice, when considered together, do not add up to a finding of "clear and unmistakable" waiver by Local 593.

IV.

Although the *Omaha World Herald* Board endorsed the notion that an "amalgam" of factors may establish waiver in a particular case, it 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 again here by holding that all three Unions, despite the factual differences in their histories and collective-bargaining agreements, waived their statutory right to bargain over the Respondent's unprecedented 2013 changes. My colleagues rely on long-abandoned contractual and extracontractual 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 traditionally understood it. Today's decision, together

[19] While Local 992 and Local 788 provided evidence of an integration clause in their collective-bargaining agreements, the excerpts in the record of Local 593's collective-bargaining agreements did not include a similar provision. I nevertheless find insufficient evidence of waiver even without such a clause, for all the other reasons explained below and in *DuPont I,* subject to the factual variations described above.

[20] Although the judge did not analyze recent bargaining history, bargaining notes from a negotiation session held January 21, 1994, 18 months before the parties executed the 1995 collective-bargaining agreement, show, at most, that Local 593 was aware that the Respondent "reserved the right to amend any provisions of the Company plan, MEDCAP, that were deemed necessary." But after providing the plan language to Local 593, the Respondent further clarified the sorts of changes that could be expected: "The recent changes in deductibles, stop-loss, and premiums were examples of such changes." I do not find that this exchange shows that Local 593 "fully discussed" and "consciously explored" the reservation-of-rights clause and "consciously yielded" its right to bargain over the total elimination of benefits for MERs, and their replacement with a voucher system. *Johnson-Bateman Co.*, 295 NLRB at 185. If anything, it shows that a total restructuring of secondary insurance was not the type of change the Respondent envisioned to be covered by the reservation-of-rights clause.

with *DuPont I*, again lowers 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. September 4, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

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

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, D.C. on June 12 and July 17, 2013, and Nashville, Tennessee on August 27 and 28, 2013. The Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of Dupont Workers (the Union or Local 992), Freon Craftsman Union, Local 788, International Brotherhood of Dupont Workers (the Union or Local 788), and International Brotherhood of Dupont Workers (IBDW), Local 593, Old Hickory Employees Council (the Union or Local 593) (collectively, the Unions), represent employees at E. I. Du Pont De Nemours and Company's (the Company) facilities in Richmond, Virginia, Louisville, Kentucky, and Nashville, Tennessee, respectively. They allege that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[1] in January 2013 by implementing changes to employees' medical and dental benefits without first bargaining with them. The Company concedes that it made the unilateral changes but contends that the Unions previously waived their rights to insist on bargaining over changes to employee-members' healthcare and dental benefits.[2]

On the entire record,[3] 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 Delaware corporation, has been engaged in the manufacture of synthetic fibers and related products at its Richmond, Virginia,[4] Nashville, Tennessee[5] and Louisville, Kentucky facilities each of which annually sells and ships products, goods, and materials valued in excess of $50,000 directly to points outside the state where the facility is located. 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 Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

Headquartered in Wilmington, Delaware, the Company operates several facilities located throughout the United States. As of January 1, 2013, the Company had more than 34,000 employees in the United States, less than 3,700 of which were represented by a labor organization. In addition, approximately 80,000 company retirees and dependants participate in the Company's corporate-wide benefit plans.[6]

The Company employs approximately 2,500 employees at the Richmond plant, approximately 1,170 of whom are hourly production and maintenance (P&M), workers and clerical, technical and office (CT&O) workers represented by Local 992. Local 992 represents P&M workers in one bargaining unit and CT&O workers in a separate unit. It has represented employees at the Richmond site for more than 50 years.[7] Local 992's executive committee meets with Richmond management twice a month to go over daily affairs and contract administration, while the CT&O and P&M Contract Committees meet with management during collective-bargaining negotiations.[8] The most recent collective-bargaining agreement (CBA) between the Company and Local 992 for the P&M unit is dated September 1, 2012. The most recent CBA entered into between the Company and Local 992 for the CT&O unit is dated October 1, 2000.[9]

The Company employs approximately 170 employees at Louisville. Approximately 96 of those employees are hourly production, maintenance, and clerical workers represented by Local

[1] 29 U.S.C. Secs. 151–169.

[2] The parties stipulated that all of the charges and amended charges were timely filed and served. (Jt. Exh. 4 at ¶¶ 58–59, 69–70, 81–82.)

[3] Just as in Case 05–CA–33461, there was little dispute as to the relevant facts. The parties stipulated to receipt of the hearing transcript in that case, as well as 106 sets of facts spanning three decades of their collective-bargaining relationship. (Jt. Exhs. 1–4.) In addition, the parties have long followed a custom and practice of relying on the Company's notes of their collective-bargaining meetings and I credit those records as fairly and accurately depicting what was discussed at those meetings. (Jt. Exhs. 21, 25, 32.) While there was testimony that the notes were not a "verbatim recitation" of the meetings, they were, at the very least "instructive" summaries as to the parties' positions on the issues. (Tr. 214.)

[4] This facility is actually located in nearby Ampthill, Virginia, and is also referred to as the Spruance plant.

[5] This facility is located in the Old Hickory section of Nashville, Tennessee, and is also referred to as the Old Hickory plant.

[6] Mary Jo Anderson, an in-house counsel and a credible witness, drafted the Company's corporate-wide health care plan provisions. As in the earlier case, there was no dispute as to her testimony 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. 540; Jt. Exh. 2 at 142–145.)

[7] Jt. Exh. 4 at ¶2.

[8] Jt. Exh. 2 at 33–34.

[9] Jt. Exh. 19–20.

788.[10] One of Local 788's predecessors, the Neoprene Craftsmen's Union (NCU) represented production and maintenance employees at Louisville for approximately 50 years. In June 2002, the NCU voted to affiliate with PACE, and became PACE Local 5-2002. In April 2005, PACE merged with the United Steelworkers of America and became USW. In May 2010, the production and maintenance employees at Louisville voted to disaffiliate from the USW and form Local 788. Local 788 and its predecessor unions have represented employees at Louisville for more than 50 years.[11] The current CBA became effective on September 7, 2010.[12]

The Company employs approximately 240 employees at Nashville. Approximately 120 of those employees are hourly production and maintenance workers represented by Local 593. Local 593 has represented production and maintenance employees at Nashville for more than 50 years.[13] The most recent CBAs are dated April 7, 1976, February 13, 1987, and July 25, 1995. The 1995 CBA is still in effect.[14]

B. The Company's Corporate-Wide Benefit Plans Generally

At all relevant times, the Company has maintained one set of corporate-wide employee benefit plans for all of its employees within the United States, whether they are unionized, non-represented, or in managerial positions. The Company's stated purposes for maintaining a single set of corporatewide plans are: (1) to ensure that all employees, regardless of location, job title of union affiliation, receive the same benefits based on years of service and other criteria; (2) to foster easier plan administration and compliance with applicable legal requirements; and (3) provide significant economies of scale that allow the Company to offer plan participants lower premiums and better service.[15]

The Company has frequently communicated to Locals 593, 788 and 992 that employees and/or retirees from a single worksite would not achieve the same level of benefits at the same rates if their labor representatives negotiated for benefit plans that were limited to represented employees and/or retirees from a single worksite.[16]

Each of the Company's corporate-wide benefit plans contains a "reservation of rights" provision stating that the Company retains the right to change or modify the plans at its discretion.[17] Consistent with those provisions, the CBAs applicable to the Company's union-represented worksites all contain an "Industrial Relations Plans and Practices" (IRP&P) provision. Section 1 of the IRP&P provision contains a list of corporate-wide benefit plans available to employees at the worksite. The IRP&P provision grants the Company the right to make changes to the listed plans, subject to the certain restrictions set forth in the IRP&P provision and the benefit plan documents themselves.[18]

The Company assesses its benefit plans and plan offerings on an ongoing basis. When it determines the need to make adjustments, it has modified the plans or plan offerings. Before implementing modifications, however, the Company typically meets with each Union at its worksite. At these meetings, the Company notifies the Union of its intention to make the modifications, discusses and provides information about the changes, and usually answers questions about the modifications.[19]

Information concerning changes to benefits is provided to company employees, retirees, and other benefit plan participants in a variety of ways. Specifically, company employees, retirees, as well as the Unions, have been notified of changes to the Company's corporate-wide benefit plans through publications such as "Plain Talk" and "Extensions" magazines, "Benefit Bulletins," "BeneFlex Guides," "Benefit Highlights," "Retiree Health Care Highlights," "Health Care Communication to Employees," "Employee Information Bulletins," "Plant Communications," benefits Q&As, and benefit-related PowerPoint presentations, as well as through notices of material modifications, letters, and emails sent to employees and/or retirees. In recent years, company employees, retirees, and Unions have also been directed to company-sponsored websites for more information concerning benefits provided through the Company's corporatewide benefit plans and changes affecting those benefits.[20]

C. DAP, MEDCAP, and BeneFlex

1. DAP

The two benefit plans at issue in this case, the Dental Assistance Plan (DAP) and Medical Care Assistance Program (MEDCAP), are corporate-wide benefit plans. DAP was created in early 1976 and offered nationwide to eligible employees and retirees. The DAP Plan Document and its accompanying Summary Plan Description (SPD) both contained reservation of rights clauses. Subsequent versions of the DAP Plan Document and SPD since 1976 have contained virtually the same reservation of rights provision recognizing the Company's right to suspend, modify, or terminate DAP at any time.[21]

At worksites where employees were represented by a union, such as at Richmond, Louisville, and Nashville, the Company presented the Unions with the DAP Plan Document and offered union-represented employees the opportunity to participate in DAP on the same basis as nonunion employees, subject to the terms of the DAP Plan Document.[22]

After bargaining over member participation, unions at the Company's represented sites agreed to have their members participate in DAP. DAP was then added to the list of corporate-

[10] Jt. Exh. 4 at ¶ 3.

[11] Subsequent references to Local 788 include the actions or inaction of its predecessors. (Id. at ¶ 4.)

[12] Excerpts from the Louisville CBAs dated March 22, 1974, March 22, 1976, March 22, 1978, April 28, 1980, April 30, 1982, May 1, 1985, April17, 1989, June 12, 1992, May 25, 1994, June 13,1997, June 1, 2006 and September 7, 2010, were received as Jt. Exh. 30(a), 6(d), 30(b)-(f), 9(a) and 9(b), 30(g)-(h), and 31, respectively.

[13] Jt. Exh. 4 at ¶¶ 5, 61.

[14] Jt. Exhs. 6(c), 7 and 8.

[15] Jt. Exh. 2 at 143; Jt. Exh. 4 at ¶¶ 6–7, 12.

[16] Except where a specific page is identified, record evidence is referred to by the last 4 digits of its Bates-stamped designation, thus dropping the preceding "DUP000." (Jt. Exh. 4 at ¶ 8; R. Exh. 3 at 8822.)

[17] Jt. Exh. 5(a)-(c) are excerpts from the Company's various corporatewide benefit plan documents setting forth examples of the reservation of rights language in each plan. (Id. at ¶ 9.)

[18] Id. at ¶ 10.

[19] Id. at ¶¶ 11, 14, 27.

[20] Id. at ¶ 13.

[21] Id. at ¶¶ 15-16.

[22] Id. at ¶¶ 17, 22.

wide benefit plans listed in the IRP&P provisions at the Richmond, Louisville, and Nashville sites, as well as other employee-represented sites.[23]

2. MEDCAP

On January 1, 1983, the Company offered MEDCAP as a healthcare plan option to its employees nationwide. Like DAP, the MEDCAP Plan Document and its accompanying SPD both contained reservation of rights clauses. All iterations of the MEDCAP Plan Document and SPD since 1983 have contained the same reservation of rights provision.[24]

Initially, MEDCAP provided benefits to eligible employees and retirees. MEDCAP was initially referenced in the Louisville and Nashville CBAs but has never been expressly referenced in any of the Richmond CBAs. The CBAs covering the Richmond CT&O and P&M bargaining units from 1984 through 1991 contained a Hospital and Medical-Surgical (HMS) coverage provision expressly referencing Blue Cross of Virginia and Blue Shield of Virginia.[25]

Article XIX of the MEDCAP Plan Document describes the Company's rights and authority as Plan Administrator.[26] Article XVI states that "premiums under this Program during each Plan Year will be determined by the Company." Article XX states that 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." The MEDCAP SPD also addresses the Company's right to suspend, modify, or terminate the plan.[27]

Under MEDCAP, participants were required to submit claims within two years from the date of service. The reimbursement process under the MEDCAP SPD required submission of certain information, including a description of the service provided, dates of service, diagnostic and treatment codes, proof of payment. Participants have a right to appeal to the Company about claims issues.[28]

Medicare-eligible retirees (MER or MERs) had an annual stop-loss provision, in which once the MER "reach[ed] the individual or family stop-loss, the Medical Plan covers 100 percent of R&C or, if applicable the Network Negotiated Rate, for the remainder of the Plan Year." Additionally, under MEDCAP, MERs could receive a maximum $1.5 million "for all covered medical expenses incurred on account of any one person in any one Plan Year."[29]

3. Unions Agreed to Participate in Plans

In the past, the Company's Unions, including Locals 593, 788 and 992, have had the option to decline to participate in the Company's corporatewide plans, and to propose alternative, site-specific plans in lieu of the Company's corporate-wide plans. Some unions, including Local 788, have, on occasion, proposed site-specific benefit plans.[30]

Local 992 agreed to the Company's DAP proposal in 1976 after discussions over its inclusion of a reservation of rights provision. DAP was then included as an additional item under the CBA's IRP&P provision.[31] After 6 years of discussions, Local 992 agreed to participate in MEDCAP in 1986 after expressing its objections to inclusion of reservation of rights language in the plan document.[32]

Local 788's predecessor agreed to have its members participate in DAP, and it was added to the list of IRP&P plans in the 1976 CBA. In 1984, Local 788's predecessor also agreed to have its members participate in MEDCAP in 1984, and MEDCAP was added to the HMS provision of the parties' 1985 CBA.[33]

DAP was added to the list of IRP&P plans in the 1976 CBA at Nashville. Local 593 agreed to participate in MEDCAP in 1983, subject to the terms of the MEDCAP Plan Documents. The parties' agreement was memorialized in a supplemental agreement executed on December 9, 1983, and effective April 1, 1984.[34] The current CBA was signed in 1995; MEDCAP and DAP are not included or referenced in that CBA.[35]

4. BeneFlex

In 1991, the Company created a new cafeteria-style benefits plan called the BeneFlex Flexible Benefits Plan (BeneFlex). Within BeneFlex are several sub-plans providing various types of benefits, including medical and dental benefits. BeneFlex was presented to the Unions in the early 1990s at worksites where employees were represented by a union. The Company offered union-represented employees the opportunity to participate in BeneFlex on the same basis as nonunion employees, subject to the terms of the BeneFlex documents.[36]

Local 992 agreed to BeneFlex in 1993;[37] Locals 593 and 788 agreed to BeneFlex in 1994.[38] In furtherance of the changes, the HMS provision was deleted from the Richmond and Nashville CBAs at the same time that a new IRP&P provision, "Section 3" addressing BeneFlex, was added to those agreements.[39] The HMS provision was modified in the 1994 Louisville CBA to add BeneFlex and delete the other medical plans formerly referenced in that provision.[40]

Once a union accepted BeneFlex, and its employee members began receiving medical and dental benefits under the BeneFlex Medical Assistance Plan and BeneFlex DAP, they became

[23] Id. at ¶¶ 18, 63; Jt. Exhs. 6(a)-(d); R. Exh. 3 at 8309, 8311; R. Exh. 8.

[24] Id. at ¶ 19; Jt. Exhs. 1 at ¶¶ 6–7, 12(b) at ¶ 21.

[25] Id. at ¶ 20.

[26] Jt. Exh. 1 at ¶ 8.

[27] Id. at ¶9; Jt. Exh. 12(b) at 120.

[28] Jt. Exh. 10 at 206–208.

[29] Jt. Exh. 10 at 178–179.

[30] Id. at ¶ 25.

[31] R. Exh. 3 at 8309, 8311; R. Exh. 8 at 8260.

[32] R. Exh. 3 at 8332, 8364, 8371, 8393–8402, 84336–8437, 8450–8452, 8499–8501, 8504; R. Exh. 6(a)-(b); R. Exhs. 5(a) at 17011–17012, 5(b) at 16358.

[33] Id. at ¶ 74–75; Jt. Exhs. 6(d), 30(e).

[34] Jt. Exh. 4 at ¶¶¶ 4, 17, 19, 63–64, 75; Jt. Exhs. 6(d), 27.

[35] Jt. Exh. 8.

[36] Jt. Exh. 4 at ¶ 21.

[37] Local 992's acquiescence came after two years of negotiations. (R. Exh. 3 at 8616–8619, 8691–8693.)

[38] BeneFlex was previously offered to Local 593, but not accepted until 1994; (Jt. Exh. 25 at 1100–1104, 1118–1120; Jt. Exh. 9(b) at 22; Tr. 371.)

[39] Jt. Exh. 4 at ¶ 22; Jt. Exh. 7–8; R. Exh. 6(a)-(b), 7(a)-(b).

[40] Id. at ¶ 22; Jt. Exh. 9(a)-(b).

ineligible to continue receiving benefits through MEDCAP and the DAP. Retirees and eligible dependants remained eligible to receive medical and dental benefits through MEDCAP and DAP, however, so long as they continued to meet the eligibility criteria in the respective plans. The medical and dental benefits offered through BeneFlex mirror those under MEDCAP and DAP. Changes made to the BeneFlex medical and dental plans have been carried over and implemented with respect to the mirror versions of MEDCAP and DAP.[41]

Employees represented by Locals 593, 788, and/or 992 currently receive medical and dental benefits under BeneFlex. Eligible pensioners who have retired from the worksites represented by Locals 593, 788, or 992, along with their eligible dependents, currently receive medical benefits through MEDCAP and dental benefits through DAP.[42] Prior to 2013, MERs simply had to submit a form expressing their intention to continue utilizing the Company's insurance in retirement, with premiums deducted from their pension payments. As was the case during active service, retirees did not have to submit any documentation if they refrained from making any changes in coverage during annual enrollment periods.[43]

D. Changes to DAP and MEDCAP Prior to 2013

The Company announced and made numerous changes nationwide to DAP and/or MEDCAP during the period from 1976 to 2012.[44] Historically, the Company has announced changes to its corporatewide benefit plans, including DAP and MEDCAP, in the late summer or fall of each year, prior the "open enrollment" period in which employees and retirees select their benefits options for the then-upcoming year. The announced changes have typically gone into effect on January 15 of the following year, which is the beginning of the benefit plan year for DAP and MEDCAP, as well as other corporate-wide plans.[45]

Before these modifications took effect, the Company typically met with each union at its worksite. At these meetings, the Company notified the union of its intention to make the modifications, provided benefit-related publications and other information, and discussed and answered questions about the modifications.[46]

The Company did not, however, usually seek the agreement of Locals 593, 788, and 992 before implementing the changes.[47] The Company often informed Locals 593, 788, and 992 that it would not bargain over specific changes to its corporatewide plans because those plans also provided benefits to participants not represented by a union. However, while the Company has informed the Unions that it would not bargain over changes to corporate-wide plans, it has consistently expressed a willingness to bargain over employee benefits and consider any site-specific benefit plan proposals that Locals 593, 788, and 992 wished to make.[48]

1. Local 992's requests for information and bargaining prior to 2013

The Company has implemented numerous changes to its benefit plans since 1987. On at least 50 occasions, the Company announced changes to healthcare premiums, deductibles, copays and annual plan limits, benefit options, terms of coverage, and participant eligibility relating to working spouses and dependents.[49]

Since at least 1988, Local 992 has requested information relating to many of those unilateral changes in benefits, including premiums, cost estimates and related data, and available insurance carriers. In numerous instances when it agreed that the information was relevant, the Company agreed to the request.[50]

Some of the unilateral changes increased coverage. In 2004, for example, the Company added a network of 58,000 dentists.[51] That same year, the Company announced coverage eligibility in its corporatewide benefit plans for an additional category of dependents—the same-sex domestic partners of employees.[52] 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. The Union had requested the Company bargain over scheduled changes to DAP. The Company refused but noted that the plant manager could replace a corporate-wide plan with a local plan, which it would consider. The Company reiterated the distinction between local and corporate-wide health plans and, when Local 992 expressed an interest in proposing changes, the Company reiterated that it would not bargain over local changes.[53]

On October 15, 2002, the Company announced that it would impose an annual limitation, or cap, on its contributions to retiree healthcare. The Company also announced an increase in the share of healthcare costs to be borne by retirees.[54] Two weeks later, the Company announced that retirees would begin paying a premium for certain types of dental work.[55]

Finally, some changes amounted to a coordination of benefits that neither enhanced nor reduced them. In 1993, the Company expanded medical precertification to 14 procedures. Also, since employees were to receive medical and dental coverage through BeneFlex, the Company proposed, and the Union agreed, to delete the HMS provision and replace it with a provision incorporating BeneFlex into section 3 of the IRPP article in the CBA.[56]

Between 2007 and 2012, Local 992 responded to the changes

[41] Id. at ¶ 23.

[42] Id. at ¶ 24.

[43] This finding is based on the credible and unrefuted testimony of James Palmore, vice president of Local 992. (Tr. 113, 125.)

[44] Jt. Exh. 4 at ¶¶ 26, 50; Jt. Exh. 10(a)-(b); R. Exh. 11(a)-(b).

[45] Jt. Exh. 4 at ¶ 27.

[46] Id. at ¶¶ 27, 51, 62, 73; Jt. Exhs. 21–22, 25–26, 32–33; R. Exh. 3 at 8511, 8691.

[47] Id. at ¶ 28; R. Exh. 11(a); Jt. Exh. 10(a).

[48] Id. at ¶ 29; Jt. Exh. 25 at 1031-1032, 1034; R. Exh. 3 at 8308, 8570, 8822.

[49] R. Exh. 11.

[50] GC Exh. 2 at 15270, 15377–15378; GC Exh. 6 at 18151–18153, 18157–18158; GC Exh. 8 at 154–15457; GC Exh. 14 at 17850–17851; GC Exh. 36 at 5274; GC Exh. 47 at 8584; R. Exh. 3 at 8719–8720, 8840–8841, 8930–8931; R. Exh. 11 at 8847.

[51] R. Exh. 3 at 8932.

[52] R. Exh. 3 at 8955–8956.

[53] GC Exh. 6 at 18155–18156.

[54] R. Exh. 11 at 2443.

[55] R. Exh. 3 at 8861–8863.

[56] R. Exh. 3 at 8693; R. Exh. 7(a) at 17129 and 7(b) at 16419.

by submitting numerous information requests regarding benefit changes to the Company for verification. The requests related to active employees and retirees. The Company typically provided the information and Local 992 acquiesced to favorable changes.[57]

Local 992 has, at times, insisted on bargaining over specific changes to its corporate-wide plans. The parties discussed and bargained over two major Company's proposals to change health care coverage from 1985 to 1987. These included company proposals to amend the CBA to include a management rights clause and a new HMS provision.[58] Local 992 also requested bargaining in 1987,[59] 1991, 1992 and 1993,[60] 1995,[61] and 1997,[62] 1998[63] and 1999[64] regarding premium increases, changes in providers, mergers of health providers and other announced benefit changes, and the Company occasionally agreed to bargain or, at least, discuss the details.[65] Some changes, such as Local 992's acceptance of the Company's offer to move employees to coverage under BeneFlex, were more significant than others.[66]

Until 2007, however, Local 992 never filed a grievance or unfair labor practice charge challenging the Company's right to make unilateral changes to either DAP or MEDCAP. The 2007 unfair labor practice related to Company announced changes in August 2006 to seven of its corporatewide employee benefit plans, including DAP and MEDCAP. Specifically, the Company amended the eligibility provisions of DAP and MEDCAP to clarify that employees hired after January 1, 2007, would not be eligible, upon retirement, to participate in DAP and MEDCAP. DAP and MEDCAP Plan Documents were amended consistent with the announced changes, and the changes to DAP and MEDCAP were implemented on January 1, 2007 (2007 Benefit changes). The Company announced and implemented the 2007 Benefit changes without first bargaining with Locals 593, 788, or 992.[67]

On February 16, 2007, Local 992 filed an unfair labor practice charge alleging the Company violated Section 8(a)(5) and (1) of the Act without first bargaining over the 2007 Benefit changes. Region 5 issued a complaint (Case 5–CA–33461) and I conducted a hearing on May 23–24, 2011.[68] On August 22, 2011, I issued a decision concluding that the Company's refusal to bargain over the 2007 changes violated Section 8(a)(5 and (1) of the Act.[69]

2. Local 788's request for information and bargaining prior to 2013

At Louisville, the Company had a longstanding practice of unilateral changes to employee and retiree health and dental care benefits. Local 788's predecessor unions responded in several instances by demanding bargaining. Local 788 demands to bargain in 1996 and 1999,[70] 2001 through 2004,[71] and 2009[72] related to premium increases, cost sharing, wellness care, and benefits for new employees. The Company agreed to bargain in some instances,[73] but typically responded that it was entitled to make such changes under the CBA and Plan Documents.[74] In one notable instance, in 2000, the Company and Local 788's predecessor entered into a memorandum of understanding after the Company attempted to a incorporate a long-term care plan into BeneFlex that would have been administered by a third party.[75]

The Louisville Unions filed several charges contesting the Company's right to make unilateral changes to premiums, copays, stop-losses, prescription coverage and payments, health insurance options, and dependent coverage between 2001 and 2007.[76]

In addition to demanding bargaining and filing unfair labor practices over changes to health benefits, the Louisville Unions frequently insisted on being provided with relevant information before the Company implemented changes in health care cost increases and participating providers for employees and retirees. Typical examples in 1994,[77] 2000[78] and 2001[79] related to lists of participating health care providers, costs, and prescription coverage. The Company generally provided the information.[80]

---

[57] Palmore and Donny Irvin, Local 992's treasurer, provided credible testimony regarding Local 992's practice of requesting information. (Tr. 34–35, 122; Jt. Exh. 2 at 38.)

[58] R. Exh. 3 at 8387–8394, 8398–8399, 8434, 8437, 8450–8452, 8459, 8471–8476, 8480–8482, 8487, 8492, 8499, 8502–8503.

[59] GC Exh. 2 at 3–4.

[60] R. Exh. 4 at 9072–9074.

[61] GC Exh. 4 at 15377–15378.

[62] GC Exh. 8 at 15456–15457; R. Exh. 3 at 8737.

[63] R. Exh. 3 at 8795.

[64] R. Exh. 3 at 8822–8823.

[65] Jt. Exh. 4 at ¶ 30; Jt. Exh. 3 at 249–250; GC Exh. 2 at 15277–15278; GC Exh. 3 at 15265, 15270; GC Exh. 8 at 15456–-15457; R. Exh. 3 at 8736–8737, 8822–8823; R. Exh. 4 at 9072–9074.

[66] My finding at fn. 56 of the decision in Case 5–CA–33461 regarding the consistency of testimony by Anderson and Irvin as to events leading to bargaining unit members enrolling in BeneFlex is consistent with their testimony in this case. (Jt. Exh. 2 at 65–68, 147–149.)

[67] Jt. Exh. 1 at 5, 16–20, 23–24; Jt. Exh. 4 at ¶ 32; GC Exh. 50.

[68] The parties retained the original exhibit numbers from Case 5–CA–33461, and any new exhibits entered in this case began sequentially with the last exhibit number in that case. (Id. at ¶ 34.)

[69] Case 05–CA–33461 is pending before the Board on exceptions. (Id. at ¶ 33.) Given the difference in the materiality of the changes involved in the two cases and the extensive stipulations of fact between the party, I decline the General Counsel's request to apply the principles of issue preclusion.

[70] Jt. Exh. 32 at 818, 870.

[71] GC Exh. 58, 60–64.

[72] Jt. Exh. 32 at 1000.

[73] Jt. Exh. 32 at 895.

[74] GC Exh. 25, 55, 57.

[75] Jt. Exh. 32 at 885.

[76] Evidence of the previous charges was received without objection. (GC Exh. 51A–H.) In response, the Company offered and I received over objection by the General Counsel and the Unions, copies of the stipulations resulting from those charges. (R. Exh. 29; Tr. 438–455.) In conjunction with the inconsistent testimony of Gregory Lowman, Local 788's president, they establish that the 2007 charge was the only one filed contesting changes to retiree benefits under MEDCAP and DAP, while the previous charges related to employee benefit changes to BeneFlex. (Tr. 254–255, 290, 307, 309, 219, 324–325.)

[77] Jt. Exh. 32 at 803.

[78] GC Exh. 54 at 1.

[79] GC Exh. 56 at 1.

[80] Jt. Exh. 32 at 807, 871–872, 904–905, 909.

3. Local 593's request for information and bargaining prior to 2013

At the Nashville plant, the Company also had a longstanding practice of unilateral changes to employee and retiree health and dental care benefits. The Company increased premiums for active employees and retirees in 1993,[81] 1998,[82] 2001 to 2008,[83] and 2012.[84] It either added or modified deductibles in 2002[85] and 2008 to 2012.[86] Employee and retiree coverage provisions were changed in 1993,[87] 2003,[88] and 2008 to 2012.[89] Eligibility, dependent and prescription coverage was modified in 2001and 2004,[90] and 2010 to 2012.[91]

Several notable changes augmented coverage. In 2004, the Company added 58,000 dentists to the DAP provider list.[92] In 2005, the plan eligibility was modified to make benefits available to same-sex partners.[93]

In several instances, however, Local 593 responded to announced changes by demanding bargaining and the Company agreed. In 1984, the Company responded favorably to Local 593's request for information and demand to bargain over a proposed increase in premiums, and enrollment and claims forms.[94] In one notable instance in 1987, the Company responded to Local 593's proposal to change insurance carriers by stating that such a change required careful consideration as to the costs, benefit levels and claims services to participants.[95] In another instance, on January 6, 1993, the Company recognized its bargaining obligation regarding the proportionate share of plan costs to be borne by the Company and employees.[96]

In other instances, the Company spurned Local 593's objections to changes to corporate-wide health and dental care benefits. In 1993 and 1994, Local 593 objected to Company changes to MEDCAP, but the Company asserted its rights to make the changes.[97] The Company did, however, bargain with Local 593 over the elimination of Prucare, a local health plan, at Nashvile.[98] The Company took similar actions over Local 593's objections in 1994 and 1997.[99]

With respect to changes in insurers, coverage, and increasing premiums and deductibles to MEDCAP and BeneFlex, Local 593 consistently requested an explanation and details regarding enrollment, eligibility and the portions of the cost to be borne by the Company, employees and retirees[100] between 1986 and 1992, 2000, 2002, 2006, 2008, and 2010. The Company generally provided the information.[101]

E. The 2013 Changes to the Dental Plan and MEDCAP and Local 992 Charge

In 2012, the Company decided to make additional changes to retiree medical and dental coverage for MERs and their covered dependants, effective January 1, 2013 (2013 Changes). More specifically, the Company decided to provide secondary medical and dental benefits to its MERs through a Health Reimbursement Agreement (HRA). On January 1 of each year, beginning January 1, 2013, each Medicare-eligible participant in MEDCAP and DAP would have his or her HRA account credited annually with $1200 for medical benefits and $200 for dental benefits. The retiree's Medicare eligible spouse or partner would have the same amounts added to the HRA. The HRA proceeds would then be available to purchase medical and dental insurance on the open market through a third-party broker. Unused amounts would roll over and be available to use in subsequent years. MEDCAP and DAP participants who became Medicare-eligible during the calendar year would be credited with a prorated contribution for that year and credited with the full contribution in subsequent years.[102]

Pursuant to the 2013 Changes, MERs would enroll in coverage of their choice within the options provided under MEDCAP and DAP, as amended. Enrollment would take place through a third-party broker, Extend Health, which would assist retirees in selecting an insurance company and plan. Extend Health is a separate entity that is neither owned nor operated by the Company.[103] The 2013 changes do not, however, apply to retirees and their covered dependants until they become eligible for Medicare. Retirees and covered dependents not yet eligible for Medicare would continue receiving medical and dental coverage under MEDCAP and DAP under the same terms as existed prior to the implementation of the 2013 changes, until they reach age 65 or become eligible for Medicare due to a disability.[104]

On August 15, 2012, the Company announced the 2013 changes: MERs would have until December 31, 2012, to choose supplemental coverage from among 75 insurance carriers. The failure to do so would result in the irrevocable declination of coverage. The Company also provided information about the changes on its website. The information included details about the new coverage per individual—fixed at $1200 for health care and $200 for dental care—and how to contact Extend Health.[105] However, the Company had no information as to the type of

[81] Jt. Exh. 2 at 89, 179, 182; R. Exh. 2 at 9080; R. Exh. 11 at 713.
[82] R. Exh. 11 at 1500–1501.
[83] Jt. Exh. 2 at 80, 82, 85, 185-187; Jt. Exh. 3 at 266; Jt. Exh. 10(f) at 175–176; R. Exh. 3 at 8950; R. Exh. 11 at 1058, 1134, 1287, 2445.
[84] Jt. Exh. 10(k) at 59.
[85] Jt. Exh. 2 at 189; R. Exh. 11 at 2155.
[86] Jt. Exh. 10(i) at 40–42; Jt. Exh. 10(f) at 200; Jt. Exh. 10(h) at 37; Jt. Exh. 10(k) at 60–61.
[87] R. Exh. 11 at 676.
[88] Jt. Exh. 11 at 2451.
[89] Jt. Exhs. 10(k) at 59–62, 10(e) at 24, 10(g) at 141–142; 10(h) at 37; 10(i) at 41–46; 10(j) at 49–57.
[90] Jt. Exh. 2 at 192-193.
[91] Jt. Exh. 10(k) at 59–62.
[92] R Exh. 3 at 8932.
[93] Jt. Exh. 2 at 191; Jt. Exh. 3 at 206.
[94] Jt. Exh. 25 at 1026–1027.
[95] Id. at 1033–1035.
[96] R. Exh. 4 at 9075.
[97] Jt. Exh. 25 at 1161.
[98] Id. at 1158–1161.
[99] Id. at 1182, 1566.
[100] The credible testimony of Todd White, Local 593's president, regarding Local 593's customary practice is corroborated by numerous Executive Committee notes. (Tr. 260–261; Jt. Exh. 25 at 2.)
[101] Jt. Exh. 25 at 1031–1032, 1051, 1073–1074, 1102, 1119, 1155, 1236, 1240, 1293, 1327, 1329.
[102] Jt. Exh. 4 at ¶ 35.
[103] Id. at ¶¶ 36–37.
[104] Id. at ¶ 39.
[105] Id. at ¶¶ 38, 53, 66, 77; Jt. Exh. 11(a)-(g).

coverage that would actually be made available to its MERs or the cost of premiums.[106]

While Local 788 got advanced notice of the 2013 changes,[107] the changes were implemented unilaterally without bargaining with any unions, including Locals 573, 788, and 992.[108] They applied corporate-wide and, according to the Company, were intended to (a) offer MERs greater choice in health care plans to supplement their Medicare coverage; (b) provide greater personal flexibility in the selection of benefit plans, allowing a MERs and their spouses, partners or dependants to choose different plans; (c) provide the possibility of savings in total out-of-pocket health care expenses depending on upon the plans selected; and (d) provide the Company with cost stability and a simplification of plan administration. The 2013 Changes were effectuated through amendments to the DAP and MEDCAP Plan Documents.[109]

Company officials met with Local 992 on August 15, 2012, to discuss the 2013 Changes and answer related questions.[110] Retirees were informed two days later that educational sessions would be conducted in August and September 2012 at various locations around the country, during which the retirees would receive detailed information about the 2013 Changes and how to enroll in the available health care options through Extend Health.[111]

Following the announced changes, Local 992 requested information on at least five occasions from the Company, including a list of providers, plan documentation and dependent coverage. Bruce Harris, the Company's labor relations manager at Richmond, told Donny Irvin, Local 992's treasurer, that there was no such list.[112]

Locals 593, 788, and 992 also objected to the 2013 Changes, which are not arbitrable.[113] On October 2, 2012, Locals 992 and 788 wrote to the Company and demanded it rescind the changes.[114] The Company responded by letters, dated October 19 and 22, 2012, and told them that it would not rescind the 2013 Changes because it believed it had no duty to bargain over the changes.[115] Local 593 responded three weeks later with a similar demand that the Company rescind the 2013 Changes. The Company rejected the Union's request later that day.[116]

F. Extend Health

1. The enrollment process

In August and September 2012, Extend Health mailed to MERs a "Getting Started Guide" and "Enrollment Guide, and conducted education sessions for potential enrollees.[117] The Guide provided information regarding available plans, listed concerns by MERs and stated that MERs would be guaranteed coverage during the first enrollment period. It also noted, however, that they might be rejected later for preexisting conditions if the selected insurance provider changed its terms of coverage.[118] Extend Health advised MERs to start this process three months before the 2013 Changes became effective.[119]

The Company and Extend Health produced education sessions in states where significant numbers of MERs resided. MERs were informed that they would be able to use their HRA allotments to choose medical and dental coverage from among approximately 75 insurance carriers through an Extend Health benefit advisor. Extend Health would continue to function as claims administrator and process all appeals. MERs were also advised that plan premiums were likely to increase each year and there was no guarantee MERs could continue seeing their current medical or dental providers.[120]

After receiving the information, MERs were required to make several telephone calls to Extend Health. MERs were asked to provide Extend Health benefit advisors with medical, Social Security and Medicare information. Based upon that information, benefit advisors recommended certain insurance carriers. The new enrollment process took several months.[121]

Pursuant to the 2013 Changes, the Company began providing secondary medical and dental benefits to its MERs through a tax-exempt HRA, effective January 1, 2013. Extend Health implemented the 2013 Changes by compiling lists of insurance carriers and web-based summaries of insurance plans available to MERs who met certain criteria in May and June 2013.[122]

Based on information from third party vendors, the Company committed approximately $93,200,000 to MEDCAP/DAP HRA accounts for 2013. As of May 2013, the number of HRA joint and individual accounts established by eligible participants since

---

[106] The consistent testimony of Company and Union witnesses reveals that the Company did not know what benefits would actually be provided to employees. (Tr. 37, 177, 187–188, 210, 237–238, 263, 293, 332–333, 380–383, 393, 411, 417, 42–428, 495, 540.)

[107] Lowman was told of the changes a few days earlier. (Tr. 285–287.) Todd White, Local 593's president, however, did not find out until the day of the announcement. (Tr. 257–258.)

[108] Jt. Exh. 4 at ¶ 57, 68, 80.

[109] Id. at ¶ 41; Jt. Exh. 12(a)-(b).

[110] Id. at ¶ 54.

[111] Id. at ¶ 40.

[112] Bruce Harris, the Company's labor representative at Richmond, confirmed Irvin's credible testimony that the Company was no longer providing MERs with insurance coverage, but rather, cash to obtain coverage. (Tr. 30-32, 205–206.)

[113] The parties stipulated that there are no references to the DAP Plan or MEDCAP in any of the applicable CBAs and, therefore, the 2013 Changes are not arbitrable. (Jt. Exh. 4 at ¶¶ 60, 65, 76.)

[114] Id. at ¶¶ 55; Jt. Exh. 23, 34.

[115] Id. at ¶¶ 56, 78–79; Jt. Exh. 23–24, 34–35.

[116] Id. at ¶ 67; Jt. Exh. 28–29.

[117] Id. at ¶¶ 42–43; Jt. Exhs. 13(a)-(b), 14–15.

[118] Only during the initial enrollment period were MERs guaranteed enrollment in a plan of their choice. (Id. at 8; Jt. Exh. 10(f) at 41.)

[119] Palmore, vice president of Local 992, provided credible and unrefuted testimony regarding the mechanics of the rollout of the 2013 changes. (Tr. 128.)

[120] Jt. Exh. 11(f) at 4, 15, 23–27, 31.

[121] The credible testimony revealed that some MERs found the process easy, while others found it difficult to navigate, but it is not disputed that the process of initially enrolling in a new insurer through Extend Health took months. (Tr. 112–121, 350–351; Jt. Exh. 13(a) at 7–11.)

[122] The parties stipulated to receipt of examples of companies serving areas near each of the three plants that restricted coverage to males over the age of 65 who were not smokers, disabled or on kidney dialysis. (Jt. Exh. 4 at ¶¶ 44–46; Jt. Exhs. 16–18.)

January 2013 was 51,849. A joint account includes Company retirees, survivors, and/or dependents.[123]

2. The new terms and conditions of coverage

The new provisions applying to MERs are contained in Appendix B of the Plan Document. In addition to the provisions already described about the enrollment process and reimbursement through HRAs, the new plan requires MERs to submit to Extend Health all claims for expenses by March 31 following the plan year in which expenses are incurred. Extend Health, not the Company, administers the reimbursement and appeals processes for MERs, and requires them to submit more claim information than previously required.[124] Moreover, MERs no longer have any stop-loss or annual benefit maximum through the Company.[125]

Legal Analysis

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. *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).

As in Case 05–CA–033461, the General Counsel once again alleges that the Company violated Section 8(a)(5) and (1) of the Act when it unilaterally changed MEDCAP and DAP for a particular group of bargaining unit employees. In that case, I found the unilateral elimination of such coverage for new hires at the Richmond plant after January 1, 2007, to be a major change and a violation of Section 8(a)(5) and (1). In this case, the General Counsel alleges the same violation with respect to the Company's unilateral replacement of MEDCAP and DAP as secondary coverage for MERs with an annual $1400 voucher payment toward the costs of coverage with an unknown carrier arranged through a third-party broker. It is further alleged that the change effectively severs the Company's obligation to bargain over health and dental coverage under the CBA, as the Union has no bargaining relationship with the Extend Health.

The Company again concedes that the changes were unilateral but asserts that the 2013 Changes are fully consistent with the Unions' waivers and simply continue an uninterrupted 30-year past practice of similar changes. The Company also concedes that the 2013 Changes changed the manner in which MERs receive benefits but asserts that they continue receiving benefits under MEDCAP and DAP, and the Company continues funding the benefits.

In its reply brief, the Company again stresses that the 2013 Changes altered the manner in which it provides benefits to MERs, but did not eliminate MEDCAP or DAP, discontinue benefits for MERs or preclude all future bargaining over retiree medical and dental coverage. The Company also contends that the General Counsel mischaracterized the bargaining history associated with past MEDCAP and DAP Changes, the past practice between the parties and the Unions failures to object to unilateral changes.

In its reply brief, the General Counsel renews its arguments that the Unions never negotiated over the inclusion of MEDCAP and DAP into the CBAs and, in any event, they are no longer referenced in any of the CBAs. Moreover, the Unions pursued bargaining over the years and did not waive their rights relating to MEDCAP and DAP. Lastly, the massive 2013 Changes are vastly different from past programmatic changes of increasing premiums and tinkering with eligibility formulas.

I. EXPRESS WAIVER

The Company's waiver argument is premised on several grounds: (1) the Unions agreed to participate in DAP in 1976 on the condition that the Company retained the right to make future changes to the plan at its discretion; (2) the Unions agreed to participate in MEDCAP in the mid-1980's on the condition that the plan documents include a reservation of rights provision; and (3) the Company has made numerous, significant and uncontested unilateral changes to both plans virtually every year since 1986.

The General Counsel refuted the Company's waiver defenses on the following grounds: (1) the MEDCAP and DAP plan documents are not part of the CBAs; (2) the unilateral changes over the years have been relatively minor compared to the 2013 Changes; (3) the history of information requests constitute requests to bargain; (4) the waiver defense was aimed at the wrong union in Louisville; (5) the Unions bargained over prior changes affecting MEDCAP and DAP; (6) the 1986 Agreement at Richmond did not result in a waiver; (7) there are no bargaining notes relating to MEDCAP in Louisville or Nashville; (8) stipulations from prior cases evidence a history of union challenges to the Company's right to make unilateral changes; and (9) the Unions contested changes to BeneFlex.

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

[123] Id. at ¶¶ 47–48.

[124] Jt. Exh. 12(b) at 123–126.

[125] Jt. Exh. 10(g).

burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1987).

Pursuant to the CBAs, the Unions have a right to bargain on behalf of retirees, as well as active employees. It is undisputed that the MEDCAP and DAP Plan Documents contained management-rights clauses making them terminable by the Company. None of the CBAs, however, mention either plan. At Richmond, neither MEDCAP nor DAP were ever mentioned in the CBA; at Louisville and Nashville, the plans were once mentioned, but were subsequently removed from the CBAs.

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 employer's contention that the unions incorporated the benefit plans' reservation of rights clauses into the contract based upon a "course of conduct" based on copies of the benefit plans provided to the unions and incorporated into the collective-bargaining agreements. 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), where a management-rights provision contained in the employee benefits plan, but not the collective-bargaining agreement, was insufficient to establish a waiver of the union's bargaining rights.

The Board's recent decision in *Omaha World-Herald,* 357 NLRB 1870, 1870–1872 (2011) does not support a different result. In that case, the Board concluded that unilateral changes to employees' pension plans were lawful but found that unilateral changes to their 401K savings plan were unlawful. As to the pension plan, it concluded that the union waived its right to bargain based on "an amalgam of factors." Under the contract, the employer was required to "advise the Union of proposed changes [to the pension plan] and meet to discuss and explain changes if requested." However, the clause coexisted with other contract provisions referencing the plan, which included a reservation of rights clause, and expressly excluding changes to the plan from the grievance and arbitration procedure because the plans covered all employees, not just represented ones. Moreover, the union neither objected nor requested bargaining regarding a *similar*, prior unilateral change by the employer *during the term* of the contract. The prior change to the pension plan was a significant one—the removal of all employees under age 50 from the plan. Id. at 3.

Significantly, the Board also noted that its conclusion was not inconsistent with *Southern Nuclear Operating Co.* and other relevant decisions. Id. at fn. 8 (citing *Amoco Chemical Co.*, 328 NLRB 1220, 1222 fn. 6 (1999), enf. denied 217 F.3d 869 (D.C. Cir. 2000); *Register-Guard*, 339 NLRB 353, 356 (2003); and *Johnson-Bateman Co.*, 295 NLRB 180, 188 (1989)).

Moreover, the Board's opposite conclusion in *Omaha World-Herald,* that the employer's unilateral change to the 401(k) plan after the contract expired was unlawful, is also consistent with the facts here. The Board's rationale for the violation rested on well-settled precedent precluding waiver of the right to bargain where unilateral action relies on expired contract or referenced plan language, and there is no evidence that the parties intended that the waiver provision continue in force beyond the contract's expiration. Id. at 3–4 (citing *E. I. du Pont De Nemours, Louisville Works*, 355 NLRB 1084, 1085 (2010); *Paul Mueller Co.*, 332 NLRB 312, 313 (2000); and *Ironton Publications*, 321 NLRB 1048, 1048 (1996)).

Notwithstanding the absence of an express waiver in the CBAs, the Company contends that the Unions waived their rights to bargain over these changes in clear and unmistakable terms, as evidenced by the bargaining history surrounding the CBAs and the Company's well-established past practice of unilaterally changing plan document terms.

Waiver of a statutory right may be evidenced by bargaining history, as the Company contends, 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 Unions consciously yielded or clearly and unmistakably waived their interests 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 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 clearly intended and expressly bargained away its statutory right).

At Richmond, there was discussion, but Local 992 never agreed to incorporate a management-rights provision into the contract. At Louisville and Nashville, there are no bargaining notes relating to the inclusion of a management-rights provision in MEDCAP or DAP. Moreover, Local 788 is not bound to any alleged waiver by its predecessor union even though it adopted the predecessor's CBA. See *Eugene Iovine, Inc.*, 356 NLRB 1056 (2011); *NLRB v. Burns Int'l Servs., Inc.,* 406 U.S. 272, 284 fn. 8 (1972); *American Seating*, 106 NLRB 250 (1953).

Based on the foregoing, the language of the CBAs, especially when construed in conjunction with the parties' past dealings and bargaining history, fail to reveal the existence of any express waivers by the Unions permitting the Company to unilaterally eliminate MEDCAP and DAP as the secondary coverage for MERs and replace them with an annual payment into an HSA to be administered entirely by a third party broker.

II. IMPLIED WAIVER

Notwithstanding the absence of an express waiver, the

Company again advances several additional theories demonstrating that the Unions waived their objections to the unilateral replacement of MEDAP and DAP for MERs—a general waiver based on past practice and the existence of a longstanding practice as the continuation of the status quo. 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 30 years of imposing unilateral changes to MEDCAP and DAP terms of coverage constitutes a waiver by all three Unions. A waiver may be inferred from extrinsic evidence of contract negotiations and/or past practice. *Mt. Clemons General Hospital*, 344 NLRB 450, 460 (2005). See also *Litton Microwave Cooking Products v. NLRB,* 868 F.2d 854, 858 (6th Cir. 1989) (waiver where management rights clause was included in contract and explicitly referred to layoffs and production methods, coupled with history of uncontested work relocation and layoffs); *California Pacific Medical Center*, 337 NLRB 910, 914 (2002) (waiver based on management rights clause giving employer the right to lay off employees whenever deemed necessary, again coupled with a history of uncontested actions and absent requests to bargain).

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 of fluctuations in the bargaining relationship between all three Unions and the Company—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 unlikely that the Unions waived their rights to bargain over the elimination of retiree health benefits.

Moreover, *Mt. Clemons*, *Litton* and *California Pacific* did not include unilateral changes that substantially deviated from past practices. Both *Mt. Clemons* and *Litton* involved disputes arising 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 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 2013 Changes were merely part of the status quo of a longstanding practice that spanned a 30-year period of unilateral changes to MEDCAP and DAP. The General Counsel again responds 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.

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). *Courier-Journal*, 342 NLRB 1093, 1095 (2004) (unilateral increase of health premium lawful where contract gave employer the right to modify or terminate the health care plan, coupled with a long history of similar unilateral changes).

Again, however, the Company failed to meet its burden in establishing that the Unions expressed a clear and unmistakable waiver of their rights to bargain. When the Company's history of unilateral changes to the health plan deductibles, premiums, eligibility and other terms are considered in conjunction with many Union requests for information, its past practice theory fails to establish a status quo that meets the requirements of *Courier-Journal*. Moreover, the Company's unilateral replacement of MEDCAP and DAP for MERs with a voucher plan is far from a continuation of the status quo.

C. Material Departure from Past Practice

The Company's reliance on a long history of changes to MEDCAP and DAP is also undermined by the materiality of the 2013 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, 523 (2010), enfd. mem. _ F.3d _, 2011 WL 2555757 (D.C. Cir. May 31, 2011)

In *Caterpillar*, the Board found that an employer's unilateral implementation of a generic-first prescription drugs program violated Section 8(a)(5). In addition to rejecting the employer's contention that it had a longstanding practice of unilaterally implementing changes to its health care plan, there was no "thread of similarity running through and linking the several types of change at issue." The Board distinguished three types of past change—preauthorization requirements, drug quantity limits and step therapies—as dissimilar to each other, as well as generic-first prescriptions. Moreover, the implementation of "generic first" represented a material departure from that past practice, as past changes were limited in scope. Lastly, the union's acquiescence to past unilateral changes did "not operate as a waiver of its right to bargain over such changes for all time." Id. at 521–523. (quoting *Owens-Corning Fiberglas*, 282 NLRB 609 (1987)).

In contrast to the employers in *Mt. Clemons General Hospital, Litton*, and *Courier-Journal*, the Company has failed to establish that the Unions waived their rights to bargain based on the bargaining history and past practice. Furthermore, based on the *Caterpillar* holding, the Company's termination of MEDCAP and DAP as secondary insurance to MERs, replacing them with a permanent annual voucher payment and referring MERs to a third party to procure some sort of health care and dental coverage, constituted a material departure from any past practices that

Company may have established. Instead of simply changing premium rates, deductibles, eligibility and scope of coverage, the 2013 Changes removed negotiations and discussions of potential health and dental insurance plans from the bargaining table.

The Company stresses that the previous $1,500,000 annual benefit maximum, a major bone of contention, was not eliminated because, in theory, there might be an insurance provider on Extend Health's list willing to provide such coverage. Moreover, the new procedure allows each retiree to shop for the coverage most beneficial to him or her, as opposed to being locked into one negotiated on behalf of thousands of beneficiaries. While such arguments are plausible, it is far from certain that an individual will be able to procure as beneficial a coverage as could be negotiated by an employer on behalf of thousands of beneficiaries. The answers presumably lie in the information request and bargaining process that was sidestepped here.

Accordingly, the Company failed to carry its burden in establishing an implied waiver through its bargaining history or past practice, and its elimination of replacement of MEDCAP and DAP with an annual $1400 voucher payment to a third-party insurance broker constitutes a material departure from past practice.

III. 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. See *FirstEnergy Generation Corp.,* 358 NLRB 842, 842 (2012), citing *Caterpillar, Inc.*, supra at 523 (union's silent acquiescence to prior changes in retiree benefits does not surrender future rights to bargain over changes); see also *Brewers and Malsters*, 342 NLRB 560 (2004), enfd. 414 F.3d 36, 45 (D.C. Cir. 2005) (union's waiver of right to bargain over prior changes does not waive right to bargain over future changes).

Unlike the union in *Manitowoc*, which was equitably estopped from bargaining due to a history of unilateral changes without bargaining requests, information requests, or other objections from the union, the Unions here made numerous information requests throughout the years, to which the Company typically acquiesced. Information requests sent to employers constitute requests for bargaining. *Eldorado*, *Inc*., 335 NLRB 952, 954 (2001). Moreover, the Company's bargaining notes indicate that the Company had no intention of terminating MEDCAP and DAP and replacing them with an annual voucher payment.

The record 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, replacing the entire retiree healthcare and dental program far exceeds the expectations of the parties based on a 30-year bargaining record.

In conclusion, the 2013 Changes were a material departure from prior changes. Historical changes affecting MERs never even remotely suggested that the Company would ever replace their defined health and dental insurance benefits with an annual voucher payment to be administered by a third-party broker, essentially requiring MERs to fend for themselves in the insurance marketplace. Indeed, the record demonstrates, and the Company stresses, that participation in its corporate-wide plans has always been voluntary and each of the Unions has always been free to propose site-specific alternative benefit medical and dental benefit plans. It also insists that it has been willing to bargain over locally based-proposals and would do so again if the Unions proposed alternative secondary coverage plans. That is a hollow claim by the Company, raised for the first time in its brief, given that Locals 593, 788, and 992 objected to the 2013 Changes in October 2012 and demanded bargaining. The Company declined or ignored those requests which, in accordance with past practice, might have produced counterproposals by the Unions for bargaining over alternative site-specific plans.

Accordingly, the Company's unilateral implementation of the 2013 Changes without first offering Locals 593, 788, and 992 the opportunity to bargain violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

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

2. The Charging Parties, Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of Dupont Workers, Freon Craftsman Union, Local 788, International Brotherhood of Dupont Workers, and International Brotherhood Of Dupont Workers (IBDW), Local 593, Old Hickory Employees Council, are labor organizations within the meaning of Section 2(5) of the Act and are the recognized collective-bargaining representatives of bargaining units composed of the production, maintenance, clerical, technical, and office employees employed by the Company at its facilities in Richmond, Virginia, Louisville, Kentucky, and Nashville, Tennessee.

3. On January 1, 2013, the Company violated Section 8(a)(5) and (1) by replacing secondary health and dental insurance to its Medicare-eligible retirees with an annual voucher toward the procurement of some version of such coverage from among choices provided by a third party broker, and failing to bargain over these changes upon request by Locals 593, 788, and 992.

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 Locals 593, 788, and 992 concerning the changing of secondary health and dental insurance to its Medicare-eligible retirees, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice to employees. Specifically, I shall order the

Company to rescind, for Medicare-eligible retirees, the change in its retiree healthcare and dental program, implemented January 1, 2013, providing them with an annual voucher to procure some version of such coverage from among the choices provided by a third party broker, and restore MEDCAP and DAP insurance coverage for Medicare-eligible retirees to the same terms and conditions as they existing on December 31, 2012. The Company shall, on demand by Locals 593, 788, and 992, bargain in good faith regarding any Company proposal to change health and dental care benefits for Medicare-eligible retirees.

In the event that this Remedy is not adhered to, bargaining unit members who are Medicare-eligible retirees, over time, will be adversely affected by the replacement of their current secondary health and dental coverage with an annual $1500 voucher into a Health Savings Account to the extent that their labor representatives will be unable to bargain with the Company over the terms and conditions of coverage. In that case, the Company shall make whole its Medicare-eligible retirees for any loss of health or dental care benefits suffered as a result of the Company's unlawful modifications. Payments for lost benefits are to be computed in the manner 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[126]

ORDER

The Respondent, E. I. DuPont de Nemours and Company, Wilmington, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(b) Making material, substantial and significant changes to secondary retirement health and dental benefits of unit employees without first notifying the Union and affording it an opportunity to bargain over 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 changes to retiree benefits implemented on January 1, 2013, as they relate to the replacement of secondary health and dental benefits for Medicare-eligible retirees with an annual voucher payment into a Health Savings Account for the procurement of secondary health and dental coverage from providers on a list supplied by a third-party insurance broker.

(b) Meet and bargain in good faith with Locals 593, 788, and 992, upon request, about the MEDCAP Plans and DAP Plans and if an agreement is reached regarding those plans, reduce the agreements to writing and execute them.

(c) Restore the benefits for the unit employees in the following bargaining units under the MEDCAP and DAP Plans that existed prior to the unlawful unilateral changes implemented on January 1, 2013:

Local 992 Medicare-eligible retirees formerly employed by the Company as:

All non-exempt monthly salary roll clerical, technical, and office employees of the Spruance Fibers Plant located at the Ampthill, Chesterfield County, Virginia plant included within the unit appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in Case Number 5-R-2835, bearing date of December 26, 1946; but excluding all hourly wage roll production and maintenance employees, nurses, security officers, Secretary/Administrative Assistant, Salary Roll, personnel Services Personnel, Contract Administration clerks, Systems Technicians, Video Specialist, employees on the no-service roll, student operators, student engineers, co-op students, and all supervisory employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

All production, maintenance, service and Plant technical hourly wage roll employees at the Spruance Fibers Plant located at Ampthill, Chesterfield County, Virginia, included within the union appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in Cases Nos. 5-R-2724, 5-R-2773, 5-R-2791 bearing date of January 31, 1947; but excluding all employees classified as instructors, instructresses, security officers, Limited Service Employees, employees when working as relief supervisors and supervisors-in-training, and all supervisory employees set forth in said cases with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

Local 593 Medicare-eligible retirees formerly employed by the Company as:

The hourly wage roll production, maintenance, and power house employees at the [Old Hickory, Nashville, Tennessee] Plant, including instructors, but excluding guards, firemen, fire inspectors, office, clerical, salaried technical, and professional employees, and relief supervisors who serve in that capacity either regularly or for substantial periods of time during the course of the year, and all other supervisors as defined in the Labor-management Relations Act.

Local 788 Medicare-eligible retirees formerly employed by the Company as:

All employees of the E. I. Du Pont De Nemours and Company included within the unit appropriate for collective bargaining purposes established in an order of the National Labor Relations Board in Case No. 9-RC-18290 bearing date of May 14, 2010; viz., all employees of E. I. Du Pont De Nemours and Company at its Louisville Works, Louisville, Kentucky, including powerhouse and refrigeration plant employees, chief

[126] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

operators, shift leaders and fire department employees, but excluding all office and clerical employees, chemical supervisors, technical engineers, assistant technical engineers, draftsmen, chemists, nurses and hospital technicians, general foremen, foremen , fire chief, guards, and all other supervisors and professional employees as defined in the National Labor Relations Act as amended.

(d) Make unit employees whole by reimbursing them, with interest, for any loss of benefits suffered and additional expenses suffered as a result of the unilateral changes to the MEDCAP Plans and DAP Plans and maintain those terms in effect until the parties bargain to a new agreement, or a valid impasse, or until the Union has agreed to changes.

(e) Within 14 days after service by the Region, post at its facility in Ampthill, Chesterfield County, Virginia, copies of the attached notice marked "Appendix A."[127] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means as the Company customarily communicates with its employees and retirees by such means. 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.

(f) Within 14 days after service by the Region, post at its facility in Nashville, Tennessee, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means as the Company customarily communicates with its employees and retirees by such means. 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, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company.

(g) Within 14 days after service by the Region, post at its facility in Louisville, Kentucky, copies of the attached notice marked "Appendix C." Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means as the Company customarily communicates with its employees and retirees by such means. 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, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company.

Dated, Washington, D.C. December 16, 2013

APPENDIX A

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 fail and refuse to bargain collectively and in good faith with AMPTHILL RAYON WORKERS, INC., LOCAL 992, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (the Union), as the exclusive representative of our employees in the following collective-bargaining units:

All non-exempt monthly salary roll clerical, technical, and office employees of the Spruance Fibers Plant located at the Ampthill, Chesterfield County, Virginia plant included within the unit appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in Case Number 5-R-2835, bearing date of December 26, 1946; but excluding all hourly wage roll production and maintenance employees, nurses, security officers, Secretary/Administrative Assistant, Salary Roll, personnel Services Personnel, Contract Administration clerks, Systems Technicians, Video Specialist, employees on the no-service roll, student operators, student engineers, co-op students, and all supervisory employees with the

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

authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

All production, maintenance, service and Plant technical hourly wage roll employees at the Spruance Fibers Plant located at Ampthill, Chesterfield County, Virginia, included within the union appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in Cases Nos. 5-R-2724, 5-R-2773, 5-R-2791 bearing date of January 31, 1947; but excluding all employees classified as instructors, instructresses, security officers, Limited Service Employees, employees when working as relief supervisors and supervisors-in-training, and all supervisory employees set forth in said cases with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

WE WILL NOT make unilateral changes to employees' MEDCAP Plans and DAP Plans without first notifying Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers, and bargaining about any proposed changes to these plans.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights as guaranteed in Section 7 of the Act.

WE WILL, on request of Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers, restore the unit employees' benefits under the MEDCAP Plans and DAP Plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2013, and maintain those terms in effect until the parties have bargained to a new agreement, or a valid impasse, or until the Union has agreed to changes.

WE WILL meet and bargain in good faith with the Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers, upon request, about the MEDCAP Plans and DAP Plans and should we reach agreement regarding those plans, we will reduce the agreements to writing and execute them.

WE WILL make unit employees whole by reimbursing them, with interest, for the loss of any benefits and additional expenses that they may have suffered as a result of the unilateral changes to the MEDCAP Plans and DAP Plans.

E.I. DU PONT DE NEMOURS AND COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-090984 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.

APPENDIX B

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 fail and refuse to bargain collectively and in good faith with INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (IBDW), LOCAL 593, OLD HICKORY EMPLOYEES COUNCIL (the Union), as the exclusive representative of our employees in the following collective-bargaining units:

The hourly wage roll production, maintenance, and power house employees at the [Old Hickory, Nashville, Tennessee] Plant, including instructors, but excluding guards, firemen, fire inspectors, office, clerical, salaried technical, and professional employees, and relief supervisors who serve in that capacity either regularly or for substantial periods of time during the course of the year, and all other supervisors as defined in the Labor-management Relations Act.

WE WILL NOT make unilateral changes to employees' MEDCAP Plans and DAP Plans without first notifying INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (IBDW), LOCAL 593, OLD HICKORY EMPLOYEES COUNCIL, and bargaining about any proposed changes to these plans.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights as guaranteed in Section 7 of the Act.

WE WILL, on request of INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (IBDW), LOCAL 593, OLD HICKORY EMPLOYEES COUNCIL, restore the unit employees' benefits under the MEDCAP Plans and DAP Plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2013, and maintain

those terms in effect until the parties have bargained to a new agreement, or a valid impasse, or until the Union has agreed to changes.

WE WILL meet and bargain in good faith with the INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (IBDW), LOCAL 593, OLD HICKORY EMPLOYEES COUNCIL, upon request, about the MEDCAP Plans and DAP Plans and should we reach agreement regarding those plans, we will reduce the agreements to writing and execute them.

WE WILL make unit employees whole by reimbursing them, with interest, for the loss of any benefits and additional expenses that they may have suffered as a result of the unilateral changes to the MEDCAP Plans and DAP Plans.

E.I. DU PONT DE NEMOURS AND COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-090984 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.

APPENDIX C

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 fail and refuse to bargain collectively and in good faith with FREON CRAFTSMAN UNION, LOCAL 788, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (the Union), as the exclusive representative of our employees in the following collective-bargaining units:

All employees of the E. I. Du Pont De Nemours and Company included within the unit appropriate for collective bargaining purposes established in an order of the National Labor Relations Board in Case No. 9-RC-18290 bearing date of May 14, 2010; viz., all employees of E. I. Du Pont De Nemours and Company at its Louisville Works, Louisville, Kentucky, including powerhouse and refrigeration plant employees, chief operators, shift leaders and fire department employees, but excluding all office and clerical employees, chemical supervisors, technical engineers, assistant technical engineers, draftsmen, chemists, nurses and hospital technicians, general foremen, foremen , fire chief, guards, and all other supervisors and professional employees as defined in the National Labor Relations Act as amended.

WE WILL NOT make unilateral changes to employees' MEDCAP Plans and DAP Plans without first notifying FREON CRAFTSMAN UNION, LOCAL 788, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS, and bargaining about any proposed changes to these plans.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights as guaranteed in Section 7 of the Act.

WE WILL, on request of FREON CRAFTSMAN UNION, LOCAL 788, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS, restore the unit employees' benefits under the MEDCAP Plans and DAP Plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2013, and maintain those terms in effect until the parties have bargained to a new agreement, or a valid impasse, or until the Union has agreed to changes.

WE WILL meet and bargain in good faith with the FREON CRAFTSMAN UNION, LOCAL 788, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS, upon request, about the MEDCAP Plans and DAP Plans and should we reach agreement regarding those plans, we will reduce the agreements to writing and execute them.

WE WILL make unit employees whole by reimbursing them, with interest, for the loss of any benefits and additional expenses that they may have suffered as a result of the unilateral changes to the MEDCAP Plans and DAP Plans.

E.I. DU PONT DE NEMOURS AND COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-090984 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.