JD-92-05
Louisville, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

E.I. DUPONT DE NEMOURS, LOUISVILLE WORKS — Cases 9-CA-40777, 9-CA-41634

and

PAPER, ALLIED-INDUSTRIAL, CHEMICAL
AND ENERGY WORKERS INTERNATIONAL UNION AND
ITS LOCAL 5-2002

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for the General Counsel.
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of Wilmington, Delaware, for the Respondent.

Statement of the Case

Karl H. Buschmann, Administrative Law Judge. This case was tried in Louisville, Kentucky, on June 21, 2005. The charge in Case 9-CA-40777 was filed January 2, 2004, and a charge in Case 9-CA-41634 was filed January 5, 2005.[1] (The additional allegations in Case 9-CA- 40919 were settled). The consolidated complaint was issued March 18, 2005. It alleges that the Respondent, E.I. DuPont De Nemours, Louisville Works, violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by implementing changes to its Beneflex 2004, Health and Welfare Benefits without the consent of the Union, the recognized collective bargaining representative of the employees at its Louisville Works, and without affording the Union an opportunity to bargain.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs and reply briefs filed by the General Counsel, the Union and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is engaged in the manufacture of fluoro-products at its facility in Louisville, Kentucky, where it annually sold and shipped goods valued in excess of $50,000 from its Louisville, Kentucky facility directly to points outside the Commonwealth of Kentucky. The Respondent admits and I find that it is an employer engaged in commerce within

[1] All dates are from 2004-2005 unless otherwise indicated.

the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

This case presents the legal issue based upon a stipulated factual record, whether the Respondent violated the Act by unilaterally changing health care benefits for unit employees following the expiration of the collective bargaining agreement. The record consists of the Stipulation of Facts and 56 exhibits, including the expired collective bargaining agreement, copies of DuPont's medical insurance plan, known as DuPont Beneflex Medical Care Plan and copies of DuPont's benefit plan for its employees, known as Beneflex Flexible Benefits Plan, as well as letters sent by the parties. The record also contains the testimony of Pamela Murray, senior consultant of DuPont. The following summary of relevant facts is primarily based upon the Stipulated Facts and the exhibits received into the record (Jt. Exh. A).

The Respondent, E.I. DuPont De Nemours, Louisville Works, and the Union have had a bargaining relationship for over 50 years. During that time, the Neoprene Craftsmen Union (NCU) represented the production and maintenance employees at the Louisville Works. In June, 2002, 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 Steelworkers of America and became USW.

The Respondent and the Union (NCU) were parties to collective bargaining agreements covering DuPont's bargaining unit employees. The agreement continued year to year unless reopened by one of the parties 60 days prior to the expiration date of the contract. The contracts provided for a wage re-opener which was exercised annually. The parties' most recent collective bargaining agreement was effective from June 13, 1997 to March 21, 2002. The prior agreement ran from May 25, 1994 to March 21, 1997.

Of significance are the Respondent's Beneflex Plan (Jt. Exh. 2), and the Beneflex Medical Care Plan (Jt. Exh. 3). During negotiations for the March 1994 agreement, the Respondent proposed and the Union (NCU) accepted the proposal to have the employees covered by the DuPont Beneflex Medical Care Plan (Beneflex Medical). More specifically, the bargaining agreement provides: "The COMPANY will provide basic Hospital and Medical-Surgical coverage as set forth in the DuPont BeneFlex Medical Care Plan." (Jt. Exh. 1). The parties further agreed that employees would be covered by the DuPont U.S. Region-wide Beneflex Flexible Benefits Plan (Beneflex Plan). The Beneflex Plan is a cafeteria-style benefits plan, which includes a variety of benefit options in addition to health care coverage, such as dental coverage, vision coverage, and life insurance. Employees are provided with annual enrollment periods each fall at which point the employee elects the level of health care desired and other elections of benefit options. Beneflex Medical is a self-insured medical care option encompassed within the Beneflex Plan. All DuPont sites in the United States participate in Beneflex. The Beneflex Plan, including Beneflex Medical, was implemented at the Louisville site effective January 1, 1995.

During the negotiations for the 1994 collective bargaining agreement, the Respondent pointed out to the Union that under the terms of the Beneflex Plan, the Respondent would be permitted to alter the level and/or costs of benefits under the plan on an annual basis. The Respondent also noted that such changes would be made on a U.S. Region-wide basis. Based on these understandings, the Union membership accepted the Beneflex Plan. In May, 1994, the Union (NCU) ratified the collective bargaining agreement which cited DuPont's Beneflex Medical Plan. Under the terms of the Beneflex Plan and the Beneflex Medical Plan, the

Respondent has the right to change or alter the level or cost of benefits under the plan on an annual basis. Both documents, the Beneflex Plan and the Beneflex Medical Plan, contain identical provisions to that effect, stating, inter alia: “The Company reserves the sole right to change or discontinue this plan in its discretion, provided, ---“ (Jt. Exhs. 2, 3).

In the fall of 1995, the Respondent presented to the Union (NCU) with a summary of any upcoming changes to the Beneflex Pan, as well as any changes or premium increases for Beneflex Medical, for the upcoming year. The Respondent subsequently mailed a “Plain Talk” to all U.S. Region DuPont employees, including Louisville employees represented by the Union (NCU). The Plain Talk was a publication used and distributed by the Respondent each fall to communicate changes to the Beneflex Plan, including any changes or premium increases to Beneflex Medical, to all participants in the in the Beneflex Plan for the upcoming calendar year.

On January 1, 1996, the Respondent implemented the changes to the Beneflex Plan. The terms of the Beneflex Plan and the Beneflex Medical allowed the Respondent to alter costs incurred by unit members and/or levels of benefits received by unit members under the Plan. The Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes.

In the fall of each year thereafter, from 1995 to 2001, the Respondent and the Union met. The Respondent presented the union representatives with a summary of any changes for the upcoming year to the Beneflex Plan, as well as any changes or premium increases for Beneflex Medical. The Respondent subsequently mailed a “Plain Talk” each year to all U.S. Region DuPont employees, including the Louisville employees represented by the Union. On January 1 of each year, from 1996 to 2002, the Respondent implemented the changes to the Beneflex Plan which had earlier been presented to the Union. The Respondent did not offer to negotiate over these changes, nor did the Union seek to bargain over these changes. In some years the Respondent implemented 5 changes, in other years 7 changes, and in 2002 the Company implemented 13 changes. The changes included, increases in premiums for medical coverage, changes to pharmacy benefits, increases to premiums for vision coverage and, in the following year, decreases in premiums for vision coverage, and changes in the rules for spousal medical coverage.

On January 16, 2002, the Union (NCU) notified the Respondent that it intended to open negotiations for a successor contract. On February 26, 2002, the parties began negotiations for a successor collective bargaining agreement. The parties agreed that if an agreement had not been reached by the contract negotiation date, management would honor the terms and conditions of the contract day-to-day until something different was bargained. On March 21, 2002, the bargaining agreement between the Respondent and the Union (NCU) expired (Jt. Exh. 9).

In June of 2002, the Union (NCU) voted to affiliate with Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE). The Respondent immediately recognized PACE.

In the fall of 2002, the Respondent met with the Union and presented a summary of the changes for the Beneflex Plan, as well as changes and/or premium increases in Beneflex Medical, for the upcoming year. The Respondent subsequently mailed a “Health Care 2003 Communication for Employees” (in lieu of a “Plain Talk”) to all U.S Region DuPont employees, including Louisville employees represented by the Union.

On October 24, 2002, and November 27, 2002, the Union (PACE Local 5-2002) on behalf of the DuPont bargaining unit, wrote to the Respondent, contending that any changes to the Beneflex were subject to good faith bargaining before implementation, and requesting bargaining on this subject (Jt. Exhs. 35, 37(a)). On November 21 and December 19, 2002, the Respondent wrote to the Union reiterating its position that it was not required to bargain over any changes to the Beneflex Plan, including premium increases (Jt. Exhs. 36, 37).

On January 1, 2003, the Respondent implemented the changes to the Beneflex Plan for the DuPont bargaining unit employees. The terms of the Beneflex Plan and Beneflex Medical allowed the Respondent to alter the costs incurred by unit members and/or the levels of benefits received by unit members. The Union requested bargaining, however, the Respondent did not offer to, nor did it, negotiate over these changes.

On June 2, 2003, the Union (PACE Local 5-2002) filed an unfair labor practice charge (Case 9-CA-40262-1), alleging that the Respondent violated the Act by unilaterally implementing changes to the Beneflex Plan, including increased premiums, for the DuPont bargaining unit employees. On December 10, 2003, these charges were dismissed on (10(b) issue) procedural grounds. The decision was upheld on March 5, 2004, by the Office of Appeals.

In the fall of 2003, while negotiations for a successor agreement were ongoing, the Respondent and the Union (PACE Local 5-2002) met and the union representatives were presented with a summary of changes for the upcoming year to the Beneflex Plan, as well as changes and/or premium increases for Beneflex Medical for the upcoming year. The Respondent subsequently mailed a “Plain Talk” to all U.S. Region DuPont employees.

On October 22, 2003, the Union (PACE Local 5-2002) again wrote to the Respondent contending that any changes to the current Beneflex Plan for the Dupont bargaining unit were subject to good faith bargaining before implementation, and requesting bargaining on the proposed changes (Jt. Exh. 43). On October 22, 2003, the Respondent wrote to the Union restating its position that the Respondent had the right to make changes to the Beneflex Plan (Jt. Exh. 44). The Union reiterated its position on November 4, 2003, that the Respondent was required to bargain over any changes to the Beneflex Plan and that any reliance on the management rights clause was misplaced (Jt. Exh. 45).

On January 1, 2004, the Respondent implemented the changes to the Beneflex Plan for the DuPont bargaining unit employees. These changes included increases in premiums for medical coverage, implementation of a new dental plan, and the addition of a legal services plan. The Union requested to bargain over the changes, however, the Respondent did not offer to, nor did it, negotiate over these changes.

The same scenario was repeated the next year. In the fall of 2004, while negotiations for a successor agreement were continuing, the Respondent presented the Union with a summary of changes to the Beneflex Plan, as well as changes or premium increases for the Beneflex Medical Plan for the upcoming year. On October 14, 2004, the Union (PACE Local 5-2002) wrote to the Respondent contending that any changes to the current Beneflex Plan for the Dupont bargaining unit were subject to good faith bargaining (Jt. Exh. 48). On October 20, 2004, the Respondent wrote to the Union, restating its position that the Respondent had reserved the right to make changes to the Beneflex Plan, and that the Respondent had consistently taken this position the past few years (Jt. Exh. 49).

On January, 1, 2005, the Respondent implemented changes to the Beneflex Plan for the DuPont bargaining unit employees. The Union requested to bargain over these changes, but the Respondent did not offer to, nor did it, negotiate over these changes. In short, following the expiration of the collective bargaining agreement in 2002, the Respondent implemented changes to the Beneflex Plan, including the Beneflex Medical Plan in 2003, 2004, and 2005 without bargaining with the Union.

In sum, for a period, from 1994 to 2001, during the existence of successive collective bargaining agreements, the parties had agreed that the Respondent would make annual changes to the Beneflex Plan, including the Beneflex Medical Plan. Indeed, by the terms of the Beneflex Plan and the Beneflex Medical Plan the Respondent had reserved the right to make changes. Following the expiration of the bargaining agreement, the Respondent rejected the Union's repeated demands to bargain over any changes to these plans.

On January 2, 2004, the Union filed the charges in Case 9-CA-40777, giving rise to the instant complaint, challenging the Respondent's unilateral changes implemented on January 1, 2004 and those implemented on January 1, 2005.

Analysis

The General Counsel and the Union argue that the Respondent's unilateral changes to the Beneflex Plan were lawful during the term of the bargaining agreement, because the parties had agreed, but when the agreement expired, so did the Union's consent to any further unilateral changes. The Respondent argues that the parties agreed that "management would honor the terms and conditions of contract day-to-day until something different was bargained", and that, in any case, the changes were authorized by past practice.

Section 8(a)(5) of the Act establishes an employer's duty to bargain collectively with the employees' representative. The parties agree that unilateral changes by an employer during the course of a collective bargaining relationship concerning matters that are mandatory subjects of bargaining are usually considered a refusal to bargain. *NLRB v. Katz*, 369 U.S.736 (1962). It also not disputed that health insurance and medical benefits are mandatory subjects of bargaining. *Mid-Continent Concrete*, 336 NLRB 258 (2001), enf'd. 308 F.3d 859 (8th Cir. 2002). Accordingly, without the Union's consent, health care benefits cannot lawfully be changed. And a union's waiver of its bargaining rights must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983).

Here, the expired contract contained a management rights provision which operates as a waiver of the Union's bargaining rights as to mandatory subjects and which authorized the Respondent to implement the annual changes. However, such provisions usually terminate with the expiration of the contract. In *Register-Guard*, 339 NLRB 353, 355 (2003), the Board stated that a "contractual reservation of managerial discretion, like the provision relied on by the Respondent, does not survive expiration of the contract that contains it, absent evidence that the parties intended it to survive," citing *Ironton Publications*, Inc., 321 NLRB 1048 (1996) and *Blue Circle Cement Co*., *Inc*., 319 NLRB 954 (1995). More recently, the Board reaffirmed that principle in *Long Island Head Start Child Development Services*, 345 NLRB No. 74 (September 29, 2005). There the Board similarly stated: "A contractual reservation of management rights does not extend beyond the expiration of the contract in the absence of the parties' contrary intentions." Here, there is no clear evidence that the parties had expressed such intentions. Instead, the Respondent has taken the position that its agreement, namely, "management would honor the terms and conditions of contract day-to-day until something different was

bargained," as implying that the terms of the contract continued in effect, thereby maintaining the status quo between the parties.

The record supports that notion. The Respondent's changes in the Beneflex Plan, including the Beneflex Medical Plan, for the duration of the collective bargaining agreements from 1995 to 2002, affected both, the represented and also the nonrepresented employees. In some years, medical premiums increased, but other benefits showed decreases in premiums, as for example in 2001, premiums for dependent life insurance and for accidental death insurance were decreased. In 2000, the annual changes included decreases in premiums for vision coverage. And the 1999 changes included reductions in deductibles for medical care options A and B. These examples and others are indicative that the unilateral changes made by DuPont to the many benefit packages under the Beneflex Plan often benefited the employees. The changes were implemented annually at the beginning of the year with advance notice to the Union and to the employees. There is also no evidence that the Respondent abused its rights to effectuate changes in the Beneflex Plan during the life of the collective-bargaining agreement to the detriment of the unit employees, or that the implemented changes after the expiration of the contract deviated from the established pattern.

Under these circumstances, I find two recent Board decisions to be most relevant, *Courier-Journal,* 342 NLRB No. 113 (September 17, 2004), and *Courier-Journal,* 342 NLRB No. 118 (September 22, 2004). In the former case, referred to as *Courier- Journal I*, the Board under a factual scenario similar to the one here, decided that the Respondent had not violated the Act, because the union's acquiescence in past unilateral action by the employer had established a past practice. The Board emphasized that in so holding, it did "not pass on the legal issue of whether a contractual waiver of the right to bargain survives the expiration of the contract," and that its "decision is not grounded in waiver," but that it "is grounded in past practice, and the continuation thereof." In the second case, the Board succinctly restated its holding applicable to both cases as follows:

> There (*Courier- Journal I)*, as here, the Respondent's collective- bargaining agreement (with a different union) authorized the Respondent to change the costs and benefits of the health care plan for bargaining unit employees unilaterally, on the same basis as for nonrepresented employees. There, as here, the Respondent made numerous unilateral changes in the health care plan, both during the term of the agreement and during the hiatus periods between contracts, without opposition from the Union. In these circumstances, we find, as we did in *Courier-Journal I*, that the Respondent's practice has become an established term and condition of employment, and therefore that the Respondent did not violate Section 8(a)(5) when it acted consistently with that practice by making further unilateral changes.

The General Counsel and the Charging Party properly point out that the unilateral changes made by the Respondent, unlike those in *Courier-Journal*, were made only during the life of the contract and never during a contract hiatus period. To be sure, that is a valid distinction and that is the only factor which detracts from the full precedential value of the decisions. In my opinion, that difference would clearly be relevant if the Board's holding were based on a waiver theory, because there the union failed to challenge the unilateral changes during the hiatus period. As already stated, however, the Board emphasized that its holding was based on past practice, and concluded that the respondent's practice had become an established term and condition of employment. Arguably, an established past practice could be considered a form of a waiver, and it is not clear if the Board would have come to the same conclusion, had it not been for the hiatus period. In *Larry Geweke Ford,* 344 NLRB No. 78 (May

12, 2005), the Board addressed the issue, while commenting on its holdings in *Courier-Journal*, stating that the "prior acquiescence of the charging party union is not invariably a requisite element in the past practice analysis" (at fn.1). There, the Board held that providing the same health plan for all its employees on a company-wide basis was insufficient to exempt it from the bargaining obligation, unless an employer can "claim that it had an established past practice of making regular annual changes in premium amounts or other aspects of the health coverage of its employees."

Here, the Respondent implemented the unilateral changes routinely from January 1, 1996 and every year thereafter until January 1, 2002, a seven year period, with reasonable certainty, not more frequently than once a year. The Union was always notified in the fall of the preceding year and presented with a summary of changes, including increases in premiums, if any. The Respondent mailed the "Pain Talk" publication to all participants in the Beneflex Plan. The changes were predictably implemented each year on the first of January. The record does not suggest that any unilateral changes, implemented during the life of the contract or thereafter, were made arbitrarily or on an ad hoc basis to the disadvantage of the represented employees. Moreover, when the bargaining representatives for the respective parties began negotiations for a successor contract in 2002, the parties agreed that the Respondent would honor the terms and conditions of the contract until something different was bargained. Although required by law, according the General Counsel, that agreement has maintained the working conditions of the unit employees and the respective positions between the parties until they negotiate a mutually agreeable understanding as to the Respondent's rights to effectuate changes to its Beneflex Plan, including the Beneflex Medical Plan.

Mindful of the positions so forcefully argued by the General Counsel and particularly, the Charging Party, that the prior agreement did not automatically renew, and that the Union's consent had expired following the expiration of the contract, I have some reservation. However, I find that the *Courier-Journal* decisions are most closely analogous to the case before me. There, as here, the Respondent established a several year routine amounting to a past practice which survived the contract and maintained the status quo. Unlike the employer in *Long Island Head Start Child Development Services, Inc.,* 345 NLRB No. 74 (at fn. 5), I find (in the words of the Board) that the Respondent has "demonstrated an established past practice of exercising its own discretion in changing its health care plan."

Conclusions of Law

1. The Respondent, E.I. du Pont de Nemours, Louisville Works, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent's unilateral changes to the Beneflex Plan following the expiration of the collective-bargaining agreement did not violate Section 8(a)(5) of the Act, because the conduct was consistent with a lawful, established past practice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., December 1500, 2005.

Karl H. Buschmann
Administrative Law Judge

[2] 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.