***Raytheon Network Centric Systems*, 365 N.L.R.B. No. 161 (Dec. 15, 2017)**

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that unionized employers must refrain from making a unilateral change in employment terms, unless the union first receives notice and the opportunity to bargain over the change.

In the instant case, the Respondent is alleged to have violated Section 8(a)(5) of the National Labor Relations Act (NLRA or Act) in 2013, following expiration of its collective-bargaining agreement (CBA), when it unilaterally modified employee medical benefits and related costs consistent with what it had done in the past. Relying primarily on the Board's decision in *E.I. du Pont de Nemours, Louisville Works*, 355 NLRB 1084 (2010) (*DuPont I*), the judge found that the Respondent violated Section 8(a)(5) of the Act. The judge rejected the Respondent's defense that its 2013 adjustments were a lawful continuation of the status quo, even though the Respondent had made similar modifications to healthcare costs and benefits at the same time every year from 2001 through 2012.

Subsequent to the judge's decision, the Board decided *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont*). In *DuPont*, which issued without any prior invitation for the filing of amicus briefs, the Board majority dramatically altered what constitutes a "change" requiring notice to the union and the opportunity for bargaining prior to implementation. The majority in *DuPont* held that, even if an employer continues to do precisely what it had done many times previously--for years or even decades--taking the same actions constitutes a "change," which must be preceded by notice to the union and the opportunity for bargaining, if a CBA permitted the employer's past actions and the CBA is no longer in effect. The *DuPont* majority also stated, as part of its holding, that bargaining would always be required, in the absence of a CBA, in every case where the employer's actions involved some type of "discretion."

Then-Member Miscimarra criticized the Board majority's decision in *DuPont* as follows:

> When evaluating whether new actions constitute a "change," my colleagues do not just compare the new actions to the past actions. Instead, they look at whether other things have changed--specifically, whether a collective-bargaining agreement . . . previously existed, whether the prior CBAs contained language conferring a management right to take the actions in question, and whether a new CBA exists containing the same contract language. If not, the employer's new actions constitute a "change" even though they are identical to what the employer did before.
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> In effect, my colleagues . . . [hold that] whenever a CBA expires, past practices are erased and everything subsequently done by the employer constitutes a "change" that requires notice and the opportunity for bargaining before it can be implemented.

We conclude that the Board majority's decision in *DuPont* is fundamentally flawed, and for the reasons expressed more fully below, we overrule it today. *DuPont* is inconsistent with Section 8(a)(5), it distorts the long-understood, commonsense understanding of what constitutes a "change," and it contradicts well-established Board and court precedent. In addition, we believe *DuPont* cannot be reconciled with the Board's responsibility to foster stable bargaining relationships. We further conclude that it is appropriate to apply our decision retroactively, including in the instant case.

Accordingly, we find that the Respondent's modifications in unit employee healthcare benefits in 2013 were a continuation of its past practice of making similar changes at the same time every year from 2001 through 2012. Therefore, the Respondent did not make any "change" when it made the challenged modifications, and accordingly it lawfully implemented these modifications without giving the Union prior notice and opportunity to bargain. Because the 2013 modifications were lawful, we also find that the Respondent's 2012 announcement of those modifications was lawful. For these reasons, we reverse the judge's unfair labor practice findings and dismiss the complaint.[5]

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Discussion

A. The Supreme Court's Katz Decision and Other Cases Addressing What Constitutes a "Change"

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The Supreme Court's *Katz* decision establishes that a unilateral change in a mandatory bargaining subject (i.e., wages, hours, and other terms and conditions of employment) violates Section 8(a)(5). In cases interpreting *Katz*, the Board has stated that "the vice . . . is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge."

In reliance on *Katz*, the Board has likewise held:

> [W]here an employer's action does *not* change existing conditions--that is, *where it does not alter the status quo*--the employer does *not* violate Section 8(a)(5) and (1). . . . *An established past practice can become part of the status quo*. Accordingly, the Board has found *no violation* of Section 8(a)(5) and (1) *where the employer simply followed a well-established past practice.*

The principle that an employer may *lawfully* take unilateral action that "does not alter the status quo," which permits changes that have become part of the status quo, is often referred to as the "dynamic status quo." This principle was described by Professors Gorman and Finkin in their well-known labor law treatise as follows:

> [T]he case law (including the *Katz* decision itself) makes clear that conditions of employment are to be viewed dynamically and that *the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of change*. An employer modification consistent with such a pattern *is not a "change" in working conditions at all*.

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B. DuPont Is Incompatible with the Supreme Court's Decision in NLRB v. Katz *and Important Purposes of the Act*

In *DuPont*, the Board majority held that, when evaluating whether actions constitute a "change," parties may not simply compare those actions to past actions. Instead, the majority held

[5] Because we find that the Respondent's benefit changes did not alter the status quo and therefore did not require notice and an opportunity to bargain before implementation, we need not reach the question of whether the Union waived its right to bargain.

that parties must look at whether other things have changed--specifically, whether a CBA previously existed, whether the prior CBA contained language conferring a management right to take the actions in question, and whether a new CBA exists containing the same contract language. If not, according to the *DuPont* majority, the employer's new actions constitute a "change" even though they *continue* what the employer previously did and can be seen *not* to involve any "substantial departure" from past practice. The majority in *DuPont* also held that, if the employer's past and present actions involved any "discretion," this *always* means a "change" occurred (requiring advance notice and the opportunity for bargaining), even where the employer obviously was continuing its past practice and was not altering the status quo. In so holding, the *DuPont* majority overruled *Beverly II*, *Capitol Ford*, and the *Courier-Journal* cases, plus earlier cases consistent with those decisions, including *Shell Oil Co.*, 149 NLRB at 283, and *Winn-Dixie Stores, Inc.*, 224 NLRB at 1418.

As explained below, we find that the Board majority's decision in *DuPont* is incompatible with established law as reflected in *NLRB v. Katz* as well as fundamental purposes of the Act. We overrule *DuPont*, and we restore the correct analysis to this area, specifically, principles reflected in the *Shell Oil* line of cases and embodied more recently in the *Courier-Journal* cases, *Capitol Ford*, and *Beverly II*.

Our view of this case is straightforward, and it consists of two parts: (1) in 1962, the Supreme Court held in *Katz*, supra, that an employer must give the union notice and the opportunity for bargaining before making a "change" in employment matters; and (2) actions constitute a "change" only if they materially differ from what has occurred in the past.

The *DuPont* majority disagreed with the second of these two points. When evaluating whether new actions constitute a "change," the *DuPont* majority did not just compare the new actions to the past actions. Instead, the *DuPont* majority held that parties must look at whether *other things* had changed--specifically, whether a CBA previously existed, whether the prior CBA or CBAs contained language conferring on management the right to take the actions in question, and whether a new CBA exists containing the same contract language. If not, the employer's new actions constitute a "change" even though they are identical to what the employer did before. . . .

We believe that this outcome is wrong because it contradicts the Supreme Court's decision in *Katz* and defies common sense. Moreover, we believe the *DuPont* majority's approach will produce significant labor relations instability at a time when employers and unions already face serious challenges attempting to negotiate successor collective-bargaining agreements. . . .

[A]pplying the *Katz* doctrine in a straightforward manner . . . does not permit employers to evade their duty to bargain under Section 8(d) and 8(a)(5) of the Act. Even though employers, under *Katz*, have the right to take unilateral actions where it can be seen that those actions are not a substantial departure from past practice, employers still have an obligation to bargain *upon request* with respect to all mandatory bargaining subjects--including actions the employer has the right to take unilaterally-- whenever the union *requests* such bargaining. The Act imposes two types of bargaining obligations upon employers: (1) the *Katz* duty to refrain from making a unilateral "change" in any employment term constituting a mandatory bargaining subject, which entails an evaluation of past practice to determine whether a "change" would occur if the employer took the contemplated action; and (2) the duty to engage in bargaining regarding any and all mandatory bargaining subjects *upon the union's request* to bargain. Existing law makes it clear that this duty to bargain upon request *is not affected by an employer's past practice*. . . .

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Henceforth, regardless of the circumstances under which a past practice developed--i.e., whether or not the past practice developed under a collective-bargaining agreement containing a management-rights clause authorizing unilateral employer action--an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past. We emphasize, however, that our holding has no effect on the duty of employers, under Section 8(d) and 8(a)(5) of the Act, to bargain upon request over any and all mandatory subjects of bargaining, unless an exception to that duty applies.

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MEMBER KAPLAN, concurring.

I join in the decision today to overrule the Board's holding in *DuPont*. I am writing separately, however, to express my support for an alternative rationale, not raised by the Respondent, that would also support a finding that the Respondent's modifications to the Raytheon Plan on January 1, 2013 did not alter the status quo and that, therefore, the Respondent did not violate Section 8(a)(5). . . .

Following the expiration of the parties' CBA on April 29, 2012, the Respondent was required to maintain the terms and conditions of employment of the expired CBA until the parties negotiated a new agreement or bargained in good faith to impasse. In my view, pursuant to this duty to maintain the status quo, the Respondent was required to continue to provide unit employees with coverage under the Raytheon Plan, in its entirety. The Respondent was not free to provide the unit employees with only certain aspects of the Raytheon Plan, nor was the Respondent free to provide unit employees with different benefits than that provided to non-unit employees under the Raytheon Plan on an annual basis. In fact, it seems clear that, had the Respondent kept in place for unit employees the specific benefits in place at contract expiration, but then revised the Raytheon Plan benefits for all other employees, such action would constitute a violation of the Act. For these reasons, in my view, it is not reasonable to consider the Respondent's responsibility to maintain the status quo as a responsibility to maintain certain, specific benefits that were in place at the time of the contract expiration. Rather, the Respondent's status quo duty was to continue providing the unit employees with the coverage provided to all employees under the Raytheon Plan, including annual changes made pursuant to the terms of the Raytheon Plan itself. . . .

The Respondent never agreed to provide benefits under the Raytheon Plan without the unilateral right to make changes to such plan; it agreed to provide those benefits with conditions, and those conditions are as much a part of the parties' agreement concerning benefits as are the benefits themselves. It is the Raytheon Plan in its entirety, and the language in the CBA governing the plan that is the term and condition of employment and, under this plan, the Respondent reserved the right to modify unit employees' costs and/or benefits. Once the parties' CBA expired on April 29, 2012, the status quo required the Respondent to maintain this term and condition of employment until the parties negotiated a new contract. . . .

MEMBERS PEARCE and MCFERRAN, dissenting.

Reversing our recent *DuPont* precedent, a newly-constituted Board majority today gives employers new power to make unilateral changes in employees' terms and conditions of employment after a collective-bargaining agreement expires. Here, as in other new decisions, the majority fails to provide notice and an opportunity for briefing, violating an agency norm. And it changes course even though *DuPont* is currently under review by the U.S. Court of Appeals for the District of Columbia Circuit, which had - in a prior remand - plainly indicated that the Board was free to choose the rule adopted and explained in *DuPont*.

With little justification other than a change in the Board's composition, the majority essentially cuts and pastes Chairman Miscimarra's dissent in *DuPont* into a new majority opinion. In holding that an employer may continue to make sweeping discretionary changes in employment terms even after a contractual provision authorizing such changes has expired and while the parties are seeking to reach a new collective-bargaining agreement, the majority's decision fundamentally misinterprets the Supreme Court's decision in *NLRB v. Katz*. Indeed, *Katz* clearly says the exact opposite: that an employer's unilateral change violates the duty to bargain under the National Labor Relations Act, even where the change is consistent with a past practice of changes made, if the changes involve significant employer discretion.

The Board is not free to adopt a position so manifestly inconsistent with Supreme Court precedent. Moreover, the majority's new rule is not only foreclosed by Supreme Court authority, it is also impermissible as a policy choice. As the Supreme Court and other Federal courts have explained, permitting an employer to make unilateral changes while negotiations for a new contract are under way frustrates the process of collective bargaining. The Act demonstrably was intended to "encourag[e] the practice and procedure of collective bargaining," not to undermine it. Undermining collective bargaining to the advantage of employers is precisely what the majority achieves today. But, for reasons we will show, that result cannot stand.

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II. DISCUSSION

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B. The Duty to Bargain

As the Board stated in *DuPont*, a fundamental policy of the Act is to protect and promote the practice of collective bargaining. In furtherance of this statutory policy, Sections 8(a)(5) and 8(d) of the Act require employers to bargain collectively and in good faith with respect to wages, hours, and other conditions of employment. An employer's duty to bargain in good faith, however, includes more than a willingness to engage in negotiations with an open mind and with a purpose of reaching a collective-bargaining agreement with the union that represents its employees. The duty also includes the obligation to refrain from unilaterally changing established terms and conditions of employment without prior notice to and bargaining to an impasse with the union. *Katz*; *Bottom Line Enterprises*. This prohibition against unilateral changes extends both to negotiations for an initial contract and for successor agreements. *Litton*.

The Supreme Court has explained that unilateral changes made during contract negotiations injure the very process of collective bargaining and "must of necessity obstruct bargaining, contrary

to the congressional policy." *Katz*. "[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton*. Indeed, "an employer's unilateral change in conditions of employment under negotiation . . . is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *Katz*.

As the Board recognized in *DuPont*, permitting an employer to make unilateral changes during bargaining would have a deleterious effect on the bargaining process by requiring the union to bargain to regain benefits lost through the employer's unilateral action. Placing a union in this weakened position fundamentally undermines the process of collective bargaining "and interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *Honeywell Int'l, Inc. v. NLRB*. In *McClatchy Newspapers*, the Board explained that the employer's "ability to exercise its economic force" by unilaterally imposing changes, and thereby excluding the union from negotiating them, "disparage[s] the [union] by showing, despite its resistance to th[e] proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment." It poses the very real danger that the unilateral action will destabilize relations by undermining a union's institutional credibility. . . .

In addition to refraining from unilaterally *changing* terms and conditions of employment during negotiations, an employer has the corollary duty *to maintain* terms and conditions of employment during bargaining. *Litton*. Where, as in this case, the parties were engaged in bargaining for a successor contract, the status quo consists of the terms and conditions that existed at the time the contract expired. Although these terms and conditions "are no longer agreed-upon terms; they are terms imposed by law." This is so because "an expired contract has by its own terms released all its parties from their respective contractual obligations." The "rights and duties under the expired agreement 'retain legal significance because they define the *status quo'* for purposes of the prohibition on unilateral changes." It is this status quo that constitutes the baseline from which negotiations for a new agreement will occur, and from which the union will base its bargaining proposals.

There are two limited exceptions to the foregoing principles which, if established by an employer, will preclude finding a Section 8(a)(5) violation. Under the first exception, an employer in certain narrow circumstances may implement unilateral changes to terms and conditions of employment if it has an established past practice of doing so. *Katz*; *Post-Tribune Co*. As described below, the past practice exception is narrowly construed (*Adair Standish Corp. v. NLRB*), and an employer claiming this exception bears a heavy burden of proof. *NLRB v. Allis-Chalmers Corp.*; *Eugene Iovine*. The second exception is waiver. Under this exception, if the evidence establishes that a union has waived its statutory right to bargain about a mandatory subject of bargaining, an employer may lawfully implement changes to it. *Provena St. Joseph Medical Center*.[1] . . .

C. Past Practice

. . . In *Katz*, the Supreme Court held that the employer violated Section 8(a)(5) in three respects during bargaining for an initial contract: (1) unilaterally announcing a change in its sick leave policy,

[1] [Editor's Note: the Board has recently overruled *Provena St. Joseph Medical Center's* affirmance of the tradition rule regarding waiver, overturning the previous standard that required a "clear and unmistakable" waiver and instead use a "contract coverage" standard under which it "will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. *MV Transportation, Inc.*, 368 N.L.R.B. No 66 (Sept. 10, 2019).]

(2) unilaterally instituting a new system of automatic wage increases, and (3) unilaterally granting merit wage increases. After finding that the unilateral changes with respect to the first two subjects "plainly frustrated the statutory objective of establishing working conditions through bargaining" and "conclusively manifested bad faith in the negotiations," the *Katz* Court considered whether the employer's unilaterally instituted merit increases should be treated as lawful because they were consistent with a "long-standing practice" of granting such increases. The Court firmly *rejected* this past practice defense. . . .

As the Board discussed in *DuPont*, the Board and courts have consistently adhered to these principles in *Katz* by holding that "employers may act unilaterally pursuant to an established practice *only* if the changes do not involve the exercise of significant managerial discretion." The importance of that precedent and the majority's failure to acknowledge it here, compels us to reiterate it. We start with the decisions in *State Farm Mutual Auto Insurance Co.* and *Oneita Knitting Mills, Inc.* In both cases, applying *Katz*, the Board found that although the employers had a past practice of granting merit increases, they violated Section 8(a)(5) by continuing their practice of unilaterally granting the increases during contract negotiations, because the increases were informed by a significant degree of discretion. . . .

In the years following these decisions, *Katz*'s emphasis on the degree of employer discretion exercised in prior unilateral changes has been the foundation underlying the Board's narrow definition of what constitutes a past practice. What the Board has required is "reasonable certainty" as to the purported practice's "timing and criteria." *Eugene Iovine, Inc.* In *Eugene Iovine*, for example, the Board found that the employer failed to establish a past practice of recurring reductions of employees' work hours because the alleged practice lacked a "'reasonable certainty' as to timing and criteria" and the employer's discretion to reduce hours "appear[ed] to be unlimited.". . .

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3. The majority's newly-fashioned standard is predicated on a misreading of *Katz* and is incompatible with the past practice doctrine

The wealth of precedent establishes that discretionary unilateral changes to a mandatory subject of bargaining that are not fixed as to timing and criteria do not establish a past practice that permits continued implementation of such changes postcontract expiration. Nevertheless, the majority states that we (and by extension, the Board and courts) have been wrong for years in interpreting *Katz* this way. The majority, which does not dispute that the Respondent here exercised broad discretion over the years when it implemented changes to health benefits, asserts that this discretion is irrelevant in determining whether an employer has implemented an unlawful unilateral change under *Katz*. Instead, it states "the only relevant factual question is whether the employer's action is similar in kind and degree to what the employer did in the past." This statement indicates a basic misunderstanding of the issue in *Katz*.

By posing the issue this way, the majority, in effect, reads *Katz* as finding that the unilateral merit increases therein were unlawful because they were not "similar in kind and degree to what the employer did in the past," but would have been lawful had the increases been similar in kind and degree to the past increases. This is simply incorrect, as the plain language of the Supreme Court's decision establishes. As discussed above, the Supreme Court noted that the merit increases were "in

line with the company's long-standing practice" or, as the majority phrases it, "similar in kind and degree," but nevertheless found them unlawful because of their discretionary nature. . . .

Clearly, the majority's interpretation of *Katz*--which would permit an employer to make whatever changes it desires, including the elimination of all health benefits, simply because it has a past pattern of making changes to benefits--cannot be right. As the Supreme Court explained in *Katz*, when changes made to employee terms and conditions are informed by a large measure of discretion, "[t]here is simply no way ... for a union to know whether or not there has been a substantial departure from past practice." . . .

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D. Waiver

The judge correctly rejected the Respondent's defense that the Union waived its right to bargain over changes to the health plan after contract expiration, by agreeing in the 2009-2012 collective bargaining agreement to grant the Respondent broad discretion to make changes to its plan. The judge's finding is consistent with longstanding Board law, on which *DuPont* is based, where the Board held that when a union agrees to a contractual management-rights clause that permits an employer to act unilaterally on a mandatory subject of bargaining, the union thereby waives its statutory right to bargain about that subject only for the term of the contract. As the Board explained in *Du Pont*, because the source of the employer's authority to act unilaterally on that subject exists solely by virtue of the union's contractual waiver, the waiver expired on the termination date of the collective-bargaining agreement. Thus, the Board found that the respondent failed to establish a waiver defense when it made postexpiration unilateral changes to health insurance benefits that it had been permitted to make during the term of the contract under a reservation of rights clause (which we found to be a management-rights clause). . . .

Because it is undisputed that the Respondent exercised wide-ranging discretion to make changes to the Plan during the term of the contract, the Respondent's practice of altering the Plan never became a cognizable past practice and part of the expiration-day "status quo." Consequently, it is immaterial that the Respondent's post-expiration discretionary changes to the employee health benefits are comparable to its pre-expiration discretionary changes, *unless of course the Union has somehow waived its right to bargain*. For reasons explained, there was no waiver here, but the majority's failure to recognize that waiver was the only remaining potentially viable defense speaks clearly to its basic misunderstanding of the principles that should have resulted in an affirmance of the judge's unfair labor practice findings in this case.

Conclusion

The majority then is simply wrong when it insists that today's decision will ""do no harm." It is clear, rather, that permitting employers to unilaterally change--at their whim and in their sole discretion--significant terms of employment during negotiations over those very terms, is inimical to the collective-bargaining process, for reasons that the Supreme Court and other Federal courts have explained. Rather than promoting collective bargaining, the majority's decision is the quintessential "blueprint for how an employer might effectively undermine the bargaining process while at the same time claiming that it was not acting to circumvent its statutory bargaining obligation." *McClatchy*. This result is flatly contrary to the expressed policy of the National Labor Relations Act, and it is based on a willful misreading of the Supreme Court's decision in *Katz*. The Board has no authority to deviate

from Supreme Court precedent and no authority to adopt its own, flawed labor policy in place of that established by Congress. . . .