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

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

August 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

We consider these now-consolidated proceedings on remand from the United States Court of Appeals for the District of Columbia Circuit. As directed by the court, we review again the issue whether unilateral changes made by E.I. du Pont de Nemours, Louisville Works and E.I. du Pont de Nemours and Company (collectively, the Respondent) to unit employees' benefit plans after expiration of a collective-bargaining agreement violated Section 8(a)(5) and (1) of the Act. For the reasons set forth in this decision, we reaffirm the Board's prior findings of violations. In doing so, we reaffirm and apply Board precedent that, as the court acknowledged, held that discretionary unilateral changes ostensibly made pursuant to a past practice developed under an expired management-rights clause are unlawful. We likewise adhere to and apply Board precedent defining what constitutes a past practice that an employer must continue as status quo terms and conditions of employment in the absence of a collective-bargaining agreement. To the extent that certain Board decisions cited by the court[1] conflict with the precedent on which we rely, they are today overruled as ill-advised and unexplained departures from well-established complementary legal principles that are essential to effectuating the Act's fundamental purpose of protecting and promoting the practice of collective bargaining and the rights of employees to fully engage in that practice through their chosen representative.

[1] E.g., *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006); *Courier-Journal*, 342 NLRB 1093 (2004); *Capitol Ford*, 343 NLRB 1058 (2004).

I. PROCEDURAL BACKGROUND

On August 27, 2010, the National Labor Relations Board issued decisions and orders finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the unit employees' Beneflex benefit plan at its facilities in Louisville, Kentucky and Edge Moor, Delaware, after the collective-bargaining agreement for each facility had expired.[2] The Respondent petitioned for review of the Board's Orders with the United States Court of Appeals for the District of Columbia Circuit, and the Board cross-petitioned for enforcement. On June 8, 2012, the court granted the Respondent's petitions for review, denied the Board's cross-petitions for enforcement, and remanded the cases to the Board for further proceedings consistent with the court's opinion. *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012). By letter dated October 31, 2012, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. Thereafter, the Respondent, the Acting General Counsel, and the Charging Party each filed a position statement.

The Board has considered the decisions and the record in light of the court's remand and the parties' statements of position. For the reasons discussed below, we affirm the Board's prior findings that the Respondent violated Section 8(a)(5) and (1) in both cases.[3]

II. FACTS

The facts of these cases are set out in full in the Board's prior decisions. In brief, the Union has long represented bargaining units of production and maintenance employees at the Respondent's Louisville and Edge Moor facilities. In the 1990s, the Respondent created the company-wide Beneflex Flexible Benefits Plan (Beneflex Plan), a cafeteria-style compendium of numerous individual medical, dental, life insurance, and financial benefit plans, most of which were self-insured. The plan documents contained the following reservation of rights clause:

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

[3] The Respondent asserts that these cases are not properly before the Board because, at the time the Board accepted the court's remand in 2012, it did not have the necessary quorum to act. We reject this argument. The court's unchallenged order remanded the case to the Board; the Board's acceptance of the court's remand is nothing more than an administrative effectuation of the court's order.

We deny the Respondent's request for oral argument, as the record, exceptions, briefs and statements of position filed by the parties adequately present the issues.

> The Company reserves the sole right to change or discontinue this Plan in its discretion provided, however, that any change in price or level of coverage shall be announced at the time of annual enrollment and shall not be changed during a Plan Year unless coverage provided by an independent, third-party provider is significantly curtailed or decreased during the Plan Year.

Subsequently, the Union agreed in separate collective-bargaining negotiations that unit employees at the Louisville and Edge Moor facilities would be covered by the Beneflex Plan, including the reservation of rights provision.[4] Pursuant to the reservation of rights language, the Respondent announced widespread and varied annual changes to the Beneflex Plan in the fall of each year that the contracts were in effect, and it implemented those changes on the following January 1 without objection from the Union. Some of the plan changes recurred regularly. Other changes were made only once or intermittently. The Respondent did not contend, and the record does not show, that it followed any fixed criteria in making these changes.

Following the expiration of the parties' collective-bargaining agreements at Louisville in March 2002, and Edge Moor in May 2004, and while the parties were negotiating successor agreements, the Respondent continued to make numerous annual unilateral changes to the Beneflex Plan.[5] The Union objected and asserted that bargaining over the changes was required.[6] At Louisville, the Respondent refused to bargain over the changes, contending that it was not required to do so because it had a past practice of making annual changes when the collective-bargaining agreements had been in effect. At Edge Moor, some bargaining took place, but it is undisputed that the parties were not at impasse when the Respondent implemented the changes. The Respondent did not contend at either location that its post-expiration unilateral changes to Beneflex were compelled by exigent economic circumstances.[7]

III. THE PRIOR BOARD DECISIONS

In separate decisions for these companion cases, the Board found that the Respondent violated the Act by unilaterally changing the terms of the Beneflex Plan following the expiration of the applicable collective-bargaining agreements, when the parties were negotiating for successor collective-bargaining agreements and were not at impasse. The Board rejected the Respondent's defense that the post-expiration changes to the Beneflex Plan were privileged by past practice. It found that because the ostensible past practice was based on prior changes that were implemented pursuant to a management-rights clause in the contracts (i.e., the Beneflex reservation of rights provision), the Respondent's ability to continue making such changes did not survive the expiration of those contracts. *DuPont-Louisville*, 355 NLRB at 1084–1086; *DuPont-Edge Moor*, 355 NLRB at 1096. In both cases, the Board rejected the Respondent's argument that the changes were lawful under the *Courier-Journal* cases, 342 NLRB 1093 (2004) (*Courier-Journal I*), and 342 NLRB 1148 (2004) (*Courier-Journal II*),[8] in which the Board had accepted a "past practice" defense to alleged postexpiration unilateral changes to employees' health benefits. The Board distinguished *Courier-Journal* on the basis that the employer in those cases had established a past practice of making unilateral changes to employees' health care premiums both during the term of the contract *and* during hiatuses between contracts, indicating that the changes were not made exclusively pursuant to a contractual waiver. *DuPont-Edge Moor*, 355 NLRB at 1104–1105. The Board reasoned that extending the *Courier–Journal* decisions to the situation presented here, where the past practice consisted

[4] In *DuPont-Louisville*, the Beneflex Plan was incorporated into the parties' collective-bargaining agreements in 1994 and 1997; for *DuPont-Edge Moor,* it was incorporated in 1994 and 2000.

[5] At Louisville, post-expiration changes implemented on January 1, 2004 included increases in medical premiums, a new dental plan, and the addition of a legal services plan. *DuPont-Louisville*, 355 NLRB at 1093. Postexpiration changes implemented at both Louisville and Edge Moor on January 1, 2005, included increased prescription drug costs, penalties for purchasing "maintenance medication" at retail pharmacies rather than through a designated mail order service, elimination of the "Employee + One" coverage level for medical, dental, and vision benefits and replacement with "Employee + Child(ren)" and "Employee + Spouse" coverage levels, increase in some medical and dental premiums, changes in coverage levels for medical, dental, and vision options, increases in premiums for the financial planning program, and the addition of a new health savings account plan. *DuPont-Edge Moor*, 355 NLRB at 1102.

[6] The Respondent argues that, in *DuPont-Louisville*, the Union did not challenge the Respondent's 2003 changes to the Beneflex Plan. However, the evidence shows that, in the fall of 2002, when the Respondent met with the Union and presented a summary of the changes for the Beneflex Plan for the upcoming year, the Union informed the Respondent that any changes to the plan were subject to bargaining. And after the Respondent implemented the changes on January 1, 2003, the Union filed an unfair labor practice charge, alleging that the changes to the Beneflex Plan were unlawful. Although this charge was ultimately dismissed on procedural grounds, the Union subsequently filed charges in January 2004 that gave rise to the present complaint in *DuPont-Louisville*.

[7] See generally *RBE Electronics of S.D., Inc.,* 320 NLRB 80 (1995), and *Bottom Line Enterprises,* 302 NLRB 373 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994); see also *Maple Grove Health Care Center*, 330 NLRB 775, 779 (2000) (finding that the employer failed to establish exigent economic circumstances that would justify its unilateral implementation of an increase in employees' health insurance premiums).

[8] Where appropriate, we collectively refer to the two cases as "*Courier-Journal*."

only of changes made during a contract term, "would conflict with settled law that a management-rights clause does not survive the expiration of the contract." *DuPont-Louisville*, 355 NLRB at 1085.

IV. THE DISTRICT OF COLUMBIA CIRCUIT'S OPINION

On review, the court concluded that the Board had departed without reasoned justification from Board precedent in finding the unilateral Beneflex changes to be unlawful. *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d at 68–70. The court accepted the proposition that during negotiations an employer may not unilaterally make discretionary changes to employees' terms and conditions of employment. In this case, however, the court found that the changes at issue were consistent with an established past practice because they were "similar in scope to those [the Respondent] had made in prior years," the Respondent's discretion in making the changes was sufficiently limited to the annual enrollment period and, like the employer in *Courier-Journal*, the Respondent's discretion was constrained by the requirement to treat represented and unrepresented employees alike. Id. at 68. For those reasons, the court held that the Respondent's across-the-board unilateral changes to the Beneflex Plan during the annual enrollment period were lawful under *Courier-Journal*. Id. at 68–69.

The court rejected the Board's reliance on the factual distinction drawn between the present cases and *Courier-Journal*: that (as explained), the Respondent's past changes to Beneflex were made only while the contractual reservation-of-rights clauses were in effect whereas in *Courier-Journal* the employer had made changes during both contract and hiatus periods. Unlike the Board, the court focused on the existence of the past practice itself, finding it immaterial that the practice had its origins in an expired management-rights clause. In support of that approach, the court pointed out that *Courier-Journal I* specifically stated that the legality of the post-expiration changes did not depend on "whether a contractual waiver of the right to bargain survives the expiration of the contract" but rather rests on whether the change "is grounded in past practice, and the continuance thereof." Id. at 69 (quoting *Courier-Journal,* 342 NLRB at 1095).[9]

The court concluded that the Board's reasoning was inconsistent with additional cases as well. The court cited *Capitol Ford,* 343 NLRB 1058 (2004), for example, where the Board found that a successor employer could continue a predecessor's past practice developed under an expired contract to justify changes during a hiatus period. Likewise, the court found that the Board's position was inconsistent with *Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319 (2006) (*Beverly 2006*), in which two panel members stated that "without regard to whether the management-rights clause survived, the [employer] would be privileged to have made the unilateral changes at issue if [its] conduct was consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract." Id. at 1319 fn. 5.[10]

Significantly, the court nevertheless acknowledged that in several earlier cases, including *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636–637 (2001) *(Beverly 2001)*, enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003), and *Register-Guard*, 339 NLRB 353, 355–356 (2003), the Board had held that "unilateral changes made pursuant to a past practice developed under an expired management-rights clause were unlawful." Despite these earlier decisions, the court observed, the Board "clearly took a different position in its more recent decisions." *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d at 70.[11]

Given the court's rejection of the Board's attempt to distinguish *Courier-Journal*, the court concluded that the Board had failed to provide a reasoned justification for departing from its more recent precedent. Recognizing, however, that the Board's view was consistent with its earlier precedent, the court remanded the present cases for further consideration. Specifically, the court directed the Board to "conform to its precedent in *Capitol Ford* and in the 2006 iteration of *Beverly Health and Rehabilitation Services* or explain its return to the rule it followed in its earlier decisions." Id.

V. DISCUSSION

Consistent with the court's remand instructions, we have examined the Board's decisions in *Courier-Journal*, *Capitol Ford*, and *Beverly 2006*, in light of the Act's fundamental policy to promote the practice of collective bargaining and longstanding precedent implementing that policy. For the reasons fully set forth below, we find that these considerations strongly support finding the

[9] The court also noted similar language in *Beverly Health and Rehabilitation Services, Inc. v. NLRB,* 297 F.3d 468, 481 (6th Cir. 2002), that "it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract." As discussed below in fn.17, the Sixth Circuit's holding in *Beverly Health* is flawed.

[10] Inasmuch as these Board Members found the changes at issue unlawful, this language was dicta.

[11] We note that the Board's "more recent decisions" made no attempt to address prior precedent, from which they deviated.

Section 8(a)(5) and (1) unilateral change violations in the present cases and overruling the cited cases to the extent they are irreconcilable with those considerations. We thus choose the second option identified by the court, and return to the rule followed in *Beverly 2001* and *Register-Guard*: that unilateral, postexpiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause.

A fundamental purpose of the Act, set forth in Section 1, is to "encourage[e] the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of . . . employment." In furtherance of this statutory purpose, Section 8(d) of the Act imposes an obligation on parties in a collective-bargaining relationship to bargain collectively and in good faith with respect to wages, hours, and other terms and conditions of employment for represented employees. The employer's bargaining obligation is enforced through Section 8(a)(5) of the Act, which prohibits an employer from refusing to bargain or from bargaining in bad faith with its employees' designated representative. Section 8(a)(5) further prohibits, with very limited exception, an employer's unilateral changes to mandatory subjects of bargaining unless the employer has bargained to impasse with the union representing the employer's employees, or the union has clearly and unmistakably waived its statutory right to bargain about a particular subject.

As the Supreme Court long ago explained in its seminal decision on this point,

> [U]nilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance.

NLRB v. Katz, 369 U.S. 736, 747 (1962).[12]

The *Katz* unilateral change doctrine was announced in a case involving an employer's unilateral changes during bargaining with a newly certified union for a first contract. The Supreme Court subsequently made clear that the doctrine "has been extended as well to cases in which an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).[13] Accordingly, "[u]nder *Katz,* terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them." Id. at 206. This is generally referred to as the obligation to maintain the status quo for mandatory subjects of bargaining. In the post-contract expiration context, the status quo consists of the terms and conditions of employment existing on the expiration date of the parties' collective-bargaining agreement.[14]

Thus, although terms and conditions of employment are frequently said to "survive contract expiration," they do so not by any lingering force of the contract, but in order to protect the continuing statutory bargaining duty that unilateral actions would circumvent. Any other approach would undermine collective bargaining by making it harder for the parties to reach agreement, while simultaneously undermining the union as the representative of the unit employees. For this reason, exceptions to the status quo doctrine are few, and are limited to mandatory bargaining subjects that are fundamentally creatures of contract and involve the surrender of a statutorily protected bargaining right that is important to the post-expiration bargaining process. These exceptions are limited to arbitration, no-strike/no-lockout, and management-rights waivers. As we discuss in Section A below, we find that the common rationale for excepting these subjects from those that must be maintained after a contract's expiration is not only consistent with the *Katz* unilateral change doctrine, it is essential to the effectuation of the statutory purpose underlying that doctrine.

It is also well established that the status quo that must be maintained after a contract's expiration includes extracontractual terms and conditions of employment that have become established by past practice. That is, "[a]n employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change. . . . A past practice

[12] See also *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1162 (D.C. Cir.1992) (Edwards, J., concurring) ("A unilateral change not only violates the plain requirement that the parties bargain over 'wages, hours, and other terms and conditions,' but also injures the process of collective bargaining itself. 'Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.'" (quoting *May Dept. Stores Co. v. NLRB,* 326 U.S. 376, 385 (1945)).

[13] Citing, e.g., *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 544, fn. 6 (1988).

[14] In the initial bargaining context, that status quo consists of terms and conditions of employment in effect when the employer voluntarily recognizes the union as its employees' bargaining representative, or the terms and conditions existing on the date of the union's selection by a voting majority of employees in a Board election.

must occur with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007) (citations omitted).

However, as discussed in Section B below, *Katz* and statutory policy viewing unilateral employer actions as contrary to the general duty to bargain support a narrow definition of what constitutes a past practice that permits an employer's unilateral action in the absence of a bargaining agreement. The focus of that definition is on the degree of discretion that the employer purports to exercise.

As stated, we find that the Board's decisions in *Courier-Journal, Capitol Ford,* and *Beverly 2006*, are inconsistent with the principles we have examined.

A. The Precedent We Overrule Today is Irreconcilable with Established Law Limiting the Duration of Waivers Under a Contractual Management-Rights Clause

A management-rights clause is a contractual provision that authorizes an employer to act unilaterally, in its discretion, with respect to one or more mandatory subjects of bargaining. The Board has consistently held that a management-rights clause does not extend beyond the expiration of the collective-bargaining agreement embodying it, in the absence of evidence of the parties' contrary intentions. See, e.g., *Holiday Inn of Victorville*, 284 NLRB 916, 916–917 (1987).[15] This is so because, like arbitration and no-strike clauses, a management-rights clause involves a consensual surrender of a fundamental statutory bargaining right. As the Board has recently explained,

> It is true that a few contractually established terms and conditions of employment--arbitration provisions, no-strike clauses, and management-rights clauses--do *not* survive contract expiration, even though they are mandatory subjects of bargaining. In agreeing to each of these terms, however, parties have waived rights that they otherwise would enjoy in the interest of concluding a collective-bargaining agreement, and such waivers are presumed not to survive the contract.

Lincoln Lutheran of Racine, 362 NLRB No. 188, slip op. 4 (2015) (footnotes omitted).[16]

Beverly 2001, 335 NLRB at 636–637, is particularly instructive as to the integral connection between a management-rights clause and discretionary unilateral changes authorized by it. In that case, the Board adopted the judge's finding that the employer violated Section 8(a)(5) by implementing a number of unilateral changes in employees' working conditions following the expiration of the parties' collective-bargaining agreements. The Board reasoned that the management-rights clause in those agreements, which the employer cited as authority for making the changes, did not survive the contracts' expiration. Id. at 636. It also rejected the dissent's argument that even if the management-rights clause expired with the contract, the post-expiration unilateral changes were lawful because the work practices extant during the contract became terms and conditions of employment, and thus the employer had not changed the status quo. The Board explained that such a view "cannot be correct, for the essence of the management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls." Id. The Board further emphasized that "[b]ecause the waiver embodied in a management-rights clause lasts only until the contract expires, the status quo after contract expiration cannot include the right to make unilateral changes since such changes cannot be made in the absence of a waiver." Id. at 636–637 fn. 7. The Board observed that a contrary rule would make the expiration of the clause "meaningless wherever the employer had taken advantage of the waiver to make changes," and that defining the status quo that must be maintained following contract expiration as something so "fluid" necessarily "discourages, rather than promotes, collective bargaining," contrary to the aims of the Act. Id. at 637; see also *Register-Guard*, supra, 339 NLRB 353, 356 (because contractual reservation of managerial discretion did not survive expiration of the contract, absent evidence that the parties intended it to do so, the employer's previous implementation of sales incentive programs under such a contractual reservation did not create a past practice that privileged the institution of new sales commissions after the contract expired).[17]

---

[15] See also *Ryder/Ate, Inc*., 331 NLRB 889, 889 fn. 1 (2000), enfd. 22 Fed.Appx 3 (D.C. Cir. 2001); *University of Pittsburgh Medical Center*, 325 NLRB 443, 443 fn. 2 (1998), enfd. 182 F.3d 904 (3d Cir. 1999); *Ironton Publications*, 321 NLRB 1048, 1048 (1996); *Buck Creek Coal, Inc.,* 310 NLRB 1240, 1240 fn. 1 (1993).

[16] See also, *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (waiver of a statutorily-guaranteed right during the life of a contract is not a "clear and unmistakable" waiver of that right beyond the contract term, citing *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708–710 (1983)).

[17] The Board also noted that certain earlier cases, including *Shell Oil Co*., 149 NLRB 283, 286–287 (1964), and *Winn-Dixie Stores*, 224 NLRB 1418, 1432–1434 (1976), enfd. in part on other grounds 567 F.2d 1343 (5th Cir. 1978), "could be read to imply to the contrary, [but] those cases have been overruled sub silentio by . . . more recent cases" Id. at 636 fn. 6. Despite this, the Sixth Circuit mistakenly suggested a year after *Beverly 2001* that the *Shell Oil* line of cases remained extant Board law "standing for the proposition that if an employer has fre-

Beverly 2001 and *Register-Guard* make clear that when a union agrees to a management-rights clause, it has prospectively waived its right to object to discretionary unilateral changes covered by the clause only for the duration of the contract containing that clause. Accordingly, those discretionary changes cannot constitute a past practice that an employer could or should continue post-expiration without affording the union its full statutory bargaining rights. Nevertheless, in the *Courier-Journal* cases, a Board majority broke from this clear precedent without explanation.

In *Courier-Journal I*, 342 NLRB at 1094, the majority found that the employer's unilateral changes to employees' health insurance after expiration of a collective-bargaining agreement were lawful pursuant to an established past practice because, for 10 years, the employer had regularly made unilateral changes in the costs and benefits of the employees' health care program under waiver provisions in successive contracts and during prior hiatus periods, without protest from the union.[18] The contracts granted the employer the right to modify the health benefits, so long as any changes were made on the same basis as for nonrepresented employees. Id. at 1093. Without expressly referring to *Beverly 2001,* much less overruling that precedent, the majority essentially adopted the rationale of the dissent in that case, stating that "we do not pass on the legal issue of whether a contractual waiver of the right to bargain survives the expiration of the contract. Our decision is not grounded in waiver. It is grounded in past practice, and the continuance thereof." Id. at 1095. As a matter of past practice, the majority reasoned that the employer's discretion to make changes was limited by its obligation to treat unit and nonunit employees the same, but even if its discretion was not limited, the union's failure to object to past changes privileged the employer to continue making them under an established past practice, even after contract expiration.

As we discuss in the next section, the *Courier-Journal* "past practice" rationale for finding broad discretionary post-expiration unilateral changes lawful cannot be reconciled with the traditional and longstanding past practice doctrine. Therefore, despite the *Courier-Journal* majority's protestations to the contrary, the only arguable source of authority for continuing to exercise the right to make such changes would be based on waiver and the union's prior acquiescence. This approach is patently mistaken. See *Beverly 2001*, 335 NLRB at 636–637. During the contract period, any failure to object by the union was in accord with the parties' negotiated agreement and cannot be construed as consent to post-contractual unilateral changes. Regarding changes made during prior hiatus periods, the failure-to-object rationale is contrary to the well-established waiver 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." *Owens-Corning Fiberglass Corp*., 282 NLRB 609, 609 (1987). Thus, the union's acquiescence in the employer's unilateral changes to health benefits made during prior out-of-contract hiatus periods did not establish a waiver of its right to bargain over the employer's post-expiration changes that it did ultimately oppose.

We reject the *Courier-Journal* approach, however denominated, because it would clearly frustrate collective bargaining and undermine the union's bargaining representative status, in direct contradiction of the Act's policies, as articulated in *Katz* and *Litton*.[19] Such an approach would render the expiration of the management-rights clause meaningless wherever the employer had acted under its authority to make changes during the contract period. Indeed, an employer that has exercised broad discretion in making unilateral changes pursuant to a management-rights provision during the contract term would have little incentive to bargain and agree on such proposals if it retains this discretion after the contract expires.

In sum, we find that the common rationale of all of these cases cited by the District of Columbia Circuit and

quently engaged in a pattern of unilateral change under the management-rights clause during the term of the CBA, then such a pattern of unilateral change becomes a 'term and condition of employment,' and that a similar unilateral change after the termination of CBA is permissible to maintain the status quo." *Beverly Health and Rehabilitation Services v. NLRB*, 297 F.3d at 481 (6th Cir. 2002). Inasmuch as the *Beverly 2001* Board had expressly rejected this proposition and deemed supporting precedent to have been overruled in relevant part, the Sixth Circuit's discussion of *Shell Oil* is misplaced. See *E.I. du Pont*, 682 F.3d at 69, citing *Beverly Health*, 297 F.3d at 481. Our dissenting colleague contends that *Beverly 2001* overruled *Shell Oil* and *Winn-Dixie* only to the extent that they suggested management rights waivers survived contract expiration. We note in this regard that *Beverly 2001* specifically stated that "[b]ecause the waiver embodied in a management-rights clause lasts only until the contract expires, the status quo after contract expiration cannot include the right to make unilateral changes since such changes cannot be made in the absence of a waiver." 335 NLRB at 636 fn. 7, citing its fn. 6 reference to the sub silentio overruling of those cases. Insofar as necessary to eliminate any uncertainty about the current status of these earlier decisions, we expressly overrule the *Shell Oil* line of cases today.

[18] The Board's rationale was applied in *Courier-Journal II,* 342 NLRB 1148, involving the same respondent, which issued a few days later.

[19] The holding in *Capitol Ford*, that a successor employer could lawfully make unilateral changes consistent with those made by the predecessor employer during a post-expiration hiatus period, suffers from the same flaws as *Courier-Journal*. So, too, does the dicta in *Beverly Health 2006* cited by the court in its remand opinion in this case.

the Respondent cannot be reconciled either with fundamental Board law limiting broad discretionary employer actions under management-rights waivers to the duration of their source contracts, or to the requirement that post-expiration changes in mandatory terms and conditions of employment be subject to the full bargaining process required by the Act.

B. The Courier-Journal and Capitol Ford Decisions are Incompatible with Well-Established Past Practice Doctrine

The Board's past practice doctrine also flows from *Katz*. The Supreme Court there held that an employer's unilateral change involving a mandatory bargaining subject, pursuant to a practice established prior to the advent of the union, violated Section 8(a)(5). The Court rejected the employer's past practice defense to the unilateral implementation of merit wage increases despite the "the fact that the [ ] raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews—in effect, were a mere continuation of the status quo." The Court reached its conclusion because "the raises [ ] in question were in no sense automatic, but were informed by a large measure of discretion." 369 U.S. at 746.

Since *Katz*, the Board and the courts have repeatedly held that employers may act unilaterally pursuant to an established practice *only* if the changes do not involve the exercise of significant managerial discretion. Promoting stability, this doctrine freezes the status quo to the greatest extent possible while allowing a narrow exception for situations where there is a history of predictable changes to a discrete term or condition of employment that would be expected to continue in a nondiscretionary, regular manner. In the latter circumstances, a so-called dynamic status quo exists in which adherence to the pattern of change is not only permitted, but required. For example, applying *Katz,* the Board held in *State Farm Mutual Auto Insurance Co.*, 195 NLRB 871, 890 (1972), that an employer did not violate Section 8(a)(5) by unilaterally granting newly represented employees cost-of-living wage increases inasmuch as they were "automatic increases [determined by Bureau of Labor Statistics data] to which the Company was committed by a longstanding program and which involved no independent action by the Company."[20]

By contrast, in *Oneita Knitting Mills*, *Inc.,* 205 NLRB 500 (1973), the Board held that an employer violated Section 8(a)(5) by unilaterally granting merit wage increases to represented employees, even though it had a past practice of granting such increases. The Board explained that if an employer has exercised, and continues to exercise, discretion in regard to the amount of an annual wage increase, it must first bargain with the union over the discretionary aspect. Id.[21]

In the decades since *Katz*, with the exception of management rights precedent we overrule here, the Board has narrowly interpreted when a past practice was sufficiently fixed as to timing and criteria—thereby limiting employer discretion—as to deem further changes to be a permissible continuation of the dynamic status quo. In most cases, an employer's past practice defense of unilateral action has been rejected because, as in the case of the wage increases at issue in *Katz* itself, they "were in no sense automatic, but were informed by a large measure of discretion." 369 U.S. at 746. For example, in *Eugene Iovine, Inc.*, 328 NLRB at 294–295 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001), the Board held that an employer's recurring unilateral reductions in employees' hours of work were discretionary and therefore required bargaining with a newly certified union: "there was no 'reasonable certainty' as to the timing and criteria for a reduction in employee hours; rather, the employer's discretion to decide whether to reduce employee hours 'appear[ed] to be unlimited.'" Accord *Adair Standish Corp.*, 292 NLRB 890, 890 fn. 1 (1989) (despite past practice of instituting economic layoffs, employer, because of newly certified union, could no longer continue unilaterally to exercise its discretion with respect to layoffs), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990); see also *Aaron Brothers Co. v. NLRB*, 661 F.2d 750, 753 (9th Cir. 1981) (the "longstanding practice" exception suggested in *Katz* places a heavy burden on the employer to show an absence of employer discretion in determining the size or nature of a unilateral employment change).

Healthcare insurance benefits, like wages and hours of work, are a mandatory subject of collective bargaining and, as such, are subject to the same general statutory principles: an employer generally may not alter them without bargaining to agreement or to a good-faith impasse. *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002); *United Hospital Medical Center*, 317 NLRB 1279, 1281 (1995).

[20] See also *Kal-Die Casting Corp.*, 221 NLRB 1068, 1068 fn. 1 (1975) (finding that an employer did not violate the Act by unilaterally making "routine production and scheduling adjustments" because there was no evidence that those adjustments varied from the employer's established past practice of making similar adjustments, and the union did not request bargaining in any event).

[21] See also *State Farm Mutual Auto Insurance*, above, 195 NLRB at 890 (finding that the employer violated the Act by continuing its practice of unilaterally granting merit increases that were informed by a significant degree of discretion).

Compare *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), affd. 772 F.2d 421 (8th Cir. 1985) (no violation of Section 8(a)(5) where, in accordance with past practice of automatic change, the employer paid one third of an insurance premium increase itself and required employees to pay the remaining two thirds) with *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1265 (1997), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1999) (increases to employee contributions were unlawful despite employer's established practice of passing on premium increases to employees in the 3 years before the union was certified, because the increases were not shown to be based on a "fixed percentage" of the total premium and the employer retained "total discretion" over what employees were required to contribute).[22]

Although most of the cases where the Board has considered an employer's past practice defense to a unilateral change in health benefits have involved changes during first contract bargaining with newly certified unions, the Board has also considered and rejected an employer's past practice defense where the parties had a preexisting bargaining relationship. In *Caterpillar Inc.,* 355 NLRB 521 (2010), enfd. mem. 2011 WL 2444757 (D.C. Cir. 2011), the Board found that an employer's unilateral implementation of a generic-first prescription drugs program violated Section 8(a)(5). The Board rejected the employer's contention that it had a longstanding practice of unilaterally implementing changes to its prescription drug program, finding that the employer failed to show any regularity and frequency with respect to the prior changes and that the employer's "series of disparate changes . . . [did] not establish a 'past practice' excusing bargaining over future changes." Id. at 523.

In the *Courier-Journal* decisions, where the majority purported to decide the cases exclusively on past practice grounds, the analysis veered sharply from the well-established precedent defining a past practice status quo. In *Courier-Journal I*, 342 NLRB 1093, the contracts granted the employer the right to modify the employees' health insurance coverage so long as any changes were made on the same basis as for unrepresented employees. For some 10 years, the employer regularly implemented changes to employees' health insurance coverage; these included increases in employee contributions towards insurance premiums, modifications to coverage, and changes in carriers. Id. at 1098. The changes were made unilaterally for both represented and unrepresented employees alike, and some changes were implemented during a hiatus period between collective-bargaining agreements. Following the expiration of the parties' most recent collective-bargaining agreements, the employer made even "more far reaching changes to the healthcare insurance benefit," including increases in employee contributions to health care premiums, modifications to the framework for setting employee contribution levels, introduction of new vision and dental coverage plans, termination of a bonus program, and a change in the insurance provider. Id. at 1099.

The *Courier-Journal* majority's conclusion that the employer's ability to make "extensive unilateral changes"[23] was sufficiently limited by the requirement that any changes for unit employees be the same as for unrepresented employees is contrary to the past practice doctrine developed in accord with *Katz*. Without explanation, *Courier-Journal* found that a recurring pattern of broad discretionary actions taken pursuant to an expired management-rights clause permitted unilateral action. The changes deemed lawful in *Courier-Journal* were unlike those made pursuant to a fixed formula in *Luther Manor*, supra, 270 NLRB 949. Instead, as in *Mid-Continent*, 336 NLRB at 268, *Dynatron/Bondo*, 323 NLRB at 1265, and *Maple Grove Health Care Center*, 330 NLRB at 780, the employer's previous changes in unit employees' health care costs and benefits were not based on reasonably certain criteria that limited the employer's discretion. Rather, the purported past practice effectively involved

[22] Compare also *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002)(employer lawfully unilaterally increased employees' required contributions to health care premiums because it had a consistent, established past practice of allocating health insurance premiums between itself and its employees at a fixed ratio); *House of the Good Samaritan*, 268 NLRB 236 (1983) (employer lawfully passed an insurance premium increase along to employees where the employer followed its written policy setting forth the maximum dollar amount it would pay toward employee health insurance); *A-V Corp*., 209 NLRB 451, 452 (1974) (where the employer's "consistent practice with regard to increased insurance premium costs . . . had been to allocate a portion of such costs to its employees on a pro rata share basis," the employer's allocation of a later premium increase in the same manner represented a continuation of the past practice rather than a unilateral change), with *Maple Grove Health Care Center*, 330 NLRB 775, 780 (2000) (rejecting employer's argument that it had no obligation to bargain over a change in employees' insurance premiums because it had maintained the status quo by passing on a portion of the externally imposed insurance premium increase to employees; the purported status quo was insufficiently certain because the employer failed to show an established practice of requiring employees to pay a fixed percentage of the healthcare insurance premium); *Mid-Continent Concrete*, 336 NLRB at 268 (rejecting the employer's argument that it had no obligation to bargain when it changed insurance plans and benefits because it had a past practice of maintaining uniformity between the benefits of unit and nonunit employees); *Garrett Flexible Products*, *Inc.,* 276 NLRB 704 (1985) (employer violated Sec. 8(a)(5) by unilaterally increasing the health insurance premium paid by bargaining unit employees where the employer had exercised substantial discretion in allocating the increases between the employer and the employees).

[23] *E.I. du Pont*, 682 F.3d at 68.

limitless discretion in changes to the employees' health insurance benefits.

The *Courier-Journal* majority also found that the employer's discretion to change health benefits was limited because changes to unit members' benefits had to be the same as those for unrepresented employees. 342 NLRB at 1094. Yet because the employers were free to change and even entirely eliminate benefits to employees who are not represented by a union, there are no fixed criteria limiting that discretion. Such discretion does not establish a past practice permitting unilateral changes. See e.g., *Larry Geweke Ford*, 344 NLRB 628, 632 (2005) (the employer's history of providing the same health plan for all its employees on a company-wide basis did not exempt it from its bargaining obligation). As dissenting Member Liebman persuasively explained in *Courier-Journal I*, this constituted "no limitation at all":

> [T]he [r]espondent could do exactly as it pleased with regard to the [unrepresented employees'] coverage, and therefore, by extension, it could do the same for unit employees. If dealing with union-represented employees exactly as it would if they were not represented is a 'limitation' on the [r]espondent's discretion, it is one that most employers would be happy to accept.

342 NLRB at 1096–1097.

Paradoxically, the *Courier-Journal* decisions created a bargaining dichotomy in which an employer would have much broader latitude to make discretionary unilateral changes when negotiating for a successor bargaining agreement than would be permitted, as in *Katz*, when bargaining for an initial agreement. There is no rational basis for this dichotomy, and it cannot be reconciled with the Supreme Court's approval in *Litton* of the Board's position that "it 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." 501 U.S. at 198. That position applies with equal force to initial and successor bargaining.

For all of the above reasons, we conclude that *Courier-Journal* cannot be reconciled with longstanding precedent defining a past practice that must be maintained as part of the status quo under the unilateral change doctrine. We therefore overrule it and other decisions to the extent that they depart from that precedent, including the holding that treating unit and nonunit employees alike when making otherwise broad discretionary changes constitutes a fixed criterion sufficient to establish a past practice status quo.[24]

[24] The Board's holding in *Capitol Ford* was likewise inconsistent with past practice principles, and must be overruled in relevant part. The Board there reasoned that the successor employer lawfully modified the unit employees' productivity bonus program, because the predecessor employer had made similar discretionary changes during the term of its contract with the union. As in *Courier-Journal*, there was no attempt to reconcile this result with the traditional definition of a cognizable past practice status quo, which emphasizes the absence of, or at least strict limitations on, the degree of an employer's discretion to act unilaterally.

VI. APPLICATION TO THIS CASE

During negotiations for successor collective-bargaining agreements at its Louisville and Edge Moor facilities, the Respondent unilaterally implemented numerous substantial changes to the Beneflex benefits of unit employees without bargaining to impasse. The changes varied widely from year to year, encompassing both changes to the price and content of benefits as well as the elimination and addition of plan options within benefit plans, including the elimination of entire categories of benefits. Those changes were limited in timing to the extent that they coincided with the annual open period for the Beneflex Plans.[25] But they were limited in substance only to the extent of the requirement that the same changes be made for nonunit employees, which, as discussed above, we find to be no meaningful limitation at all.

In addition, the Respondent's right to exercise broad discretion in unilaterally changing the benefit plans existed solely because the Union agreed that the Respondent could make changes during the term of the parties' collective-bargaining agreement pursuant to the reservation of rights clause in the Beneflex Plan documents.[26] Consistent with precedent we reaffirm today, overruling cases to the contrary, this provision did not survive the expiration of the collective-bargaining agreements—and neither did the employer's contractual right to make uni-

[25] The District of Columbia Circuit has itself expressed the view that fixed timing alone is "a characteristic found insufficient to create a term or condition of employment" under past practice doctrine. *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1239 (D.C. Cir. 2011), citing *Daily News of Los Angeles v. NLRB,* 73 F.3d 406, 412 fn. 3 (D.C.Cir.1996).

[26] We reaffirm the prior Board's findings, for the reasons set forth in its initial decisions, that the reservation of rights clause in the Beneflex Plan documents is a management-rights clause. *DuPont-Louisville*, 355 NLRB at 1086, 1094; *DuPont-Edge Moor*, 355 NLRB at 1103–1104.

We also reaffirm the prior Board's findings, for the reasons set forth in its initial decisions, that the Respondent failed to show that its unilateral changes were privileged under *Stone Container Corp.,* 313 NLRB 336 (1993), or were "covered by" the expired collective-bargaining agreements. *DuPont-Louisville*, 355 NLRB at 1086 fn. 8; *DuPont-Edge Moor*, 355 NLRB at 1106–1108. In addition, we find that the *Stone Container* exception is inapplicable in this case because it applies only where the parties are negotiating for an initial collective-bargaining agreement and not to negotiations for successor contracts. *Connecticut Institute for the Blind, Inc., d/b/a Oak Hill*, 360 NLRB No. 55, slip op. at 52 (2014). Therefore, we find inapposite the Respondent's reliance on *Brannan Sand and Gravel*, 314 NLRB 282 (1994), and *Nabors Alaska Drilling, Inc*., 341 NLRB 610 (2004).

lateral changes permitted by it. Consequently, the Respondent's wide-ranging and varied changes, made with no cognizable fixed criteria, did not establish a status quo under our doctrine that the Respondent was permitted to continue post-expiration.

Further, the fact that the Union did not object to Beneflex changes during the term of the collective-bargaining agreements is of no consequence. For as long as the contractual management-rights clause remained in effect, these were permissible discretionary changes. But once the agreements expired, the Union's past silence surely did not constitute a waiver of its right to oppose similar changes. The Respondent moreover has failed to show that the changes it made to the Beneflex Plan after the contracts expired were made according to fixed criteria.[27] Instead, the evidence shows that they clearly fell outside the limited range of repeated changes made with little or no discretion that, with the exception of cases we overrule today, the Board has recognized as a statutory status quo that may be maintained in the absence of a collective-bargaining agreement.[28]

Following the expiration of the parties' collective-bargaining agreements, therefore, the Respondent had the statutory obligation to adhere to the terms and conditions of employment that existed on the expiration date at each facility until it bargained to agreement or reached a good faith impasse in overall bargaining for a new agreement. When the collective-bargaining agreements expired, the Beneflex Plan benefits in effect on the expiration dates became fixed as the status quo subject to this statutory duty to bargain.[29]

By unilaterally implementing further post-expiration changes in the absence of a bargaining impasse, the Respondent breached its obligation to maintain that status quo and thereby violated Section 8(a)(5) and (1) of the Act.

VII. RESPONSE TO DISSENT

Our dissenting colleague makes three primary contentions. First, he asserts that our decision is based on a new definition of what constitutes a change under the Supreme Court's decision in *Katz* and that this allegedly new definition cannot be reconciled with *Katz*, the Act, or what he deems to be fundamental common sense. Second, he contends that our decision is based on a narrative that falsely paints the *Courier-Journal* cases, rather than *Beverly 2001* and *Register-Guard*, as unexplained departures from long-established Board precedent. Third, he asserts that our decision today has no rational policy basis and that it will both ill serve collective-bargaining and undermine industrial peace. Obviously we disagree, and for good reason.

To begin, we believe that the District of Columbia Circuit was fully cognizant of *Katz* and its bearing here when it remanded this case with instructions that the Board should "conform to its precedent in *Capitol Ford* and in the 2006 iteration of *Beverly Health and Rehabilitation Services* or explain its return to the rule it followed in its earlier decisions [in *Beverly 2001* and *Register-Guard*]." 682 F.3d 65. These instructions leave open the issue whether those earlier Board decisions are in accord

[27] When an employer asserts a past practice as a defense to a charge that it has refused to bargain, the employer carries the burden of proving the existence of the past practice. See, e.g., *Caterpillar, Inc.,* 355 NLRB at 523; see also *Eugene Iovine, Inc.*, 328 NLRB at 294 fn. 2.

[28] The Respondent asserts that *The Finley Hospital*, 359 NLRB 156 (2012), supports its view that the post-expiration status quo included the Respondent's right to make annual changes to the Beneflex Plan. The Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), rendered the Board's decision in *Finley Hospital* invalid. However, in *Finley Hospital*, 362 NLRB No. 102 (2015), reversed in part __ F.3d __, 2016 WL 3511487 (8th Cir. 2016), the Board affirmed the judge's finding that the employer violated Sec. 8(a)(5) by unilaterally discontinuing annual raises required under the collective-bargaining agreement when the agreement expired and essentially adopted its earlier rationale. Nevertheless, we find that *Finley Hospital* is inapposite; it did not involve the Board's past practice doctrine, nor did the employer in that case raise such a defense. In *Finley*, a contractual provision in the parties' collective-bargaining agreement stated in relevant part that "For the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date. Such pay increases for Nurses not on probation, during the term of this Agreement, will be three (3) percent . . ." 362 NLRB No. 102, slip op. at 2. During the term of the contract, the employer had implemented wage increases pursuant to this provision that provided for annual increases in specified amounts. The Board found that the employer violated Sec. 8(a)(5) by unilaterally discontinuing the annual 3-percent pay raises provided in agreement after it expired. Id., slip op. at 3–5. The Board reasoned that employer had a duty to continue to pay the 3-percent pay increases following the contract's expiration consistent with its statutory duty to maintain the status quo. Unlike in this case, the wage increase provision in the contract in *Finley* was not a management-rights provision, but rather was a particular term and condition of employment—a discrete and clearly defined wage increase—that the employer was required to continue post-expiration. Such a defined wage increase is vastly different from the ad hoc discretionary changes in benefits that the Respondent here contends it is privileged to make as part of the purported status quo.

[29] The Respondent maintains that requiring it to maintain the Beneflex Plan as it existed on the contract's expiration dates "defeats any notion of status quo." On the contrary, it is well-settled Board law that the status quo for unit employees as of the expiration of the contract is whatever health coverage they had in effect at the expiration of the agreement. See *Remington Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 5 (2015) (employer violated Sec. 8(a)(5) by instituting a new medical insurance plan for its employees, and by ceasing to make payments to the medical insurance carrier under the plan as provided for in the expired collective-bargaining agreement); *United Hospital Medical Center*, 317 NLRB 1279 (1995) (employer violated the Act when it made certain changes in health benefits during negotiations for a successor contract).

with *Katz* and the Act as a matter of law if the Board chose to overrule the more recent conflicting precedent.

Further, we cannot accept our dissenting colleague's assertion that when examining whether an employer's unilateral action constitutes a "change" under *Katz*, "the only relevant factual question is whether the employer's actions are similar in kind and degree to what the employer did in the past." Under the dissent's view, proof of a prolonged series of totally discretionary and varied changes in a particular term of employment, unfixed as to timing and criteria, would permit a continuation of this putative past practice until such time as the employer agreed in negotiations to limit this practice. And applying that view in this case, where the only limit on the Respondent's discretion to change union employee health benefits was that the changes be the same as it imposed on unrepresented employees, the Respondent would be free to significantly diminish or even completely eliminate the benefit so long as it did so for its unrepresented employees. We cannot discern how an analysis that permits such unbridled discretion can be reconciled with the reasoning of *Katz* or the Court's holding there that the employer made unlawful unilateral changes in wages that were not in line with prior *automatic* wage increases but were instead "*informed by a large measure of discretion*." 369 U.S. at 746 (emphasis added). Indeed, apart from precedent set in the management-rights cases that we overrule today, there seems to be no precedent to support that view.[30] In fact, as set forth previously, there is substantial contrary precedent that the dissent neglects and that clearly supports our view of *Katz* and the appropriate definition of change subject to the customary statutory obligation of advance bargaining.

As to our dissenting colleague's assertion that our interpretation of when employer changes require advance bargaining "defies common sense"—because it prevents an employer from doing "precisely what it has done in the past," or from taking actions "identical to what the employer did before"—we need simply refer to the facts of this case. The record clearly establishes that, although the Respondent has established a pattern of making annual changes to the Beneflex Plan, it has not established a pattern of making anything approaching regularly recurring similar changes on those occasions. As previously described, some Plan changes were made on a recurring basis and some of them were one-time events; some involved the establishment of entirely new benefits, and some involved the complete elimination of existing benefits. By the Respondent's own admission, while the timing was fixed, there were no fixed criteria for the annual changes; the sole alleged criterion, that any changes apply to unit and nonunit employees alike, does not determine the nature or amount of Plan changes in any apparent way, and the Respondent identified none. In our view, it defies common sense to assert that employees would reasonably perceive that there was an established past practice as to any element of the Beneflex Plan or understand what to expect on the occasion of annual revisions to it. As stated in *Katz*, "[t]here simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist" on bargaining in advance of change. 369 U.S. at 746.

This brings us to the dissent's second principal contention—that we have misrepresented the history of relevant precedent. Our colleague asserts that the precedent set in *Beverly 2001* and *Register-Guard* represented a brief and mistaken departure from longstanding precedent permitting unilateral action in the circumstances presented here. We do not dispute that both before and after those cases there have been Board decisions holding that employers lawfully adhered to a past practice of broad discretionary changes established pursuant to a contractual management-rights waiver. What we contend here is that those decisions are in conflict with the longstanding precedent defining change and past practice in every other bargaining context, whether for initial or successor agreements. They are in conflict as well as with the equally longstanding precedent limiting management-rights clauses to their contractual term. (As previously noted, the dissent does not acknowledge this precedent.) *Beverly 2001* and *Register-Guard* corrected this conflict, creat-

[30] Other than the *Courier Journal* cases, *Capitol Ford*, and *Beverly 2006*, the dissent primarily relies on *Shell Oil Co.*, 149 NLRB 283 (1964), *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965), and *Winn-Dixie Stores, Inc.*, 224 NLRB 1418 (1976), enfd. in part on other grounds 567 F.2d 1343 (5th Cir. 1978). Notably, none of these cases was cited as supporting precedent in the *Courier-Journal* decisions, and for good reason. As previously discussed, *Shell Oil* and *Winn-Dixie* were described in *Beverly 2001* as having been overruled by subsequent precedent. 335 NLRB at 636 fns. 6 & 7. *Westinghouse* was a case where the employer "had unilaterally engaged in the practice of subcontracting for a substantial period of time and the union employees had never performed the work which was subcontracted." *Leeds & Northrup Co. v NLRB*, 391 F.2d 874, 879 (3d Cir. 1968). *Westinghouse* did not involve any management-rights clause and the decision does not indicate that the past practice of subcontracting, while extensive, lacked fixed criteria. In subsequently distinguishing *Westinghouse*, the Board has emphasized that the subcontracting at issue there involved work not performed by unit employees and therefore had no direct adverse impact on them. *University of Pittsburgh Medical Center*, 325 NLRB 443, at 443 fn. 4 (majority opinion) and 444 fn. 2 (concurring opinion)) (1998). See also, e.g., *General Electric Co.*, 264 NLRB 306, at 308–309 (1982).

Bath Iron Works Corp., 302 NLRB 898, 901 (1991) and *Trading Port, Inc.*, 224 NLRB 980, 983–984 (1976), cited in the dissent for the proposition that changes must be "material, substantial, or significant," do not involve an application of the Board's past practice doctrine.

ing a single standard for all collective-bargaining negotiations. Without any mention of those two cases, much less providing a rational explanation for departing from their holdings, the *Courier-Journal* decisions effectively reinstated a different standard for defining what constitutes a change in the management-rights context. But whatever might be said about the history of Board doctrine in this area, our decision today makes a clear and carefully considered choice between different lines of precedent—as the District of Columbia Circuit has directed us to do.

Finally, we refute our dissenting colleague's contention that our holding in this case lacks a rational basis and will disrupt the bargaining process. To reiterate, our decision is well grounded in the Act's fundamental policy to promote the practice of collective bargaining and longstanding precedent implementing that policy. Further, the dissent both exaggerates and distorts the effect that our decision will have on parties' collective bargaining. Contrary to our dissenting colleague, we do not hold that all past practices are erased whenever a contract expires. We hold only that an employer cannot continue a practice of making the same discretionary unilateral changes, not fixed as to timing and criteria, that it was permitted to make pursuant to a management rights clause.[31] Thus, we impose no great new burden on employers or on the bargaining process generally. First, identifying the status quo is not difficult and does not involve the strained "drilling-down" scenario set forth in the dissent. The status quo is whatever employees' concrete terms and conditions of employment are—on the ground, so to speak—when the contract expires. That is the baseline from which the parties bargain. Thus, if a management-rights provision involves healthcare benefits, the benefits in effect at contract expiration—regardless of whether they have been established unilaterally and periodically changed at the employer's discretion up to that moment—must be maintained. Second, employers who wish to be able to continue making discretionary unilateral changes post-expiration can bargain for contract language in the successor agreement that clearly and unmistakably gives them that right. This obligation to bargain over employee terms and conditions of employment is a function of the Act, not a Board-imposed burden. Our decision adheres to a fundamental principle that, with very limited exceptions, bargaining on mandatory subjects should be promoted, not excused.

Indeed, it is the dissenting position that threatens the bargaining process. It is difficult to imagine anything more disruptive to the collective-bargaining process than an employer's exercise of its broad discretion to unilaterally change—or even eliminate—a major term and condition of employment, such as health insurance, which may have a profound effect on the lives of individual employees and their families. In *Katz*, the Court stated, "[u]nilateral action by an employer without prior discussion with the union . . . must of necessity obstruct bargaining, contrary to congressional policy." 369 U.S. at 747. Further, it would discourage unions from agreeing to give employers any rights to make unilateral changes during a contract term for fear that they may never be able to limit the scope of change exercised in subsequent contract negotiations. Because contractual grants of managerial discretion can be an important tool in addressing mid-term issues, a position that discourages agreement to management-rights provisions would significantly impair collective bargaining. More important, permitting an employer to continue to unilaterally make widespread changes to employee terms of employment during negotiations for a successor collective-bargaining agreement would have a deleterious effect on the bargaining process, by forcing unions to bargain to regain benefits lost to post-expiration unilateral changes.[32] It would also undermine the union's stature in the eyes of the employees they represent, signaling that the union is helpless to prevent an employer from acting on its own. In short, permitting effectively unlimited employer discretion to change important terms and conditions of employment—without the consent of the union and while no contract is in place—is a recipe for precisely the sort of disruptive labor disputes the Act is intended to prevent.

VIII. CONCLUSION

In sum, we affirm our previous findings in both decisions that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the Beneflex Plan at a time when the parties were negotiating for a collective-bargaining agreement and were not at impasse. In response to the court's remand directions, we overrule the *Courier Journal* decisions and *Capitol*

[31] Because the facts before us involve the legality of broad and varied discretionary changes by the Respondent, we need not address the issue whether an employer could continue post-expiration a practice of automatic change based on fixed timing and criteria, if that practice was established pursuant to a management-rights clause,

[32] In addition, at the bargaining table, the extant set of terms and conditions of employment subject to bargaining will have changed, making waste of negotiations and preparations based on those former terms and conditions. The union confronted with these changes will necessarily have to review them and adjust its proposals accordingly, in some instances having now to bargain to regain benefits that have preemptively been eliminated.

Ford, and we disavow dicta in *Beverly Health 2006* to the extent that these cases conflict with our rationale here and departed from well-established statutory bargaining principles. Our duty as a Board is to fulfill the Act's stated purpose of encouraging collective bargaining. Decisions endorsing an employer's right to make broad discretionary unilateral changes in represented employees' terms and conditions of employment are antithetical to that purpose. As the Supreme Court observed in *Katz*, such unilateral action by an employer "will rarely be justified by any reason of substance." 369 U.S. at 747. No such reason presents itself in the circumstances of this case.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we find it appropriate to apply our decision today retroactively. We find no manifest injustice in so doing, as our analysis is consistent with longstanding precedent and well-established principles. Therefore, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the employees' benefit plan during periods when the parties were engaged in negotiations for a collective-bargaining agreement and had not reached impasse, we shall require the Respondent to make whole the unit employees and former unit employees for any loss of benefits they suffered as a result of the Respondent's unlawful changes to their benefits. Such amounts shall 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 at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).[33]

Further, in accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016), the Respondent shall compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file a report with the Regional Directors of Regions 4 and 9 allocating the backpay awards to the appropriate calendar years for each employee.

Finally, we shall modify the prior Board Orders to provide for notice-posting in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), and, due to the length of time since the violations, we additionally shall order notice mailing to reach employees who otherwise would not see the notices or learn of the violations. We have substituted new notices to conform to the Orders as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

ORDER

A. The National Labor Relations Board reaffirms its original Order, reported at 355 NLRB 1084 (2010), as modified and set forth in full below, and orders that the Respondent, E.I. du Pont de Nemours, Louisville Works, Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Paper, Allied-Industrial, Chemical, and Energy Workers International Union and its Local 5-2002 (the Union) by making unilateral changes to the benefits of unit employees during periods when the parties are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

The unit is:

> All employees employed by [the Respondent] at its Louisville Works, Louisville, Kentucky, including powerhouse and refrigeration plant employees, chief operators, shift leaders, fire department employees, cafeteria employees, and counter attendants, but excluding all office 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 Act.

(b) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit.

(b) Upon request of the Union, restore the unit employees' benefits under the Beneflex package of benefit

[33] We will allow the Respondent to litigate in compliance whether it would be impossible or unduly or unfairly burdensome to restore the unit employees' benefits to the terms that existed prior to the unlawful unilateral changes. See *Larry Geweke Ford*, 344 NLRB 628, 629–630 (2005) (employer permitted to litigate in compliance whether it would be unduly burdensome to restore the health insurance coverage in effect prior to the unilateral change).

plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2004 and January 1, 2005, 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.

(c) Make all affected employees whole for any losses that they may have suffered as a result of the unilateral implemented changes in benefits in the manner set forth in the remedy section of the decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director of Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Louisville, Kentucky, facility copies of the attached notice marked "Appendix A."[34] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Further, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees at any time since January 1, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board reaffirms its original Order, reported at 355 NLRB 1096 (2010), as modified and set forth in full below, and orders that the Respondent, E.I. du Pont de Nemours and Company, Edge Moor, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (U.S.W.), and its Local 4-786 (formerly Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) and its Local 2-786) (the Union) by making unilateral changes to the benefits of unit employees during periods when the parties are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

The unit is:

> All employees of the Edge Moor Plant with the exception of the Administrative Secretary to the Plant Manager, Human Resources Assistant, Technologists (Training, Planning, DCS), Work Leader, Nurses, salary role employees exempt under the Fair Labor Standards Act, and supervisory employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

(b) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit.

(b) Upon request of the Union, restore the unit employees' benefits under the Beneflex package of benefit plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2005, 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.

(c) Make all affected employees whole for any losses that they may have suffered as a result of the unilateral implemented changes in benefits in the manner set forth in the remedy section of the decision.

[34] 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.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director of Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Edge Moor, Delaware facility copies of the attached notice marked "Appendix B."[35] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Further, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees at any time since January 1, 2005.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Former Board Chairman John Fanning once said that "one factor every case has in common . . . is the presence of at least two people who see things completely different."[1] This case involves *more than* two people who see things different. Competing views exist between the parties, between the Board and the court of appeals (which remanded this case back to the Board following an earlier Board ruling), and among the members of the National Labor Relations Board (NLRB or Board).

My view of this case is simple, and it consists of two parts: (1) in 1962, the Supreme Court decided *NLRB v. Katz*,[2] which held that an employer must give the union notice and the opportunity for bargaining before making a "change" in employment matters, and the Court held that bargaining is *not* required before taking actions that are *not* a "change"; and (2) actions constitute a "change" if they materially differ from what has occurred in the past.

My colleagues disagree with me on part 2. 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 (CBA) 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 lan-

[35] 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.

[1] John Fanning, *The National Labor Relations Act: Its Past and Its Future*, in William Dolson and Kent Lollis, eds., *First Annual Labor And Employment Law Institute* 59-70 (1954) (emphasis added), quoted in Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. Lab. Res. 699, 713 (Fall 2001). Former Chairman Fanning became a Board member on December 20, 1957 and remained on the Board until December 16, 1982. See http://www.nlrb.gov/who-we-are/board/board-members-1935 (last viewed August 15, 2016).

[2] 369 U.S. 736 (1962). Obviously, the Board is bound by our statute, which requires bargaining in Sections 8(a)(5) and 8(b)(3), and the Board is bound by Supreme Court decisions, which include *NLRB v. Katz*, where the Court held that any "change" from the status quo must be preceded by reasonable notice to the union and the opportunity for bargaining, but these requirements do not apply if there has been no "change."

guage. If not, the employer's new actions constitute a "change" even though they are identical to what the employer did before.

In effect, my colleagues create the labor law equivalent of the "neuralyzer" from the *Men in Black* movies: 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.[3]

Take, for example, an employer that has always painted factory walls blue every summer and green every winter. When doing this painting, the employer exercised discretion: it varied the precise shade of blue and green, and it also varied the precise time when the painting would be done. Summer approaches. If the employer again paints the factory walls blue, will that constitute a "change"? In my view, because this is what the employer has always done, it is not a "change" for the employer to do the same thing again.

Here is how my colleagues would analyze it. Summer approaches, and with it, the time to paint the factory walls blue. Will this constitute a "change"? To answer that question, the parties must look at whether CBAs existed previously during all or some of the past factory-wall-painting. If CBAs existed previously, parties must then determine whether those CBAs contained language conferring on management the right to paint the walls as described above, and whether a new CBA containing the same language exists now. If no CBA exists now, or if the CBA does not contain the same language conferring a management right to paint the walls, then everything the employer did in the past is treated like it never happened. Therefore, even though the employer does what it always did (paints the walls blue every summer), my colleagues will find this constitutes a unilateral "change," which means the employer will have violated our statute, and to avoid violating the Act, the employer must first give the union notice and the opportunity for bargaining.[4] In a separate part of their holding, my colleagues also decide that, whenever the employer exercises any "discretion" (in my illustration, for example, the employer always determined the shade of blue or green as well as the exact time when the painting would occur), taking precisely the same action would *always* constitute a "change" because the employer exercised "discretion."

Of course, employers do not just paint walls. They take all kinds of actions, including many that affect wages, hours, benefits and other employment terms. Again, the Supreme Court held in *Katz* that employers can lawfully take these actions without bargaining if doing so does not constitute a "change." According to my colleagues, however, if a past practice developed under contractual management right's language, the expiration of a CBA means that *every* employer action taken thereafter constitutes a "change," even though the employer merely continues doing what it has done before.

I believe this outcome is wrong because it contradicts the Supreme Court's decision in *Katz* and defies common sense. Moreover, I believe the 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. Three considerations are important to keep in mind here.

First, unions and employers face enormous challenges in contract negotiations: prioritizing issues, reconciling divergent positions, preparing and responding to information requests, and managing the bargaining process. My colleagues needlessly add to these challenges by creating a new Board-imposed duty for parties to negotiate regarding actions that represent a *continuation* of what the employer has done before.

Second, when no CBA exists, and when parties attempt to comply with this new Board-imposed bargaining obligation (which, again, requires bargaining over actions that merely continue what the employer has done before), the employer's obligation is not merely to negotiate to a single-issue impasse or agreement regarding the particular action that the employer has announced (e.g., painting the walls blue, to use my earlier example). Rather, if no CBA exists, the employer must bargain to agreement or overall impasse regarding *all* mandatory bargaining subjects that are under negotiation before the employer can take action regarding *any* issue.[5] This type

[3] The *Men in Black* movies involve secret agents, played by Tommy Lee Jones and Will Smith, among others, who protect the human race from extraterrestrial aliens who disguise themselves on earth. Whenever the agents destroy or apprehend an alien in the presence of human civilians, the agents use a "neuralyzer" to erase the civilian's memory of the event. See Wikipedia, *Men in Black* (https://en.wikipedia.org/wiki/Men_in_Black_(franchise)) (last viewed August 15, 2016); id., Neuralyzer (https://en.wikipedia.org/wiki/Neuralyzer) (last viewed August 15, 2016).

[4] I have used the painting of factory walls as an example to illustrate the different definitions of "change" that my colleagues and I apply. However, I do not reach or pass on whether the color of factory walls is a sufficiently substantial term or condition of employment to require bargaining under Sec. 8(a)(5) before this can be done, assuming that it constitutes a "change" for purposes of *Katz*.

[5] *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) ("[A]n employer's obligation . . . encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole."), enfd. mem. 15 F.3d 1087 (9th Cir. 1994); *RBE Electronics of S.D., Inc.,* 320 NLRB 80 (1995) (same). Although *Bottom Line* and *RBE Electronics* are well established, I do not pass on whether these decisions were correctly decided.

of Board-imposed paralysis—preventing employers from doing precisely what they have done in the past until everything is resolved in pending contract negotiations—will poorly serve employees, unions and employers alike. This is contrary to *Katz* and to the Board's obligation to foster stable labor relations,[6] and it was clearly not intended by Congress. As the Supreme Court stated in *First National Maintenance Corp. v. NLRB*,[7] "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."[8]

Third, even though *Katz* affords employers the right to take unilateral actions consistent with past practice, employers still have an obligation to bargain 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 *upon the union's request* over all mandatory bargaining subjects.[9] Existing law makes it clear that this duty to bargain upon request *is not affected by an employer's past practice*.[10] In my "painting-the-walls-blue" illustration, for example, I believe the employer has a unilateral right to paint the walls blue this summer (because doing so would not be a "change"); but the employer is still required to engage in bargaining over this subject—*regardless* of any past practice—if the union requests such bargaining.[11]

Another difference in the instant case concerns how my colleagues describe the development of Board case law. They construct a narrative that starts by describing a time when the Board properly applied the law, as follows: (a) if employer actions occurred during a CBA's term, these were permitted only because of a contractual waiver of bargaining rights (usually pursuant to the management-rights clause); (b) if the employer took the same (or similar) actions when no CBA was in effect, the Board supposedly applied a "traditional and longstanding past practice doctrine"[12] under which the employer's new actions constituted a "change" even if they were identical to what the employer did in the past. Under my colleagues' narrative, this utopian period when the Board properly applied the law was reflected primarily in two cases—*Beverly Health & Rehabilitation Services (Beverly I)*,[13] decided in 2001, and *Register-Guard*,[14] decided in 2003.

The villains in my colleagues' story consist of two Board cases decided in 2004, which I will refer to as *Courier-Journal I* and *Courier-Journal II*.[15] My colleagues state that the *Courier-Journal* cases were "unexplained departures from well-established . . . legal principles" and "veered sharply from the well-established precedent defining a past practice status quo."[16] According to my colleagues, the *Courier-Journal* cases "cannot be reconciled with the traditional and longstanding past practice doctrine"[17] (as established in *Beverly I* and *Register Guard*). Therefore, in today's decision, my colleagues purport to "return to the rule followed in our earlier cases,"[18] thereby restoring the law to its proper state and where it has always been (excluding the traitorous *Courier-Journal* cases and their accursed progeny, *Capitol Ford* and *Beverly II*).

My colleagues' narrative has two problems. First, the story is not true. My colleagues' narrative does not account for an earlier decades-long period during which the Board—consistent with the *Courier-Journal* cases[19]—similarly held that employer actions were not a "change" that required bargaining under *Katz* if they were consistent with past practice, regardless of whether or when

[6] One of the Board's primary responsibilities under the Act is to foster labor relations stability. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (A "basic policy of the Act [is] to achieve stability of labor relations.").

[7] 452 U.S. 666 (1981).

[8] 452 U.S. at 676 (emphasis added).

[9] See fn. 22, infra and accompanying text.

[10] For more detail regarding the difference between the duty to bargain upon request and the *Katz* duty to refrain from unilaterally changing a term or condition of employment—and the fact that an employer's past practice leaves the former duty undiminished—see fns. 23, 35 & 39, infra.

[11] Although the duty to engage in bargaining upon request is undiminished by the existence of a past practice, there are some potential exceptions that can affect this duty. See fn. 23, infra.

[12] Majority opinion, slip op. at 6.

[13] 335 NLRB 635 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003).

[14] 339 NLRB 353 (2003).

[15] 342 NLRB 1093 (2004) (*Courier-Journal I*), and 342 NLRB 1148 (2004) (*Courier-Journal II*). My colleagues pass equally harsh judgment on similar Board decisions in *Capitol Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319 (2006) (*Beverly II*).

[16] Majority opinion, slip op. at 8.

[17] Id., slip op. at 6.

[18] Id., slip op. at 3.

[19] Supra fn. 15

a CBA was in effect.[20] In other words, today's decision is not supported by any "traditional and longstanding past practice doctrine" as described by my colleagues. Rather, the Board's "traditional and longstanding" Board case law *contradicts* today's decision. At most, the Board applied *Beverly I* and *Register-Guard* (the two cases relied upon by my colleagues)[21] during a short 3-year period, which was preceded *and* followed by numerous Board cases that squarely rejected the reasoning embraced by my colleagues today. This can hardly be described as a story about a righteous past, a fall from grace, and a restoration of righteousness.

There is a second and more fundamental problem with my colleagues' narrative. This case is not controlled by Board law. It is controlled by the Supreme Court's decision in *Katz*, which interpreted our statute, neither of which can be overruled or changed by my colleagues.

In the remainder of this opinion, I resist the temptation to create a lengthy counter-narrative that replaces the story recounted by my colleagues. Rather, as noted above, this is a simple case: the Board is bound by our statute, and we must adhere to Supreme Court decisions, including the Supreme Court's decision in *Katz*. There, the Supreme Court held that an employer must provide prior notice and the opportunity for bargaining before it implements a "change," and an employer may lawfully take unilateral actions if they are not a "change." Most people understand what "change" means, and I believe this common-sense understanding is what the Supreme Court in *Katz* embraced: when an employer takes action consistent with what it did before, this is not a "change." In my view, it does not matter whether or what type of CBA may exist, or may have existed, when evaluating whether particular actions constitute a "change." My colleagues' view to the contrary improperly confuses the Board's treatment of contractual waivers of the right to bargain—which depend on the existence of a CBA—and what constitutes a "change" for purposes of *Katz*. Equally incorrect, in my view, is my colleagues' finding that every employer action constitutes a "change" that requires bargaining, even if it is identical to what the employer has always done, if the action involves any employer "discretion." This aspect of today's decision is contrary to *Katz* as well as numerous other longstanding and recent Board and court decisions.

For these reasons, as described more fully below, I respectfully dissent.

Discussion

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

As noted above, this case is controlled by the Supreme Court's decision in *Katz*. Prior to *Katz*, it was well established that Section 8(a)(5) require parties to engage, upon request, in good-faith negotiation over mandatory bargaining subjects, which the Act defines as "wages, hours, and other terms and conditions of employment"[22] Separate from this duty to bargain upon request,[23] the Supreme Court in *Katz* held that Section 8(a)(5) requires employers to refrain from making a *change* in mandatory bargaining subjects unless the change was preceded by giving the union notice and the opportunity for bargain-

[20] See, e.g., *Shell Oil Co.*, 149 NLRB 283 (1964); *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965); *Winn-Dixie Stores, Inc.*, 224 NLRB 1418 (1976). See also the text accompanying notes 30–44, infra.

[21] Although *Beverly I* and *Register-Guard* provide support for the reasoning adopted by my colleagues today, each case is distinguishable from the instant cases. In *Beverly I*, the employer did not rely on a past practice defense, and the employer in *Register-Guard* did not establish that the changes undertaken were consistent with past actions taken by the employer.

[22] Sec. 8(d). A subject is considered a "mandatory" subject of bargaining when it is among the subjects described in Sec. 8(d) of the Act, which defines the duty to bargain collectively as encompassing "wages, hours, and other terms and conditions of employment." *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (regarding mandatory subjects, the employer and union upon request have an "obligation . . . to bargain with each other in good faith," although "neither party is legally obligated to yield"); *NLRB v. Katz*, 369 U.S. at 743 ("A refusal to negotiate *in fact* as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.") (emphasis added).

[23] There are some exceptions to the requirement to bargain upon request over a mandatory subject, including, for example, where the parties have entered into a collective-bargaining agreement that suspends the obligation to bargain for the agreement's term, or that constitutes a waiver of the obligation to bargain or covers the subject matter at issue. *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). Cf. *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992) (describing "contract coverage" standard applied by some courts when evaluating whether unilateral action is permitted); *NLRB v. Postal Service*, 8 F.3d 832, 836–837 (D.C. Cir. 1993) (same); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936–937 (7th Cir. 1992) (same).

Significantly, as noted above, the duty to bargain upon request regarding a mandatory subject of bargaining is *not* satisfied or eliminated based on an employer's past practice. Therefore, even if an employer has taken actions involving wages or other employment terms in precisely the same way, the existence of such a past practice does *not* permit the employer to refuse to bargain over the subject if requested to do so by the union. See, e.g., *Shell Oil Co.*, 149 NLRB 283, 287 (1964). In other words, even though *Katz* permits the employer to take unilateral actions to the extent they are not a "change" (i.e., if they are consistent with past practice), the employer must engage in bargaining regarding those actions whenever the union requests such bargaining, unless an exception to the duty to bargain applies—e.g., the existence of CBA language that waives any obligation to bargain over the subject or that demonstrates that bargaining over the subject has already occurred. See *Provena*, supra; *Department of Navy v. FLRA*, supra.

ing regarding the planned change.[24] Among other things, the employer in *Katz*—while engaging in initial contract negotiations with the Union—unilaterally implemented merit wage increases for some employees and not others, without giving the union any notice or the opportunity for bargaining regarding the merit increases before they were imposed. The employer implemented selective "merit increases" that had been discussed in three bargaining sessions, even though "no final understanding had been reached."[25] The Supreme Court concluded that unilaterally changing wages constituted an unlawful refusal to bargain in violation of Section 8(a)(5):

> The respondents' . . . unilateral action related to merit increases . . . . must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of § 8(a)(5), *unless . . . the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews—in effect, were a mere continuation of the status quo* . . . . Whatever might be the case as to so-called "merit raises" which are in fact simply automatic increases to which the employer has already committed himself, *the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice,* and therefore the union may properly insist that the company negotiate *as to the procedures and criteria for determining such increases*.[26]

The rule in *Katz* is that employers *cannot* deviate from the status quo by making unilateral changes in wages and other mandatory bargaining subjects. The *Katz* exception—often referred to as the "dynamic status quo"—permits unilateral wage increases that are supported by the employer's past practice.[27] As described by Professors Gorman and Finkin in the most recent edition of their well-known treatise:

> [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.[28]

One conclusion is readily apparent from the above descriptions of what constitutes a "change" for purposes of *Katz*. There is no suggestion that the determination of whether a "change" had occurred involved anything more than determining "whether or not there has been a *substantial departure from past practice*."[29] In other words, when evaluating whether particular actions constitute a "change," one evaluates *only* the action or actions taken in relation to actions that have been taken in the past. One does not consider whether the actions taken in the past were taken under a CBA containing a management right's clause or other contractual bargaining waiver.

Indeed, in *Shell Oil*, which was decided by the Board in 1964 (two years after the Supreme Court's *Katz* decision), the Board squarely rejected the position urged by my colleagues today. The Board held that, when evaluating whether an employer's actions constitute a "change," this does *not* depend on whether past actions were permitted by CBA language that no longer applies following the CBA's expiration.

In *Shell*, the parties' CBA contained a subcontracting clause—article XIV—that authorized the employer to subcontract bargaining-unit work without giving the union notice and an opportunity to bargain. Consistent with management's right recognized in article XIV, the employer "for some time" had subcontracted construction and maintenance work.[30] The CBA expired in March 1962, and a lengthy hiatus period ensued during which no CBA was in effect.[31] During the hiatus, the employer subcontracted three construction and/or maintenance jobs without giving the union notice and opportunity to bargain.[32]

In these circumstances, the Board in *Shell* found that the employer did not violate Section 8(a)(5) of the Act when it unilaterally subcontracted work during the hiatus between contracts because the subcontracting was con-

[24] Although *Katz* involved the obligation to refrain from making changes from the status quo during negotiations for a first contract, the *Katz* principle was subsequently reaffirmed by the Supreme Court in the context of negotiations for a new CBA following expiration of the prior CBA. See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

[25] 369 U.S. at 746.

[26] Id. at 745–747 (emphasis added; footnote omitted).

[27] Id. at 746.

[28] Robert A. Gorman, Matthew W. Finkin, Labor Law Analysis and Advocacy, at 720 (Juris 2013) (hereinafter "Gorman & Finkin") (emphasis added). See also *Westinghouse Electric Corp. (Mansfield Plant)*, 1577 (1965) (referring to whether unilateral subcontracting decisions "vary significantly in kind or degree from what had been customary under past established practice").

[29] *Katz*, 369 U.S. at 746–747 (emphasis added).

[30] 149 NLRB at 284.

[31] Id. at 285.

[32] Id. at 285–286.

sistent with what the employer had done previously. The General Counsel argued that the new subcontracting during the hiatus must be regarded as a change because the prior subcontracting occurred during the CBA (which contained article XIV, the subcontracting clause that recognized management's right to engage in subcontracting unilaterally), and the General Counsel contended that "termination of the preceding agreement in March 1962 revived any bargaining rights the Union may have surrendered under article XIV."[33] The Board rejected this argument for reasons that have equal application in the instant case:

> In our opinion, the rights and duties of parties to collective bargaining, during a hiatus between contracts, may be derived from sources other than a formal extension agreement. Thus, it is well settled that notwithstanding the termination of a labor contract, the parties, pending its renewal or renegotiation, have the right and obligation to maintain existing conditions of employment. Unilateral changes therein violate the statutory duty to bargain in good faith. We are persuaded and find that *Respondent's frequently invoked practice of contracting out occasional maintenance work on a unilateral basis*, while predicated upon observance and implementation of article XIV, *had also become an established employment practice and, as such, a term and condition of employment*.[34]

The Board concluded:

> [I]t does not appear that the subcontracting during this hiatus period *materially varied in kind or degree from what had been customary in the past*. In these circumstances, we cannot say that the Respondent's action in subcontracting, according to its established practice, certain unit work without prior notice to or bargaining with the Union *during the period when no bargaining agreement was in effect* was in derogation of a statutory duty to bargain on terms and conditions of employment.[35]

Significantly, the Supreme Court in *Fibreboard Paper Products Corp. v. NLRB*[36] upheld the Board's position that certain subcontracting decisions were a mandatory subject of bargaining. Yet, in the Board's very first post-*Fibreboard* case evaluating subcontracting—*Westinghouse Electric Corp. (Mansfield Plant)*[37]—the Board reiterated that determining what constitutes a "change," even during the hiatus between contracts, involves comparing the challenged actions taken by the employer with what the employer had done in the past. Thus, in *Westinghouse* the Board, applying *Katz* and *Fibreboard*, squarely rejected the position that my colleagues are adopting today.

In *Westinghouse*, the Board held that the employer lawfully implemented "thousands of contracts"[38] during a hiatus period between contracts, and it explained this decision as follows:

> [I]t is wrong to assume that, *in the absence of an existing contractual waiver*, it is a per se unfair labor practice in all situations for an employer to let out unit work without consulting the unit bargaining representative. As the Supreme Court [in *Katz*] has indicated in a broader context, even where a subject of mandatory bargaining is involved, there may be "circumstances which the Board could or should accept as excusing or justifying unilateral action."
>
> It is also pertinent to the issue before us to observe that an employer's duty to give a union prior notice and an opportunity to bargain normally arises *where the employer proposes to take action which will effect some change in existing employment terms or conditions within the range of mandatory bargaining*. In the *Fibreboard* line of cases, where the Board has found unilateral contracting out of unit work to be violative of Section 8(a)(5) and (1), it has invariably appeared that *the contracting out involved a departure from previously established operating practices*, effected *a change in conditions of employment*, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit.

[33] Id. at 287.

[34] Id. at 287 (emphasis added).

[35] Id. at 288 (emphasis added). The Board in *Shell Oil* also held that, even though the employer could continue its practice of engaging in unilateral subcontracting during the hiatus between contracts—i.e., without giving the union advance notice and the opportunity for bargaining before making and implementing the subcontracting decision—the union retained its right to request bargaining over subcontracting, and the employer—though permitted to proceed with subcontracting unilaterally—was still required to engage in bargaining as requested by the union. Thus, separate from the employer's right to engage in lawful subcontracting under *Katz*, any existing past practice did not eliminate the employer's duty to engage in bargaining upon request by the union because the union had the right "to propose a change in or elimination of the Company's practice and to request bargaining thereon." Id. But the Board stated that "the Union's demand to bargain for a modification or elimination of the Respondent's established practice did not suspend the Respondent's right to maintain its established practice, any more than a demand by the Union to modify the existing wage structure would suspend Respondent's obligation to maintain such wage structure during negotiations." Id. at 287–288.

[36] 379 U.S. 203, 211 (1964).

[37] 150 NLRB 1574 (1965).

[38] Id. at 1576.

> Here, however, there was no departure from the norm in the letting out of the thousands of contracts to which the complaint is addressed. The making of such contracts was but a recurrent event in a familiar pattern comporting with the Respondent's usual method of conducting its manufacturing operations at the Mansfield Plant. It does not appear that the subcontracting engaged in during the period in question materially varied in kind or degree from that which had been customary in the past.[39]

Even when dealing with something as central to the Act as wages, the Board has likewise found that, when an employer has a past practice of providing certain wage increases, an employer does not violate Section 8(a)(5) when it provides new wage increases in keeping with that practice without bargaining. See, e.g., *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). Indeed, although the majority in today's decision finds that any "discretion" associated with an employer's action means the action constitutes a "change" that cannot be unilaterally implemented, regardless of whether the employer has taken precisely the same actions in the past, the Board in other cases has expansively defined "past practice" when finding that the Act *requires* employers to take unilateral actions—specifically, to provide new wage increases without bargaining—even though the past wage increases involved substantial employer discretion. See *Arc Bridges, Inc*., 355 NLRB 1222 (2010), enf. denied 662 F.3d 1235 (D.C. Cir. 2011); *Mission Foods*, 350 NLRB 336, 337 (2007); *Central Maine Morning Sentinel*, 295 NLRB 376 (1989).[40]

Nor has the Board required bargaining prior to an employer's minor variations from actions taken in the past. "When changes in existing plant rules . . . constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice," it is lawful to continue applying the same rules without bargaining because the changes are not sufficiently "material, substantial, and significant" to require notice and the opportunity to bargain. *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991); see *Trading Port, Inc.*, 224 NLRB 980, 983–984 (1976) (employer implemented no change that required bargaining when the employer applied its preexisting productivity standards, including penalties for failing to satisfy those standards, but "devised a more efficient means of detecting individual levels of productivity, of policing individual efficiency, and advanced a more stringent view towards below average producers than in the preceding 18 months or so").

In more recent decisions—as the Court of Appeals for the D.C. Circuit recognized when remanding this case—the Board and the courts have likewise held that, following a CBA's expiration, employers may lawfully take unilateral actions consistent with past practice, even though the practice may have occurred in whole or in part while prior CBAs were in effect. In *Courier-Journal I*, the Board held that the legality of employer actions consistent with past practice following contract expiration did not depend on "'whether a contractual waiver of the right to bargain survives the expiration of the contract' but rather upon whether the change 'is grounded in past practice, and the continuance thereof.'"[41] In *Capitol Ford*, the Board stated that "'the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice,'" and "although the employer 'cannot rely upon the management rights clause of that contract to justify unilateral action,' the 'past practice is not dependent on the continued existence of the [expired] collective-

[39] Id. (emphasis added). In *Westinghouse*, the Board again stated that an employer's right to engage in unilateral subcontracting consistent with past practice did not affect or diminish the employer's obligation, upon request, to bargain with the union regarding subcontracting. Id. at 1576–1577 ("We do not mean to suggest that, because subcontracting in accordance with an established practice may stand on a different footing from that of subcontracting in other contexts, an employer is any less under an obligation to bargain with the union on request at an appropriate time with respect to such restrictions or other changes in current subcontracting practices as the union may wish to negotiate."). Significantly, the Board held that this duty to bargain upon request was an additional reason not to require bargaining before an employer took action that was consistent with past practice. Thus, the Board in *Westinghouse* explained: "The fact that the Union does have an opportunity to bargain generally on request about Respondent's recurrent subcontracting practices, *provides in our view a contributing, though not a controlling, reason for not imposing upon the Respondent the duty to bargain separately, at the decision-making level, about each of the thousands of individual subcontracts covering work that could be performed by its own employees*." Id. at 1577 (emphasis added).

As noted in the text, the union's right to request bargaining regarding mandatory subjects is not reduced or eliminated merely because an employer may have the right to take unilateral action consistent with its past practice, and any contractual waiver of the union's right to request bargaining would remain predicated on the existence of a contract. Id.

[40] In my view, the Board must exercise considerable care when interpreting *Katz*—where the Supreme Court described a *defense* against an allegation that an employer's unilateral changes violated Sec. 8(a)(5)—to mean that Sec. 8(a)(5) imposes an obligation on employers to *make* unilateral changes in wages, particularly since the Act explicitly states that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." Sec. 8(d); see also *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970). I do not here reach or pass on the validity of cases that apply this reverse version of the *Katz* exception.

[41] *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 69 (D.C. Cir. 2012) (*DuPont* remand) (quoting *Courier–Journal I*, 342 NLRB at 1095).

bargaining agreement.'"[42] To the same effect, as the D.C. Circuit observed in its decision remanding these cases, the Court of Appeals for the Sixth Circuit "captured the point precisely" in *Beverly Health and Rehabilitation Services, Inc. v. NLRB*, 297 F.3d 468 (6th Cir. 2002), where the Sixth Circuit stated: "'[I]t is the *actual past practice of unilateral activity under the management-rights clause of the CBA*, and *not* the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract."[43] And in *Beverly II*, although a consistent past practice had not been established, the Board stated that "'without regard to whether the management-rights clause survived,'" the employer would have been "'privileged'" to make "'the unilateral changes at issue if [its] conduct was consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract.'"[44]

It is true that, contrary to this extensive and consistent application of *Katz*—finding that an employer has made no "change" when it has taken the same action previously, regardless of whether a CBA was in effect—the Board issued decisions in *Beverly I*,[45] decided in 2001, and *Register-Guard*,[46] decided in 2003, which support the reasoning adopted by my colleagues in today's decision. At most, however—as the above discussion demonstrates—*Beverly I* and *Register-Guard* were short-lived departures from preexisting case law, and the Board returned to its prior longstanding treatment of this issue, consistent with *Katz*, in the *Courier-Journal* cases (decided in 2004), *Capitol Ford* (also decided in 2004), and *Beverly II* (decided in 2006).[47]

B. The Board Majority Incorrectly Redefines What Employer Actions Constitute a "Change" Requiring Advance Notice and the Opportunity for Bargaining

For several reasons, I disagree with my colleagues' redefinition of the term "change" under *Katz*, and I believe they erroneously expand the *Katz* duty to refrain from making unilateral changes to encompass situations where an employer continues its preexisting practice. In particular, when evaluating whether an employer's actions constitute a "change," I believe it is unreasonable to require parties and the Board to examine whether and what type of CBA(s) may have existed at various times in the past. I also believe my colleagues improperly conclude that everything constitutes a "change" within the meaning of *Katz*—regardless of what an employer has done in the past—if the employer's actions involve "discretion."

First, as noted above, *Katz* supports a view that, when examining whether an employer's actions constitute a "change" (triggering the obligation to provide notice and

[42] Id. (quoting *Capitol Ford*, 343 NLRB at 1058 fn. 3) (alteration in *DuPont* remand).

[43] Id. (quoting *Beverly Health and Rehabilitation Services, Inc. v. NLRB*, 297 F.3d at 481) (alteration in *DuPont* remand; emphasis added).

[44] Id. at 69–70 (quoting *Beverly II*, 346 NLRB at 1319 fn. 5) (alteration in *DuPont* remand).

[45] 335 NLRB at 635.

[46] 339 NLRB at 353.

[47] It is not correct, as my colleagues appear to argue, that *Shell Oil* and *Winn-Dixie* were subsequently overruled with respect to the holdings of those cases that are relevant here. My colleagues indicate that *Shell Oil* and *Winn-Dixie* were "deemed" by the Board in *Beverly I* to have been "overruled in relevant part[,]" sub silentio, by subsequent precedent (Majority opinion, slip op. at 5-6, fn. 17). However, the only aspects of *Shell Oil* and *Winn-Dixie* that were referenced in *Beverly I* as being potentially overruled involved a different proposition—that a management-rights clause does not survive contract expiration—with which I completely agree. See *Beverly I*, 335 NLRB at 636 ("[T]he management-rights clause in those agreements . . . did not survive the contracts' expiration.") (footnote omitted). The Board in *Beverly I* then indicated that, "[t]o the extent" that *Shell Oil* and *Winn-Dixie* "could be read to imply the contrary," they had been overruled *sub silentio* in more recent cases. Again, this pertained *only* to whether a management-rights clause survives contract expiration, which is not disputed in the instant case. Moreover, the Board's suggestion in *Beverly I*—that *Shell Oil* or *Winn-Dixie* "could be read to imply" that management-rights clauses survive contract expiration—was unfounded. Neither *Shell Oil* or *Winn-Dixie* implies any such thing: neither decision held or so much as suggested that a management-rights clause survives following expiration of the CBA. Rather, as described in the text, the decisions in *Shell Oil* and *Winn-Dixie* reflect the fact that an employer's actions *based on past practice* do not constitute a "change" over which bargaining is required. It is true that in *Beverly I*, two members of a three-member panel—Members Liebman and Walsh—expressed the same position the majority adopts today: that a past practice developed under the auspices of a management-rights clause terminates at the expiration of the CBA that contained that clause. 335 NLRB at 636 & fn. 7. However, the third member of the panel, Chairman Hurtgen, rejected that view. Id. at 646 ("[E]ven if the management-rights clause expired with the contract, the work practices that were extant during the contract constituted a part of the terms and conditions of employment. Thus, if the employer, after contract expiration, continues to act consistently with those practices, it has not 'changed' the status quo and it has not violated Section 8(a)(5)."). Because the Board adheres to the practice that two members cannot overrule Board precedent, this makes it even clearer that the panel majority consisting of Members Liebman and Walsh in *Beverly I* did not overrule *Shell Oil* or *Winn-Dixie*. Prior to my colleagues' decision today, the Board has never overruled *Shell Oil* or *Winn-Dixie* (by implication or otherwise) regarding the import of past practice—which is unaffected by the existence or nonexistence of a management-rights clause—and this holding was subsequently reaffirmed in the *Courier-Journal* cases, *Capitol Ford*, and *Beverly II*.

Moreover, this is precisely the distinction made by the D.C. Circuit when it remanded this case. As the court stated, "whether a management-rights clause survives the expiration of the contract is beside the point Du Pont is making." *DuPont* remand, 682 F.3d at 69. The court then stated that the Sixth Circuit also "captured the point precisely" when it observed that "'it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract.'" Id. (quoting *Beverly Health and Rehabilitation Services, Inc. v. NLRB,* 297 F.3d 468, 481 (2002)).

the opportunity for bargaining), the only relevant factual question is whether the employer's actions are similar in kind and degree to what the employer did in the past. This is precisely the inquiry undertaken by the Supreme Court in *Katz*, as shown by the Court's finding that the employer's merit increases were not "in line with the company's long-standing practice of granting quarterly or semiannual merit reviews," and its resulting conclusion that the increases could not reasonably be regarded as "a mere continuation of the status quo." In determining whether the employer had made a change, the Court focused on the union's ability to determine "whether or not there has been a substantial departure from past practice" involving, among other things, "the procedures and criteria for determining such increases."[48]

Second, in *Katz*, the employer was engaged in bargaining for an initial contract, and the Supreme Court held that the employer's unilateral actions would have been permissible to the extent they were consistent with its "long-standing practice."[49] This leaves no doubt that the Supreme Court in *Katz*—at least in this context—focused specifically on what actually occurred without regard to any prior contractual waiver (since no prior contracts existed) when determining whether the employer's action constituted a "change."

Third, I believe the issues presented here are controlled by *Katz*. Thus, although my colleagues portray these issues as being within the province of the Board—if true, the majority would be free to change existing law if it articulates a reasoned justification for doing so[50]—the Board is duty-bound to apply decisions of the Supreme Court, including decisions interpreting the Act. As to the proper interpretation of what constitutes a "change," however, I believe there is no "reasoned justification"[51] for abandoning the longstanding interpretation of *Katz*[52] that the Board applied consistently over many decades—except for the 3-year period when it deviated from this interpretation in *Beverly I* and *Register-Guard*—as reflected in the *Courier-Journal* cases, *Shell Oil*, and *Westinghouse*, among others. As the Board has stated, whether a "change" has occurred under *Katz* does not depend on "whether a contractual waiver of the right to bargain survives the expiration of the contract" but rather upon whether the change "is grounded in past practice, and the continuance thereof";[53] "the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice";[54] and even when the employer's actions involved "thousands of contracts" with outside employers during a hiatus between CBAs, there was no "change" that required advance notice and potential bargaining with the union when the employer's actions did not "materially var[y] in kind or degree from that which had been customary in the past."[55]

Fourth, as noted above, I believe the majority's understanding of what constitutes a "change" defies common sense. Nearly everyone would evaluate whether a "change" has occurred by comparing the challenged actions to the employer's past actions. In contrast, my colleagues define "change" as requiring the examination of matters *other than* what occurred before. Specifically, if an employer is doing precisely what it has always done, my colleagues find this involves a "change" if past actions were taken when a CBA containing a management rights clause was in effect. It is incongruous to determine whether a "change" has occurred during periods when no CBA exists by undertaking a detailed historical examination of past CBA provisions, all of which have expired. Not only does this improperly confuse the concept of "contractual waiver" with the *Katz* focus on what constitutes a "change," it is a near-certainty that the Board's analysis of these purely contractual issues would not be afforded deference by the courts. See *Litton Financial Printing Division v. NLRB*, 501 U.S. at 203 ("We would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract, as distinct from its devising a remedy for the unfair labor practice that follows from a breach of contract.").

---

[48] *Katz*, 369 U.S. at 746–747.

[49] *Katz*, 369 U.S. at 746.

[50] As the D.C. Circuit correctly observed when remanding these cases to the Board, when the Board deviates from its own precedent—which it clearly did when it decided these cases previously—the Board is required, at a minimum, to provide a "reasoned justification for departing from its precedent." *DuPont* remand, 682 F.2d at 70 (citation omitted).

[51] Id. at 70.

[52] The D.C. Circuit, when rejecting the Board's prior analysis, stated that it was not consistent with the Board's own decisions. The D.C. Circuit did not state its views regarding the merits, but it is significant that the court of appeals described *Katz* as holding that an employer "unilaterally may implement changes 'in line with [its] long-standing practice' because such changes amount to 'a mere continuation of the status quo,'" and the court quoted *Courier-Journal* for the proposition that "'a unilateral change made pursuant to a longstanding practice is essentially a continuation of the *status quo*—not a violation of Section 8(a)(5).'" 682 F.3d at 67 (quoting *Katz*, 369 U.S. at 746, and *Courier-Journal I*, 342 NLRB at 1094)). I believe both of these propositions, which the D.C. Circuit quoted with approval, are contrary to the Board majority's holding in the instant case.

[53] *Courier–Journal I*, 342 NLRB at 1094.

[54] *Capitol Ford*, 343 NLRB at 1058 fn. 3.

[55] *Westinghouse*, 150 NLRB at 1576; see also *Shell Oil*, 149 NLRB at 288 (no duty under *Katz* to provide advance notice and the opportunity for bargaining regarding subcontracting during hiatus period that had not "materially varied in kind or degree from what had been customary in the past").

Fifth, by requiring scrutiny of prior CBAs, possibly extending back in time over decades, the majority establishes a standard with which most employers and unions will find it impossible to comply. Here, my colleagues do not merely misinterpret *Katz*, they *eliminate* the holding of *Katz* permitting employers to take actions "in line with the company's long-standing practice"[56] to the extent their standard will prevent anyone from establishing the existence of a "long-standing practice."[57] My colleagues use shorthand references to the mere existence or nonexistence of a CBA, which incorrectly presume that any past employer actions taken during a CBA's term must have been permissible only because the CBA contained a contractual waiver. However, their standard clearly requires meticulous scrutiny into myriad details. Rather than doing what *Katz* directs—which is to inquire whether the employer's challenged actions are consistent with what it did before—the majority's approach requires detailed scrutiny into the following:

(a) precisely when did prior actions occur, when did they commence, and when did they cease;
(b) whether and to what extent prior actions coincided with times when prior CBAs existed, or before any CBAs existed, and/or during hiatus periods between CBAs;[58]
(c) where prior actions were permitted pursuant to side agreements, grievance settlements, or arbitration awards that were not memorialized in any CBA, whether these constituted a "waiver" or were merely based on a preexisting management right that existed separate from any agreement;
(d) what substantive contract terms existed in any prior CBAs pertaining to the "past practice"; what came first, the CBAs or the employer's practice; and did the CBA constitute a "waiver" permitting unilateral actions the employer could otherwise not take, or did the CBA merely recognize a preexisting management right that existed separate from the CBA;
(e) how did relevant CBA provisions, side agreements, grievance settlements, or arbitration awards evolve over the years; when did the changes occur; and how did these provisions, agreements, settlements or awards coincide with the employer's past actions; and
(f) did negotiating history establish that parties agreed the employer lacked the right to take particular actions absent express language in the CBA, or did the employer insist on CBA provisions that conformed to a right that had already been exercised and as to which the union acquiesced.

The Supreme Court did not deem any of these considerations relevant when it considered *Katz* or *Litton*. Indeed, it is clear the Supreme Court would have rejected arguments that such scrutiny was necessary to determine whether employer actions constituted a "change" from what had occurred before. To borrow the Supreme Court's language in *Katz*, under my colleagues' approach "[t]here simply is no way . . . for a union" or anyone else "to know whether or not there has been a substantial departure from past practice."[59]

Sixth, my colleagues attempt to minimize the unworkable nature of today's decision, as illustrated above, but

[56] *Katz*, 369 U.S. at 746.

[57] Id.

[58] My colleagues no longer rely on the (false) dichotomy between unilateral changes made during the term of a contract and unilateral changes made during the hiatus periods between contracts, which the Board previously relied on in attempting to distinguish the instant cases from the *Courier-Journal* cases. See *E.I. DuPont de Nemours, Louisville Works*, 355 NLRB 1084, 1084–1085 (2010); *E.I. DuPont de Nemours & Co. (Edge Moor)*, 355 NLRB 1096, 1096 (2010). This notwithstanding, drilling down into the contracts would still require us to analyze, in at least some circumstances, interpretations of language in (expired) contracts during hiatus periods.

[59] *Katz*, 369 U.S. at 746–747 (emphasis added). Indeed, another incongruity resulting from my colleagues' redefinition of "change" under *Katz* is their creation of multiple different standards that parties would need to apply when evaluating whether a "change" occurred. One *Katz* standard would apply during bargaining for an initial contract, when no union has previously represented the unit employees and no CBA has previously existed. In this situation, parties would determine whether a "change" occurred merely by comparing the challenged employer actions with the employer's past actions. A second *Katz* standard would apply during initial contract negotiations, where the same employer and union *were* party to prior CBAs. Here, whether a "change" occurred would depend, in part, on a detailed scrutiny of prior CBA provisions in relation to the employer's past actions, as described in the text. A third *Katz* standard would apply whenever the employer is engaged in first contract negotiations with *one* union, where employees were previously represented a *different* union that had been party to prior CBAs with *the same employer*. In this situation, my colleagues would find that the employer's prior actions—if taken pursuant to one or more CBAs with the different union—would be irrelevant when determining whether the challenged action or actions constituted a change. However, this conclusion would follow from the prior CBAs, under the reasoning utilized by my colleagues, only if the employer's prior actions were impermissible in the absence of a contractual bargaining waiver, which would again require detailed examination of the prior CBAs, the specific CBA provisions that ostensibly privileged the employer's past actions, and similar issues. Other situations could very well involve different combinations of the above circumstances. In any event, because my colleagues' reasoning would require this type of examination—which parties would nearly always find impossible to reconstruct within a reasonable period to permit bargaining, if required—my colleagues are effectively eliminating the *Katz* holding that permits employer actions that are consistent with "long-standing practice," 369 U.S. at 746, which exceeds the Board's authority.

in doing so, they make matters worse. The cornerstone of my colleagues' analysis is that, whenever management actions are taken pursuant to rights *conferred by clear and unmistakable CBA language*, those actions are not part of the "status quo" that may lawfully be continued unilaterally following the CBA's expiration, because contractual bargaining waivers expire with the CBA. However, this also means that employers have the right to continue without bargaining, as part of the status quo, past practices that are *unrelated* to contractual rights conferred under past CBAs. My colleagues must recognize that these types of past practices continue as part of the "status quo" because (i) this is precisely what the Supreme Court held in *Katz*, and (ii) even under my colleagues' analysis, a CBA's expiration only eradicates those past practices where the employer's unilateral actions were based on rights conferred by "clear and unmistakable" CBA language.[60] In fact, my colleagues concede that, under their theory, all "*extracontractual* terms and conditions of employment that have become established by past practice" *remain* part of the "status quo" that may be continued unilaterally after a CBA's expiration—to borrow my colleagues' words, these extracontractual past practices "*must* be maintained after a contract's expiration."[61] Therefore, as explained in the preceding paragraph, my colleagues' analysis requires parties to reconstruct what past practices developed in connection with rights conferred by past clear and unmistakable CBA language (which my colleagues would find may *not* be continued as part of the "status quo"), as opposed to those "extracontractual" past practices that employers *may* continue—indeed, *must* continue—as part of the "status quo" without bargaining.

Here is where matters get worse. My colleagues state that their new approach does *not* require this "drilling-down" because, in their view, any CBA's expiration extinguishes *all* past practices, *including those that developed extracontractually*. My colleagues' explanation speaks for itself:

> [W]e impose no great new burden on employers or on the bargaining process generally. First, identifying the status quo is not difficult and does not involve the strained "drilling-down" scenario set forth in the dissent. *The status quo is whatever employees' concrete terms and conditions of employment are—on the ground, so to speak—when the contract expires*. That is the *baseline from which the parties bargain*. . . . Second, *employers who wish to be able to continue making discretionary unilateral changes post-expiration can bargain for contract language in the successor agreement that clearly and unmistakably gives them that right*.[62]

My colleagues cannot have it both ways. Their own opinion differentiates between (i) "extracontractual" practices that employers may continue (must continue) without bargaining following the CBA's expiration, and (ii) practices attributable to clear and unmistakable contract language that (according to my colleagues) may *not* be continued as part of the "status quo." This distinction requires the type of meticulous "drilling-down" that I have described previously. Alternatively, if one accepts my colleagues' explanation in the above-quoted passage, there is no need for "drilling-down," but this is only because my colleagues extinguish virtually *all* past practices from the status quo when any CBA expires, and the "baseline" from which parties must bargain consists of "whatever employees' concrete terms and conditions of employment are . . . when the contract expires."[63] My colleagues' "baseline" approach has one virtue: it is indeed simple. Employers can never take actions unilaterally based on any past practice after a CBA expires. However, this approach is irreconcilable with *Katz*, it is contradicted by my colleagues' own opinion (including

[60] The entire premise of my colleagues' reasoning is that contractual waivers terminate with the expiration of the CBA. Therefore, the types of past practice that are extinguished upon the CBA's expiration are actions that were based on rights conferred by CBA language. This means that when a CBA expires, the extinguished past practices must be limited to those based on actions taken under the auspices of "clear and unmistakable" CBA language, which is the standard that the Board (with only mixed acceptance in the courts) uniformly applies when evaluating contract waivers. See fn. 23, supra. As noted in the text, my colleagues also concede that "extracontractual" past practices remain part of the status quo and may be continued (indeed, *must* be continued) without bargaining following a CBA's expiration. See text accompanying fn. 61, infra.

[61] Majority's opinion, slip op. at 4 (emphasis added).

[62] Majority's opinion, slip op. at 12.

[63] Ostensibly, my colleagues are not finding for the time being that employers violate the Act by taking actions, following a CBA's expiration, based on "a practice of automatic change based on fixed timing and criteria [where] that practice was established pursuant to a management-rights clause" (Majority's opinion, slip op. at 12 fn. 31). Although this caveat appears in their opinion—just like they state there is no need for a meticulous examination of prior CBAs to differentiate between past practices that are based on conferred contractual rights and "extracontractual" past practices—my colleagues' analysis permits no other conclusion. My colleagues find that a CBA's expiration—which discontinues all contractual waivers—also extinguishes past practices that are based on contractual rights. This rationale necessarily encompasses *all* "contractual" past practices under Section 8(a)(5), even if employers elected to exercise their contractual discretion by taking action "based on fixed timing and criteria." For the reasons explained in the text, I believe that treating past practices in these circumstances as if they did not exist is directly contrary to *Katz* and extensive Board case law.

their entire rationale underlying their decision in this case),[64] and it is contrary to other Board cases.[65]

Seventh, I believe it is equally objectionable for my colleagues to find that an employer's actions always constitute a "change" under *Katz* whenever the employer's actions involve "discretion." Although the Supreme Court in *Katz* mentioned that the employer's "merit increases" at issue in that case involved "a large measure of discretion," this was a factual observation made by the Court when comparing the "merit increases" to a different "long-standing practice" that involved "quarterly or semiannual merit reviews," and the Court referred to the latter as "*so-called* 'merit raises'" because they were "*in fact* simply *automatic* increases."[66] The Supreme Court certainly did *not* articulate a blanket rule that every action taken by an employer involving any "discretion" required advance notice and the opportunity for bargaining, even if the employer was *continuing* to do precisely what it had always done. Rather, even regarding the "merit increases" at issue in *Katz*, the Supreme Court still examined whether they constituted a "change," and the Court examined whether they were "in line with the company's long-standing practice" and whether it was possible "for a union to know whether or not there has been a substantial departure from past practice."[67] Moreover, the Board has applied *Katz* in circumstances where the employer's actions involved substantial discretion. For example, in *Westinghouse*, the employer engaged in unilateral subcontracting implemented "thousands of contracts," and the Board found that no "change" occurred within the meaning of *Katz* because the subcontracting had not "materially varied in kind or degree from what had been customary in the past."[68] Additionally, the majority's holding here that the exercise of "discretion" precludes unilateral action is squarely contrary to the Board's treatment of Section 8(a)(5) cases addressing whether past changes (e.g., wage increases) are part of the "status quo" that *must be continued* without bargaining based on the *Katz* definition of "change." In these cases, as noted above, the Board has held it does not constitute a "change" for an employer to grant unilateral wage increases—indeed, the Board finds the employer is *required* to give those increases without bargaining—even though past wage increases involved substantial employer discretion.[69]

Finally, the change in the law adopted by my colleagues here goes to one of the most central aspects of the Act—the duty to bargain—and the inability of employers to act without, in every instance, affording separate notification and opportunities for bargaining until the parties bargain to agreement on a complete contract or overall impasse may substantially undermine the employers' ability to operate their businesses. My colleagues create confusion when parties need to know the scope of their respective rights and obligations by constructing standards that will prevent employers from having any "certainty beforehand" regarding when they may safely continue to act as they have in the past.[70] Applicable here are the Supreme Court's observations in *First National Maintenance*, where the Court (evaluating partial closing decisions) found that no duty to bargain existed:

> An employer would have *difficulty determining beforehand* whether it was faced with a situation *requiring* bargaining or one that [was] . . . sufficiently compelling to *obviate* the duty to bargain. . . . *A union, too, would have difficulty determining the limits of its prerogatives*, whether and when it could use its economic powers to try to alter an employer's decision, or whether, in doing so, it would trigger sanctions from the Board.[71]

C. Application of the Law to DuPont's Actions Here

As described by my colleagues and in the D.C. Circuit's opinion remanding this case, DuPont had been party to successive CBAs at its facilities in Louisville, Kentucky and Edge Moor, Delaware. During bargaining at Edge Moor in 1993 and at Louisville in 1994, the parties agreed that the unit employees would be covered by DuPont's Beneflex Plan. From 1994 through 2004, DuPont made changes to the Beneflex Plan every year during the annual enrollment period and applied those changes to the unit employees at Louisville (1995 to 2002) and Edge Moor (1994 to 2004). The changes included "increases in the premiums for medical, life, vision, and dental insurance, changes in coverage, and the addition and elimination of plan options."[72] DuPont applied the changes "to employees at all Du Pont facilities, to union and non-union employees alike."[73] After the

[64] See fn. 60–61and accompanying text supra.

[65] See, e.g., *Arc Bridges, Inc*., 355 NLRB at 1222; *Mission Foods*, 350 NLRB at 337 (2007*); Central Maine Morning Sentinel*, 295 NLRB at 376.

[66] *Katz*, 369 U.S. at 746–747 (emphasis added).

[67] Id.

[68] *Westinghouse*, 150 NLRB at 1576; see also *Shell Oil*, 149 NLRB at 288.

[69] See *Arc Bridges, Inc*., 355 NLRB at 1222; *Mission Foods*, 350 NLRB at 337; *Central Maine Morning Sentinel*, 295 NLRB at 376.

[70] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

[71] Id. at 684–686 (emphasis added; citations omitted).

[72] *DuPont* remand, 682 F.3d at 66–67.

[73] Id. at 66–67.

CBAs at Louisville and Edge Moor expired, and while DuPont was engaged in bargaining with the union at each facility for a successor contract, DuPont announced similar types of changes during the annual enrollment period as DuPont had previously made.[74]

In these circumstances, consistent with *Katz*, I believe the Board must find that DuPont's changes were lawfully implemented, consistent with its "long-standing practice."[75] Previously, the D.C. Circuit reversed and remanded the Board's prior decisions in these cases[76] because (i) the Board's own cases contradicted the Board's finding that DuPont's actions constituted an unlawful unilateral change, and (ii) the Board had not given a "reasoned justification" for departing from its own precedent.[77] With all due respect to my colleagues, I believe the majority still has provided no "reasoned justification" for the standards being adopted today, and reasonable or not, I believe they are erroneous as a matter of law.

Thus, as the D.C. Circuit already concluded in its earlier decision, DuPont, "by making unilateral changes to Beneflex after the expiration of the CBAs, maintained the status quo expressed in the Company's past practice,"[78] which warrants a conclusion that the changes were lawful under the Supreme Court's decision in *Katz*.

Two other considerations deserve further comment here.

First, my colleagues disregard the fact that parties have a particular need for certainty and predictability, which the Supreme Court emphasized in *First National Maintenance*,[79] when dealing with medical benefits like those at issue here. I do not at all suggest that because of the importance of medical benefits, changes involving such benefits warrant a departure or exception from the bargaining obligations imposed by our statute. If anything, the importance of these benefits—no less than wages—warrants vigilance by the Board to ensure that parties satisfy their bargaining obligations. However, I believe the Board should recognize that the *Katz* holding—permitting unilateral employer actions that do not constitute a "change" because they are similar in kind and degree to actions taken previously—is sufficiently flexible to accommodate actions that require advance planning and involve significant complexity, provided the employer acts consistently with its past practice. In the instant case, these considerations are especially relevant, given the existence of fixed annual enrollment periods, the participation by represented employees in benefit plans that applied throughout the company, and the lack of certainty when ongoing negotiations would conclude.[80]

Second, any concerns about the union being excluded from bargaining over actions that are consistent with past practice can be easily addressed. In fact, they have *already* been addressed by Congress in Section 8(a)(5) of the Act, by the Supreme Court in *Katz* and other cases, and by the Board in many decisions. Under existing law, even when an employer's past practice permits the employer to take the same or similar actions unilaterally under *Katz* (i.e., without first giving its union notice and the opportunity for bargaining), the employer is required under Section 8(a)(5) to engage in bargaining over the same subject matter—indeed, over the actions being taken unilaterally—upon request by the union. This duty to engage in bargaining upon request over mandatory subjects, which includes matters that may be unilaterally implemented by an employer under *Katz*, is completely unaffected by any past practice, and an employer's refusal to engage in such bargaining clearly constitutes a violation of Section 8(a)(5).

As to this last issue, it is ironic that my colleagues have insisted on completely overhauling the Act's treatment of bargaining obligations in the instant case. The record contains some suggestion that the Union at DuPont's Louisville plant requested bargaining over the potential Beneflex changes, and DuPont refused to engage in such bargaining in reliance on DuPont's past practice described above. Such a refusal would clearly constitute a violation of Section 8(a)(5), not because it is a unilateral "change" under *Katz*, but rather because it violates an employer's separate duty to bargain upon request regarding any mandatory subject, and this separate duty is completely unaffected by any past practice.[81] Unfortunately, perhaps in the Board's zeal to use this case to substantially reformulate what constitutes an unlawful unilateral "change" within the meaning of *Katz*, this case was litigated solely on this basis. Similarly, the D.C. Circuit's remand is limited to the Board's treatment of what constitutes a unilateral "change" under *Katz*. Thus, although I believe the record might support the existence of a refusal-to-bargain violation by DuPont, in

[74] Id. at 67.

[75] *Katz*, 369 U.S. at 746.

[76] *E.I. DuPont de Nemours, Louisville Works*, 355 NLRB at 1084; *E.I. DuPont de Nemours & Co. (Edge Moor)*, 355 NLRB at 1096.

[77] 682 F.3d at 67–70.

[78] Id. at 68.

[79] See text accompanying fn. 72, supra.

[80] My colleagues minimize the fact that changes were also limited with regard to timing: they were permitted only during the annual enrollment period. *DuPont* remand, 682 F.3d at 68.

[81] See fns. 11, 23, 35 & 39 and accompanying text supra. As noted previously, the employer's conventional duty to engage in bargaining upon request is subject to certain other potential exceptions, but is unaffected by past practice. See fn. 23, supra.

mistaken reliance on past practice, when the Union in Louisville requested bargaining over the Beneflex changes, this issue is not presently before the Board.

CONCLUSION

I have stated that "when changing existing law, the Board should first endeavor to *do no harm*: we should be vigilant to avoid doing violence to undisputed, decades-old principles that are clear, widely understood, and easy to apply."[82] My colleagues take a well-known word that the Board and the courts (for the most part) have consistently interpreted, and that most people understand—the word *change*—and instead of simply comparing what the employer plans to do *now*, against what it did in the *past*, my colleagues require a detailed examination of past contracts going back years, perhaps decades, to examine what contracts were in effect at what times, what employer actions occurred when, whether the past actions were taken pursuant to a management rights clause or other contract language, and possibly whether the past actions predated the earliest contract.

In my view, this makes no sense, and it is unsupported by our statute and contrary to the Supreme Court's *Katz* decision. As stated at the outset, in contrast to my colleagues' approach, I believe this case involves a simple question with a straightforward answer. Under *Katz*, an employer must provide notice and the opportunity for bargaining before making a "change" in employment matters, and bargaining is *not* required when no "change" has occurred. Where, as here, the employer takes actions that are not materially different from what has been done in the past, no "change" has occurred and the employer's unilateral actions do not violate Section 8(a)(5) of the Act.

Again, under existing law, even when new actions taken by the employer are consistent with past practice, this leaves unaffected the union's right to request bargaining regarding *all* mandatory subjects (including actions the employer may lawfully take unilaterally), and I agree with the well-established principle that the employer remains bound by its duty to engage in such bargaining, without regard to any practice that may have existed.[83]

For these reasons, I believe DuPont did not violate the Act by making the changes described above without providing advance notice and the opportunity for bargaining. Accordingly, I respectfully dissent from the majority's finding that DuPont violated Section 8(a)(5).

[82] *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 18 (2014) (Member Miscimarra, dissenting) (emphasis added).

[83] See fns. 11, 23, 35 & 39, supra, and accompanying text. Again, the employer's conventional duty to engage in bargaining upon request is subject to certain other potential exceptions, but is unaffected by past practice. See fn. 23, supra.

Dated, Washington, D.C. August 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

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 with Paper, Allied-Industrial, Chemical, and Energy Workers International Union and its Local 5-2002 (the Union) by making unilateral changes to the benefits of unit employees during periods when the parties are engaged in negotiations for a collective-bargaining agreement and have not reached impasse. The unit is:

> All employees employed by [the Respondent] at its Louisville Works, Louisville, Kentucky, including powerhouse and refrigeration plant employees, chief operators, shift leaders, fire department employees, cafeteria employees, and counter attendants, but excluding all office 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 Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in

good faith with the Union as your exclusive bargaining representative.

WE WILL, upon request of the Union, restore the unit employees' benefits under the Beneflex package of benefit plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2004 and January 1, 2005, 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 make all affected employees whole for any losses that they may have suffered as a result of the unilateral implemented changes in benefits in the manner set forth in the remedy section of the decision.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 9 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

E.I. DU PONT DE NEMOURS & COMPANY

The Board's decision can be found at www.nlrb.gov/case/09–CA–040777 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 SE, 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 with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (U.S.W.), and its Local 4-786 (formerly Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) and its Local 2-786) (the Union) by making unilateral changes to the benefits of unit employees during periods when the parties are engaged in negotiations for a collective-bargaining agreement and have not reached impasse. The unit is:

> All employees of the Edge Moor Plant with the exception of the Administrative Secretary to the Plant Manager, Human Resources Assistant, Technologists (Training, Planning, DCS), Work Leader, Nurses, salary role employees exempt under the Fair Labor Standards Act, and supervisory employees 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 in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as your exclusive bargaining representative.

WE WILL, upon request of the Union, restore the unit employees' benefits under the Beneflex package of benefit plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2005, 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 make all affected employees whole for any losses that they may have suffered as a result of the unilateral implemented changes in benefits in the manner set forth in the remedy section of the decision.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for

Region 4 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

E.I. DU PONT DE NEMOURS & COMPANY

The Board's decision can be found at www.nlrb.gov/case/09–CA–040777 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 SE, Washington, D.C. 20570, or by calling (202) 273–1940.