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

E.I. DUPONT DE NEMOURS & CO., INC.

and Case 3–CA–27828

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC

Ron Scott, Esq.,
for the General Counsel.
Kris D. Meade, Esq., and Glenn D. Grant, Esq. (Crowell & Moring LLP),
for the Respondent Company.
Catherine Creighton, Esq. (Creighton, Johnsen & Giroux),
for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, **Administrative Law Judge**. The complaint in this case alleges that E.I. DuPont unlawfully failed to bargain with the Union before implementing changes to the healthcare benefits plan covering the 135–140 unit production, maintenance, and clerical workers at its Niagara Falls, New York facility in January 2011.

The central issue in the case is whether the parties' most-recent collective-bargaining agreement, which admittedly waived the Union's right to bargain over such changes, was still in effect or had expired at the time of the January 2011 changes. The General Counsel contends that the contract had expired, and that the Company's right to make unilateral changes had therefore likewise expired, citing the Board's August 2010 decisions involving previous benefit plan changes at two other DuPont facilities in Louisville, Kentucky and Edge Moor, Delaware (355 NLRB Nos. 176 and 177).

The Company, on the other hand, contends that the contract continued in effect. Alternatively, the Company argues, as it did previously in the above-cited Board cases,[1] that it retained the right to make the unilateral changes post-expiration because the changes were consistent with the past practice during the term of the agreement and therefore maintained the status quo.

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[1] Both Board decisions are currently before the D.C. Circuit pursuant to the Company's petition for review (Case Nos. 10-1300 et al., oral argument held September 19, 2011).

5 Following a prehearing conference, the case was tried on October 17 and 18, 2011 in Buffalo, New York.[2] Thereafter, on November 22, the General Counsel, the Charging Party Union, and the Respondent Company filed posthearing briefs. Based on the briefs and the entire record,[3] for the reasons set forth below, I find that the Company violated Section 8(a)(5) of the Act as alleged.[4]

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I. FINDINGS OF FACT

A. *The parties' bargaining history*

15 The subject contract between the parties (Jt. Exh. 1) first became effective in March 1983 and continued thereafter for many years without interruption pursuant to a so-called "evergreen" or rollover clause. The clause, which is set forth in article XVIII, section 1 of the contract and was last amended in 1995, states, "[t]his Agreement shall continue in full force and effect beginning May 16, 1995, and continue thereafter until terminated by either party with ninety (90) 20 calendar days' advance notice in writing . . ."

There were, however, several amendments to the contract during this period. Section 2 of the same article permitted either party to "open" the agreement for bargaining by giving notice in writing of the desire to modify or change the agreement.[5] Pursuant to this provision, the

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[2] The Union filed the underlying charge on October 18, 2010, and the Regional Director issued the complaint on March 31, 2011. A hearing was originally scheduled for June 13, 2011, but was postponed at the request of the Company and the Union to allow them more time to resolve the dispute (GC Exh. 1).

[3] Absent any opposition, the hearing transcript is corrected as set forth in my December 28, 2011 notice to show cause (ALJ Exh. 1). The General Counsel's motion to strike the attachment to the Company's brief is also granted. Unless otherwise stated, cited evidence has been credited, to the extent supportive, and contrary evidence discredited. In evaluating witness credibility, all relevant and appropriate factors have been considered, including, not only the demeanor of the witnesses, but their apparent interests, if any, in the proceeding, whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts, "inherent probabilities, 'and reasonable inferences which may be drawn from the record as a whole'" (*Daikichi Corp*., 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003) (unpub.), quoting *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)).

[4] Jurisdiction is uncontested. The Company admits, and I find, that it is a corporation; that it manufactures chemical products; that it annually purchases and receives at its Niagara Falls facility over $50,000 in goods directly from outside the State of New York; and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Company also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[5] In full, section 2 states:

> If either party desires to modify or change this Agreement, it shall give notice in writing of the desire to modify or change. If notice to modify or change is given by either party the Agreement shall be deemed to have been opened for bargaining on any or all provisions or on any new provisions. After the

parties negotiated several supplemental agreements over the years amending the contract in various respects, without actually giving notice of termination under section 1. (Tr. 31–33, 269–270, 283, 307–308.)

In 2009, however, the Union decided for the first time to terminate the contract. According to the Union's subsequent bargaining notes, the Union did so "out of frustration and the way management was dealing with the Union and fragmented bargaining" (R. Exh. 3). Union Staff Representative Briggs testified that the Union was particularly concerned about adverse changes that the Company had previously made to employee benefits, including the corporatewide employee healthcare plan (called the "Beneflex Flexible Benefits Plan"). The Beneflex plan, including its waiver provisions permitting the Company to make changes to employee benefits without bargaining, had been incorporated into the contract effective January 1, 1996, pursuant to a May 1995 supplemental agreement (Jt. Exh. 1, art. XI). And the Company had exercised its right to make unilateral changes to the plan virtually every year since. The Company typically announced the changes in the fall, prior to the employee open-enrollment period, and implemented them on January 1 of the following year. (Tr. 10, 17, 33–37, 64, 69, 75, 120, 233, 262–263, 283, 290.)

Accordingly, by letter dated September 4, 2009, the Union served the required notice on the Company. The letter stated that, pursuant to section 1 of article XVIII, and in accordance with the Labor Management Relations Act (LMRA), the Union was giving notice to "open" the contract; that the "expiration date" would be December 9, 2009; and that the Union desired to negotiate a "new collective-bargaining agreement" pursuant to "said termination provisions." (Jt. Exh. 2; Tr. 32, 42, 173, 264; E. Br. 4.) Notwithstanding the Union's use of the term "open" (which as indicated above is a term from the contract modification provision in section 2 of article XVIII), there is no dispute that this letter was intended to terminate the contract, and it was interpreted as such by the Company. (Tr. 264; E. Br. 4.)[6]

The parties' held their first meeting following the Union's termination notice on October 13. By that time, consistent with its past practice, the Company had announced the changes it intended to make to the Beneflex plan effective January 1 of the upcoming year. However, Briggs informed the Company that, in the Union's view, "any implementation" of the announced plan changes for 2010 would be "illegal" because the Union had "served notice that the contract

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> provisions of this Section 2 have been invoked, in the absence of termination pursuant to Section 1 of this Article, all the provisions of this Agreement shall continue in full force and effect unless and until modified in accordance with this Section.

[6] The letter's reference to the LMRA presumably referred to Section 8(d), which requires a minimum of 60 days notice to terminate or modify a contract. Section 8(d) also requires notice, within 30 days thereafter, to the Federal Mediation and Conciliation Service (and any State mediation and conciliation agency), and prohibits a strike or lockout for a period of 60 days after such notice is given or until the expiration of the contract, whichever occurs later. There is no contention that the Union has failed to comply with any of these provisions. Nor does the Company contend that the provisions are relevant to evaluating whether the parties' contract continued or expired.

was open" and healthcare benefits were a mandatory subject of bargaining. The Company responded that it followed the terms of the contract in announcing the changes, and that, in its view, the changes "were not bargainable." The Union stated that it disagreed with the Company's position.

There was also some discussion at the meeting about extending the contract past the December 9 expiration date. The Company asked if the Union expected negotiations for a new contract to be complete by that time. Notwithstanding its concern about the announced 2010 Beneflex changes, the Union replied that it would be willing to extend the contract (including its bargaining-waiver provisions) if the negotiations were not complete by December 9.

The Company also raised the issue of a potential strike. The Company was very concerned that, because this was the first time in 26 years that either party had given notice of termination, the Union might be considering a strike to support its economic demands. In particular, the Company was concerned about receiving sufficient notice of a strike. If a strike occurred before the Company had adequately trained personnel from other DuPont facilities to run the operation (so-called "exempt" employees), the plant would be forced to shut down, the chemical (sodium and lithium) production cells would freeze over, and it would be cost prohibitive to rebuild and restart them. The Company therefore asked the Union whether a strike vote had been taken. The Union said no, but that a vote might be taken depending on how the negotiations went. (Jt. Exh. 5, Tab 1, pp. 1–2;[7] Tr. 31, 40, 47, 175–177, 211, 234–235, 265–267, 271, 288, 318–320, 333–334, 340–341.)

Not surprisingly, this was insufficient assurance for the Company, which promptly commenced training exempt employees to run the plant. Also not surprisingly, this development did not sit well with the Union. At the parties' next meeting on November 4 (the first actual contract negotiation session), the Union advised the Company that it had the "same if not more vested interest in plant survival," and that it intended to bargain, not strike. It also expressed concern that the Company was training exempt employees in preparation for a lockout. The Union stated that it was willing to put a proposal on the table that would extend the contract for 6 months and require 30 days notice to strike, if the Company stopped the training. The Company responded that it was just being cautious; that it did not want a strike or a lockout and would not lock out the employees on December 9; and that it appreciated the Union's offer and would get back to the Union on it. (R. Exh. 3; Tr. 84, 266–268, 305–306, 318–320; see also Jt. Exh. 5, Tab 3, p. 13–14 (discussing November 4 meeting).)[8]

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[7] All cited pages in Joint Exhibit 5 refer to the Bates-stamp page numbers.

[8] Idzik, a labor attorney retained by the Company to serve as its lead negotiator (Tr. 39, 169–171), testified that the Union said 30 days notice would be required to terminate the contract (Tr. 177) However, Union Representative Briggs, who spoke for the Union on the subject at the November 4 meeting, testified to the contrary (Tr. 84). Briggs' testimony is consistent with how Union Vice President Bright described the proposal at the parties' next meeting on November 13. See the Company's stenographic notes of the meeting, Jt. Exh. 5, Tab 3, p. 14 ("We told you the original proposal was for 6 months with a 30-day notice that we would not strike. . ."). As discussed below, it is also consistent with how Idzik responded to Bright. Finally, although the record indicates that Briggs read from a document when he described the Union's proposal on

5 The parties next met on November 13. As described in a Company "Employee Communication" dated the same date, the Company at that time presented

> a written proposal to extend the terms of the existing contract through April 30, 2010. If signed, the Union and Management would agree not to strike or lockout
10 prior to April 30, 2010 without sixty days written notice of the intent to do so. (GC Exh. 2.)[9]

The reason for substituting 60 days notice was explained to the Union by Idzik, who as noted above was a labor attorney retained by the Company to serve as its lead negotiator:[10]

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> [O]ur proposal to change 30 to 60 days is related to that training. Okay in other words you give us notice to strike, then we want to throw it into gear to do the training and that's why we want the 60 days because 30 isn't enough.
> . . . .
20 The whole reason for 60 days would be to give the parties enough time, especially the company, to make sure the plant continues running in the event you strike. If the plant shuts down, it's gone.

Union Vice President Bright responded that the Union would sign the Company's
25 proposal if the current training ceased immediately. However, Idzik indicated that the Company was disinclined to stop all training, and no agreement was reached. (Jt. Exh. 5, Tab 3, p. 13. See also id. at p. 16, and Tr. 40, 48–49, 87–88, 268, 291.)

The parties met again 3 days later, on November 16. Idzik advised the Union that the
30 Company would not stop the training given the preparation and effort that had already gone into it and the need to ensure that the plant continued to operate. Sarazin, the Company's HR manager at the Niagara facility and the "site lead bargainer" in the new contract negotiations (Tr. 261–264), confirmed this.[11] In response, the Union asked why, if the Company was going to continue the training, did it then need "60 days at the end in case we announced a strike or you
35 imposed a lockout." Sarazin replied that the Company believed a "60-day opener" was valid because the trainees might need refresher training and there were a lot of travel and other arrangements to be made. Idzik also addressed the issue, stating,

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November 4, there is no contention that an adverse inference is warranted by the Union's failure to introduce the document into evidence. Accordingly, I credit Briggs' testimony and find that the Union proposed 30 days notice to strike rather than to terminate the contract.

[9] See also the Company's November 16 "Employee Communication," GC Exh. 3; and Tr. 186. The written proposal itself is not in evidence. Again, however, no party contends that an adverse inference is warranted by the failure to introduce it.

[10] The General Counsel alleges, the Company does not seriously dispute, and I find that Idzik was an agent of the Company within the meaning of Section 2(13) of the Act.

[11] Although the record is not entirely clear on the matter, it appears that Attorney Idzik was the overall lead negotiator for the Company, and Sarazin was the lead bargainer among the management representatives employed by the Company at the facility.

> [t]he 60 days, I'm trying to remember, I think that was my idea because I was trying to quiet things down with regard to the strike and lockout talks. [Sixty] days, in the event you were to give a strike notice; it gives us a good amount of time to work things out. There was discussion whether it was 60 days after April 30 but it's not. You could give notice on the first of March and be on strike May 1st, that's what it says.

Union Representative Briggs, however, reminded Idzik that the Union had previously told the Company that it would have "60 days from April 30th to train," and that the Union could not give notice before April 30th. Idzik acknowledged this, but said he did not think the Company would change its mind about the current training. (Jt. Exh. 5, Tab 4, pp. 18–21; Tr. 292.)

The parties met again the following day, November 17. Briggs at that time offered a compromise: the Union would agree with the Company's proposal "if you finish training the people on the floor. . .nobody goes back on the floor until we serve you with 60 day notice and neither party can serve either party prior to April 30th." Idzik, however, indicated that it was unlikely that the Company would agree to this either. (Jt. Exh. 5, Tab 5, p. 42; Tr. 95–96, 186.)

Nevertheless, an agreement was, in fact, reached away from the bargaining table a few days later. According to Sarazin, after the November 17 meeting, she and other members of the site management team met privately to discuss the matter further. She then drafted up the following

> <u>Memorandum of Agreement</u>
>
> E.I. DuPont de Nemours and company (Niagara Plant) and United Steelworkers Local 4-5025 (Union) agree as follows:
>
> 1. It is in the best interests of the Niagara Plant and the Union to have sufficient time to negotiate a new Collective Bargaining Agreement and both parties agree that more time is needed before the contract termination date of December 9, 2009.
>
> 2. The parties therefore agree to extend the terms of the Agreement through April 30, 2010. This agreement shall continue in full force and effect until terminated by either party with sixty (60) calendar days advance notice in writing except in no case will the COMPANY or the UNION strike or lockout prior to April 30, 2010. This means, for example, that if either party wanted to take action on May 15, 2010, written notice would have to be provided to Management or the Union no later than March 15, 2010.
>
> 3. As part of this agreement, Management will stop training of exempt employees on hourly jobs once the current 11/16/09 training group has completed their

5 training and will not continue training beyond that point. Training may recommence upon notice of termination of contract extension. (Jt. Exh. 3.)[12]

Sarazin and Plant Manager Wallden presented the MOA to Union Vice President Bright on November 20 in Sarazin's office. After reading the MOA to Briggs over the phone, Bright
10 signed it on behalf of the Union. (Tr. 150, 187, 271, 284–285, 297–300. See also Tr. 47, 98–99.)

Approximately 3 months later, in February 2010, the Company proposed, and the parties executed, another "interim" agreement. The agreement was effective by its terms from February 23, the date it was executed, through September 13, 2010, and again addressed the right to strike
15 or lockout. It also addressed the hiring of so-called "limited service employees" (LSEs) to help run the plant during the summer months, when additional staff was needed due to the heat—a subject that was not specifically addressed in the contract or the November 2009 MOA. The interim agreement stated, "both parties agree to extend the no strike/lockout agreement through September 13, 2010 (end of summer standards)," and "LSEs hired under this agreement will not
20 be used in the event of a strike or lockout." There is no dispute that this agreement extended the no-strike or lockout date from April 30 to September 13, 2010. There is also no dispute that the parties did not discuss the contract extension at that time, and that the agreement did not address contract extension or termination. (Jt. Exh. 4; see also Tr. 50–51, 108, 193–194, 277–278, 306–307, 323, 327–328; GC Br. 12; U Br. 17; and E. Br. 15.).
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About 5 months later, in late June, the Company proposed yet another "interim" agreement. The proposal would have further extended the no-strike or lockout prohibition through March 31, 2011 "unless cancelled prior to that date by mutual agreement." The Union, however, stated that it would only agree to extend the prohibition another month, to October 13.
30 In response, the Company offered a modified proposal, which adopted the October 13 date but required 60 days notice to terminate the prohibition thereafter.

The Union agreed to the modified proposal. Accordingly, as ultimately adopted on July 26, 2010, the parties' "no strike/no lockout" agreement was effective by its terms "until October
35 13, 2010" and "after . . .unless it is cancelled by mutual agreement or by either party giving at least sixty (60) days written notice to the other party after October 13, 2010." The agreement affirmatively stated that "during the term of this Agreement, there shall be no strikes or work stoppages of any kind. . .[and] the Company likewise agrees that . . .it will not lock out any of the employees covered by this Agreement for any reason."

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[12] Sarazin testified that Attorney and Lead Negotiator Idzik, who usually participated in the management meetings, also reviewed the draft before it was presented to the Union (Tr. 284–285). However, she suggested otherwise when questioned about why she had used certain language in drafting the MOA. See Tr. at 273 and 313. Further, Idzik himself testified that he had no communication whatsoever with the Company from November 17 through 20, and was "surprised" by the MOA. (Tr. 187–188, 190, 237.) Accordingly, I find that a preponderance of the evidence indicates that Idzik had no involvement in drafting the MOA.

Unlike the February interim agreement, the July 2010 interim agreement did not reference or expressly extend the November 2009 no-strike/no-lockout agreement. However, it included a similar provision addressing training, stating that management would not train exempt employees to prepare for a strike "unless sixty (60) days written notice to terminate this agreement has been given by either party." Like the February agreement, it also prohibited LSEs from being used to perform unit work during a strike or lockout. In addition, it incorporated certain enforcement language from the no-strike/no-lockout provision that the Company had proposed during the new-contract negotiations. (Jt. Exh. 6; see also Jt. Exh. 5, Tabs 38–40; Tr. 49–53, 103–106, 114–118, 195–198, 216–217, 221–223, 328–329, 336–340.)

Finally, the July agreement included a sentence at the end stating, "No other promises or representations are intended or made by either party with regard to any subject(s) other than strike or lockout." It is undisputed that this language was drafted by Idzik and included in the agreement at the request of the Union. However, Idzik and Wallden testified that the Union never specifically explained why it wanted such language; the Union simply said it did not want the no-strike/no-lockout agreement to impact the Union's ability to do anything else. (Tr. 216–217, 339–340.).

Briggs, on the other hand, testified that he had previously advised Idzik during a July 21 phone conversation that the Union did not want anything in the agreement about a contract extension:

> I told [Idzik], I said look, . . .I want to be crystal clear. We have no problem with no strike/no lockout. We'll work with you on the LSEs. But you need to understand we have no interest at all if the document is going to contain anything about a contract extension. We have no interest in that. And in fact I informed him that the reason we didn't want to agree to a contract extension since the April 30th had expired was we [in]tended to use it as leverage to get a deal done. (Tr. 54.)

Idzik admitted that he did, in fact, have two phone conversations with Briggs that day. However, he denied that Briggs specifically said the contract had "expired" or that the Union would not agree to another contract extension. (Tr. 202–210, 219–220.).

Idzik's contemporaneous notes of the phone calls support his testimony that Briggs did not specifically make the foregoing statements. However, the notes confirm that Briggs said the contract was "open"; that the Company would be announcing Beneflex changes in October; and that this could be used as "leverage" to complete negotiations (R. Exh. 6; see also Tr. 207–208). As indicated above, although the word "open" has an independent meaning under the contract, it has regularly been used by both parties as synonymous with "terminated." Indeed, Briggs had used the same term at the initial, October 13, 2009 meeting, after the Union's notice of termination (which also used the term "open"), in objecting, consistent with the union position in

5 the two DuPont cases pending before the Board,[13] that implementation of the announced changes would be "illegal." See also Idzik's testimony, Tr. 230 (acknowledging that his management team "kept saying" the same thing: "the contract is open," "this is the first time they have opened the contract for bargaining in 23 [sic] years"); Sarazin's testimony, Tr. 264 (the Union's September 4, 2009 letter "stating that they wanted to terminate the contract" meant to her that
10 "the bargaining agreement was open for negotiation. All of the terms and conditions of the contract") and 271 (the parties' contract had not been "open" for 26 years); Wallden's testimony, Tr. 333 (same); the Company's notes of the November 4, 2009 meeting, Jt. Exh. 5, Tab 2, p.1 (same); and the discussion below regarding the parties' September 27, 2010 meeting.[14]

15 Further, the Union would only have "leverage" in the negotiations if the contract and its waiver provision permitting annual unilateral changes to the Beneflex plan had expired. And it would obviously make no sense to extend the contract at that point if the Union wanted to use the lack of a contract as leverage to get a deal done before the next, upcoming round of Beneflex changes.

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Accordingly, I find that Briggs did effectively, if not expressly, indicate to Idzik on July 21 that the Union believed the contract had expired on April 30 and would not agree to another extension.[15] I also find (and it is undisputed) that, like the February interim agreement, the July 2010 interim agreement did not address the contract's expiration or extension.

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[13] See 355 NLRB No. 176, slip op. at 18 (("The General Counsel and the Union argue that the Respondent's unilateral changes to the Beneflex Plan were lawful during the term of the bargaining agreement, because the parties had agreed, but when the agreement expired, so did the Union's consent to any further unilateral changes."); and 355 NLRB No. 177, slip op. at 12 ("Although the parties agree that [the management-rights provision] constituted a contractual waiver by the Union of its right to bargain over changes to employees' benefits during the contract's term, they disagree about whether the waiver survived the contract's expiration.") Briggs had participated in the contract negotiations at both of the facilities, was familiar with the litigation in the two Board cases, and had been present at the hearing in at least one of them (Tr. 41).

[14] Although the Company acknowledges that "open" was used synonymously with "terminated" (Br. 6), it argues that it was not used synonymously with "expired." In support, it cites the fact that Briggs used the term "open" in October 2009, after the Union had given 60 days notice of termination but prior to the December 9 expiration date. However, the record as a whole fails to support the Company's argument. Indeed, as indicated above, although Briggs used the term in October 2009, before the December 9 contract-expiration date, he did so in objecting to "any implementation" of the proposed Beneflex changes for the following year, which would not have occurred until January 1, 2010, after the December 9 expiration date.

[15] Union President Freeburg testified that he had made similar statements to Wallden in a conversation the previous day, on July 20 (Tr. 155–156, 161–162). However, I do not credit this testimony. Wallden denied that Freeburg had made any such statements during the conversation (Tr. 330–332) and, unlike Briggs' conversation with Idzik, there are no notes confirming that Freeburg either expressly or impliedly made them. Moreover, Freeburg's testimony is otherwise unsupported and/or inconsistent with other record evidence, including Briggs' testimony describing what Freeburg subsequently told him about the conversation (Tr. 51–53).

5 B. *The 2011 Beneflex Changes*

Approximately 7 weeks thereafter, on September 13, 2010, the Company called a meeting with the Union and announced the Beneflex changes for the following year. Among other things, the changes increased employee health insurance premiums and eliminated certain 10 health plan options and coverage of nonbiological dependent children. Briggs responded that the Company could not lawfully make the changes, citing the Board's decisions at the Company's plants in Louisville and Edge Moor, which had issued approximately 2 weeks earlier, on August 27. As indicated above, the Board's decisions held that the Company's previous unilateral benefit-plan changes at those plants violated Section 8(a)(5) of the Act because the contracts, and 15 therefore the contractual bargaining waivers, had expired at the time of the changes. 355 NLRB Nos. 176 and 177. Williams, the Company's new HR manager (having replaced Sarazin following her retirement), replied that the Company disagreed with the Board's decisions and would follow the status quo. (Tr. 56, 125, 343–344; Jt. Exhs. 7, 8.)[16]

20 The parties subsequently repeated their positions at a bargaining session on September 27. Briggs stated that the Company's announced changes were "illegal" because the parties were in "overall contract bargaining." And Williams responded that "we feel we are consistent with the status quo," and "we are still weighing our options in regards to the Board's decision." (Jt. Exh. 5, Tab 44, p. 378; R. Exh. 2; Tr. 58, 345–348.)

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A few weeks later, on October 18, 2010, the Union filed the underlying unfair labor practice charge (GC Exh. 1(a)). Nevertheless, the Company unilaterally implemented the changes on January 1, 2011 as planned (GC Exh. 1(e), (g)).[17]

30 **II. ANALYSIS**

As indicated above, the threshold issue is whether the parties' contract waiving the Union's bargaining rights with respect to such Beneflex changes had expired before the January 1, 2011 implementation date.[18] The General Counsel and the Union contend that the contract had 35 automatically expired on April 30, 2010, pursuant to the parties' November 2009 MOA. The

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[16] According to Briggs, he also specifically stated at the September 13 meeting that the parties were "working under an expired agreement." (Tr. 56). However, Williams did not recall this statement (Tr. 344), and there are no notes of the meeting. In any event, as it is uncontroverted that Briggs referenced the Board's then-recent decisions, which turned on the undisputed fact that the contracts had expired, it is clear that the Union's asserted legal position at the meeting was based on its belief that its contract with the Company was also no longer in effect at that point.

[17] As of the October 2011 hearing, the parties had still not reached a new collective-bargaining agreement (Tr. 36).

[18] There is no contention that the parties intended the bargaining waiver to survive contract expiration. There is also no dispute that the changes were material and substantial and involved a mandatory subject of bargaining (employee healthcare benefits) under Board law. See generally *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005); and *Long Island Head Start Child Development Services v. NLRB*, 460 F.3d 254, 258 (2d Cir. 2006).

5 Company, on the other hand, contends that the MOA required 60 days notice to terminate the contract extension after April 30, 2010, and that the contract therefore remained in effect given that the Union admittedly never gave such notice.

A. *The MOA language*

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The starting point in interpreting any agreement is the language of the agreement itself. Indeed, parol or extrinsic evidence of the parties' intent should normally be considered only when the language is ambiguous. See e.g., *Church Square Supermarket*, 356 NLRB No. 170, slip op. at 4 (2011); and *Commonwealth Communications, Inc. v. NLRB*, 312 F.3d 465, 468
15 (D.C. Cir. 2002).[19]

Here, both the Union and the Company, the two parties to the agreement, contend that the language is clear and unambiguous. However, the Union contends that it clearly and unambiguously states that the contract would automatically expire on April 30, 2010 (Br. 24);
20 whereas the Company contends that it clearly and unambiguously states that the contact would continue absent 60 days notice of termination (Br. 30). The General Counsel disagrees with both the Union and the Company, and concedes/contends that the MOA is ambiguous (Br. 23–24, 29). For the reasons set forth below, I agree with the General Counsel.[20]

25 *"1. It is in the best interests of the Niagara Plant and the Union to have sufficient time to negotiate a new Collective Bargaining Agreement and both parties agree that more time is needed before the contract termination date of December 9, 2009.*

30 *2. The parties therefore agree to extend the terms of the Agreement through April 30, 2010."*

All parties agree, and I find, that these first two sentences of the MOA clearly and unambiguously extended the parties' contract through April 30, 2010. However, by themselves,
35 these sentences say nothing directly about whether or under what circumstances the contract may continue after that date.

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[19] The General Counsel does not contend that the contract-extension issue in this case should be analyzed under the "clear and unmistakable waiver standard," i.e. that the Company must show that the Union clearly and unmistakably waived the right to bargain. See *Englehard Corp*., 342 NLRB 46, 47 (2004), enfd. 437 F.3d 374 (3rd Cir. 2006), and cases cited there. See also *NLRB v. New York Telephone Co*., 930 F.2d 1009 (2d Cir. 1991) (in evaluating question of waiver, extrinsic evidence may be examined even if the contract language appears to be unambiguous).

[20] Given this conclusion, it is unnecessary to address whether the Union's position regarding the MOA language improperly enlarges or changes the General Counsel's theory of the case. See generally *Nott Co.*, 345 NLRB 396, 398 fn. 10 (2005); *Zurn/NEPCO*, 329 NLRB 484 (1999); and *Kimtruss Corp*., 305 NLRB 710, 711 (1991).

5 *"This agreement shall continue in full force and effect until terminated by either party with sixty (60) calendar days advance notice in writing except in no case will the COMPANY or the UNION strike or lockout prior to April 30, 2010."*

Sarazin, who drafted the MOA, testified that "This agreement" in this next sentence
10 refers to the contract rather than the MOA (Tr. 272–273). However, on its face, it appears to refer to the MOA. Thus, the contract in the prior sentence was referred to as "the Agreement," and it would have been most natural to use the same term again ("The Agreement shall continue . . .) if that was the intent. (Sarazin's only explanation was "well, I didn't have [Idzik] telling me I should have a capital 'A' in there." Tr. 273.) Further, Sarazin's testimony is inconsistent with
15 the very last sentence of the MOA ("Training may recommence upon notice of termination of contract extension"). It is also inconsistent with the Company's opening statement at the hearing, Tr. 21 ("The MOA then goes on to say that this extension agreement, quote, 'shall continue. . .'") and posthearing brief, Br. 1 ("the parties agreed that . . . "such extension agreement 'shall continue . . .'"). See also E. Br. 32–33 ("the plain language of the 2009 MOA
20 establishes that the entirety of the commitments set forth [therein]—including [] the contract extension, the no-strike/no-lockout pledge, and prohibition on training—continued through and beyond April 30, 2010, pending 60-days advance written notice of termination"). Finally, contrary to the Union's contention (Br. 24), "This agreement" cannot reasonably be interpreted on its face to refer only to the no-strike or lockout agreement, which is not mentioned until later
25 in the sentence as an "except[ion]." See also Union Representative Briggs' testimony, Tr. 102 (acknowledging that the reference to "notice of termination of contract extension" in the very last sentence raises some ambiguity).

In any event, like the first two sentences, this sentence does not clearly address whether
30 the contract would continue beyond April 30 absent 60 days notice. The listed "except[ion]" at the end of the sentence, providing that "in no case" will either party strike or lockout prior to April 30, 2010, suggests that the provision was intended to address whether and how the contract extension could be terminated prior to April 30, 2010 rather than after. Further, unlike typical evergreen or rollover provisions, it does not specifically state whether the contract would
35 continue after April 30, 2010. See, for example, the provisions in *Atlas Refinery, Inc*., 354 NLRB 1056 (2010); *Long Island Head Start*, 345 NLRB 973 fn. 4 (2005); *G & T Terminal Packaging Co.,* 326 NLRB 114, 116 (1998); *Williams Pipeline Co*., 315 NLRB 630, 634 fn. 5 (1994); and *Ben Franklin National Bank*, 278 NLRB 986, 989 (1986). See also art. XVIII, Sec. 1 of the parties' contract ("This agreement shall continue in full force and effect beginning May
40 16, 1995, and continue *thereafter* until terminated by either party with ninety (90) calendar days' advance notice in writing, except that in no case will the Company give notice to terminate this Agreement prior to October 1, 1997").[21] And compare the Company's June 2010 proposed interim agreement (extending the no strike or lockout date through March 31, 2011 "unless cancelled *prior to* that date by mutual agreement"), with the interim agreement the parties'
45 ultimately executed on July 26 ("This Interim Agreement will be in effect until October 13,

[21] Thus, contrary to the Employer's posthearing brief (p. 34), the language of the MOA did not "track" the opener language of the contract. Not only did the MOA omit the word "thereafter," but the "except[ion]" related to a different subject (when a strike or lockout could occur) than when the agreement could be terminated.

2010. *After* October 13, 2010 it will continue in effect unless it is cancelled by mutual agreement or by either party giving at least sixty (60) days written notice to the other party after October 13, 2010.") (emphasis added).

> *"This means, for example, that if either party wanted to take action on May 15, 2010, written notice would have to be provided to Management or the Union no later than March 15, 2010*."

It is not entirely clear whether "take action" in this next sentence refers to terminating the contract extension, striking/locking out, or both. As both are addressed in the immediately preceding sentence, and the phrase, by its very vagueness, is broad enough to include both, it could reasonably be interpreted as including both. However, again, it does not really matter; in either case, the sentence on its face likewise does not provide a clear answer to the issue presented. Thus, if "take action" includes terminating the contract extension as well as striking or locking out, it clearly indicates at most that 60 days notice would be required if either party wished to terminate the contract extension and/or strike or lockout within 60 days after April 30, 2010, i.e. on or before June 30, 2010. This provides no help as the subject changes were announced and implemented months later. And if "take action" refers only to striking or locking out, it says little if anything about whether 60 days notice would be required to terminate the contract anytime after April 30, 2010.[22]

> *"3. As part of this agreement, Management will stop training of exempt employees on hourly jobs once the current 11/16/09 training group has completed their training and will not continue training beyond that point. Training may recommence upon notice of termination of contract extension."*

As previously mentioned, these last two sentences on their face indicate that the 60-day notice provision applies to terminating the contract extension agreement prior to April 30, 2010. However, again, like the previous sentences, they do not clearly address whether the contract would continue or rollover after April 30, 2010 absent 60 days notice.

Accordingly, in agreement with the General Counsel, I find that the language of the MOA cannot reasonably be read to clearly and unambiguously support the position of either the Union or the Company.

B. *The extrinsic evidence*

As indicated above, when contract language is ambiguous, it is appropriate to look at extrinsic evidence of the parties' intent. See, e.g., *Spectrum Health-Kent Community Campus v. NLRB*, 647 F.3d 341, 347 (D.C. Cir. 2011), enfg. 355 NLRB No. 101 (2010), reaffirming and incorporating by reference 353 NLRB 996 (2009). Such evidence may include "bargaining

[22] The sentence is also unclear on its face what type of 60-day notice would be required to strike or lockout, i.e. whether a party would be required to give 60 days notice that it is terminating the contract extension in order to strike or lockout, or whether it could give 60 days notice that it intended to strike or lockout without terminating the contract extension.

history, the parties' interpretation of the contract, the conduct of the parties, and the legal context in which the contract was negotiated." *Des Moines Register and Tribune Co*.. 339 NLRB 1035, 1037 (2003), rev. denied 381 F.3d 767 (8th Cir. 2004) (citing *Electrical Workers Local 1977 (A.O. Smith Corp.),* 307 NLRB 138, 139 (1992)). See also *Evans Sheet Metal*, 337 NLRB 1200 (2002), enfd. 92 Fed. Appx. 844 (3rd Cir. 2003) (unpub).

Here, there is substantial extrinsic evidence supporting the General Counsel's and the Union's position that both parties intended the contract to terminate or expire automatically on April 30, 2010 without the necessity of any further notice. First, the Union had just given notice to terminate the contract on December 9, 2009. Thus, as Union Representative Briggs testified (Tr. 47–48), it would make little or no sense for the Union to agree to an indefinite extension of the contract thereafter subject to another notice to terminate. Although the Company asserts that the parties "in effect" substituted 60 days notice in the MOA for the contractual 90 days notice to terminate (Br. 12), there is no evidence that they consciously decided to do so. On the contrary, Sarazin, the Company's lead site bargainer, testified "I really don't think we thought about it on either side." (Tr. 309).[23]

Second, the 60-day notice provision in the MOA was initially proposed by the Company on November 13, and subsequently discussed by the parties, only in relation to strikes or lockouts, not with respect to terminating the contract extension. As indicated above, the Company was understandably concerned that the Union's unprecedented (for 26 years) notice of termination in September 2009 signaled a potential strike. However, the record indicates that the subsequent proposals for a 6-month contract extension and for 60 days notice had different purposes. As Idzik, the Company's lead negotiator, testified, "the 6-month contract extension was important because it cooled things down and the 60 days were important because if the Union did provide notice that they were going to strike, then we needed 60 days to complete the training or train other people" (Tr. 192).

Third, following the MOA, the Company proposed two more interim agreements in February and July 2010. As indicated above, the February 2010 proposal regarding LSEs, which the Union agreed to, expressly extended the no-strike/no-lockout agreement in the MOA to September 13, 2010. The Company's witnesses (Idzik, Sarazin, and Wallden) testified that the Company included this no-strike provision in the LSE agreement because, under the MOA, the Union could have given 60 days notice to go on strike before the end of summer standards, which would have prevented the Company from continuing to use the LSEs along with the exempts to keep the plant running during the strike (Tr. 193–194, 280, 323–327). However, the

[23] The General Counsel also argues that extending the contract indefinitely made no sense because the Union wanted to prevent the Company from continuing to rely on the contractual waiver clause to make annual unilateral changes to the Beneflex plan. This argument is significantly undercut, however, by the fact that the Union actually agreed to extend the contract to April 30, 2010, notwithstanding its objections to the Company's proposed January 1, 2010 changes. Further, as noted by the Company, the Union would have still had plenty of time after April 30 to give 60 days notice of termination if it wished to do so before the 2011 changes were announced and implemented in September/October 2010 and January 2011, respectively.

5 February agreement not only extended the first possible strike/lockout date from May 1 to September 14; it expressly extended the entire "no strike/ lockout agreement." It was unnecessary to do so if the MOA, including the no-strike or lockout agreement, rolled over and continued in effect absent such notice.

10 In any event, as indicated above, the Company subsequently sought yet another no–strike or lockout interim agreement in July, which would have effectively extended the first possible strike date to April 1, 2011. There was no further need for LSEs after September 13, 2010, and the Company's witnesses offered no other persuasive reason for seeking this additional agreement. Although Idzik and Wallden testified that there was still concern about a possible 15 strike, and the Company wanted "protection for the future," Wallden admitted that the February agreement had not changed in any way the provision in the MOA that the Company could begin training exempts upon receiving a 60-day strike notice. (Tr. 195, 221, 327–328.) Thus, if the MOA and its no–strike or lockout provisions still remained in effect, the Company already had the protection it had previously demanded and obtained. Nevertheless, the Company proposed, 20 and the July agreement included, a similar training provision. See also Idzik's statements at the bargaining table on July 9, Jt. Exh. 5, Tab 39, p. 211, para. 2 ("If we do not have this No strike/No lockout proposal, we are convinced contingency planning will occur . . .The existing interim agreement does not state that the company cannot train exempts . . . we do not understand why training cannot be done."); and his hearing testimony, Tr. 201 (admitting that he 25 did not even consider the MOA at the time; "it just didn't occur to me to check that").[24]

Fourth, Union representative Briggs effectively expressed the Union's belief that the contract had expired as early as July 21, in his telephone conversation with Idzik, well before the Company announced its planned 2011 changes to the Beneflex plan. Further, he subsequently 30 repeated the Union's position on September 13 and 27 when the Company notified the Union of the planned changes. As discussed above, although Briggs did not specifically use the word "terminated" or "expired" on any of these three occasions, his statements clearly implied that the Union believed the contract had terminated or expired, given the underlying legal context and the parties' well-documented history of using similar language in reference to the contract's 35 termination and/or expiration.

Finally, the Company's limited response to Briggs's statements on September 13 and 27 indicates that the Company did not believe the contract was still in effect either. As discussed above, Briggs stated at the September 13 and 27 meetings that the proposed 2011 Beneflex 40 changes would be illegal, citing the Board's then-recent decisions holding that the Company had unlawfully refused to bargain over post-expiration unilateral changes to the Beneflex plan at two

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[24] The Union's position regarding training at the July 9 meeting was that the Company could not conduct contingency training while LSEs were employed on the site. Whether or not this was a correct position, it appears to have been based on the February 2010 interim LSE agreement, rather than the MOA (which did not address LSEs). See the Company's stenographic notes, Jt. Exh. 5, Tab 39, p. 211. See also Idzik's testimony, Tr. 199–200 ("[Briggs] said that the interim LSE agreement, which was dated February 23rd of 2010, was given with the understanding that there would be no training conducted on the plant site while there were LSEs on the plant site. That's what he said.").

other facilities. The most obvious and natural response, if the Company believed the contract and its bargaining-waiver provision had not expired, was to cite the contract and/or the MOA extending it indefinitely absent 60 days notice. Instead, the Company simply stated that it disagreed with the Board's decisions and reiterated its legal position in those cases that such changes lawfully continued the status quo (which the Board had rejected).

In contrast, there is little extrinsic evidence indicating that the parties intended the contract or its extension to rollover or continue indefinitely absent 60 days notice. Although the Company cites a number of facts and circumstances, none provides substantial support for its position. For example, the Company cites Sarazin's statement at the November 16 bargaining session that the Company believed its proposed 60-day "opener" was valid. Sarazin testified that, in using this phrase, she did, in fact, mean 60 days to open the contract for negotiation. Indeed, she testified that she used the term strictly in the sense described in article XVIII, section 2 of the contract, and did not mean to "terminate" the contract as described in section 1 of the same article. (Tr. 269–270; see also Tr. 183 (Idzik).) However, this testimony makes no sense, as the contract at that time had already been "opened" for negotiations and nobody was proposing to temporarily close it or shut the negotiations down. Rather, the parties clearly intended to continue bargaining over a new contract during the proposed contract extension, and they did so.

Further, even assuming, as indicated by the Company (Br. 10, 33–34), that Sarazin really meant 60 days to terminate the contract extension, her testimony is clearly inconsistent with the Company's actual proposal at the time. As indicated above, Idzik's description of the 60-day notice provision at the November 13 and 16 meetings, as well as the Company's description in its contemporaneous "Employee Communications," all referred to giving notice to strike rather than to terminate the contract extension. See also Idzik's testimony, Tr. 192, 236 (quoted above). Unlike Sarazin's testimony, this does make sense, given that the Company's primary concern was receiving adequate notice to keep the plant running and prevent the chemical production cells from permanently freezing over.[25] Thus, the record as a whole indicates that Sarazin's reference to a 60-day "opener" at the November 17 meeting was simply a misstatement. See also Sarazin's testimony, Tr. at 283 (acknowledging that her previous testimony that the contract had not been "opened" in 26 years was "probably a misstatement on my part"), and 313 (acknowledging that she does not have a legal background and that the MOA "could have been drafted better").

The Company also cites the undisputed fact that, unlike prior to the December 9, 2009 expiration date, there was no discussion of an extension prior to the April 30, 2010 date. According to the Company, this indicates that the parties believed the contract extension continued or rolled over, as it is unlikely that parties would have "sat idly . . .and silently by" as the April 30 date drew near (Br. 37). However, as discussed above, the Union had previously given notice to terminate the contract as of December 9, 2009, and the record indicates that the Company's primary, ongoing concern thereafter was the possibility of a strike. There is no evidence that either expressed any strong interest in continuing the contract indefinitely after

[25] As noted by the General Counsel (Br. 8), the contract did not contain a general no-strike or lockout clause.

April 30 in the event the parties failed to reach a new one by that date.[26] Thus, the lack of any discussion prior to April 30 of the contract's upcoming expiration or possible further extension could just as reasonably indicate that neither party had any strong objection to the contract automatically expiring on that date.

The Company also cites the undisputed fact that it did not cease deducting dues after April 30 or refuse to arbitrate post-April 30 grievances, as it lawfully could have if the contract had expired on that date.[27] However, it is likewise undisputed that the Company did not cease deducting dues at the two other facilities involved in the pending Board cases until a year or more after the contracts expired (Tr. 111–112, 133–135, 142). And there is no record evidence that the Union actually requested arbitration of any post-April 30 grievances.

Finally, the Company cites the testimony of its three primary witnesses (Sarazin, Idzik, and Wallden) about what the MOA meant. However, Idzik had no involvement with drafting the MOA (see fn. 12, above), and Wallden did not attend the bargaining sessions and received all of his information second-hand from the management bargaining team (Tr. 317, 334). As for Sarazin, as discussed above she was clearly not a reliable historian. In any event, such post-hoc subjective and self-serving testimony has little weight unless it is consistent with the language of the agreement and other objective evidence of the parties' intent. See *Des Moines Register,* 339 NLRB at 1037.[28]

Accordingly, I find that the General Counsel has established, by a preponderance of the evidence, that the parties intended the contract extension to automatically expire on April 30, 2010, without the necessity for further notice of termination. See generally *Spectrum Health-Kent Community Campus,* 647 F.3d at 347 n. 5. I therefore further find that the Company's subsequent, unilateral implementation of its announced changes to the Beneflex plan on January

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[26] Although the Company offers certain reasons why it would not have been in the Union's interest for the contract to automatically expire on April 30, there is no evidence that the Union actually considered or was motivated by those reasons in agreeing to the MOA.

[27] See *Hacienda Resort Hotel & Casino (Hacienda III)*, 355 NLRB No. 154 (2010), enf. denied *Local Joint Exec. Bd. of Las Vegas, Culinary Workers Local 226 v. NLRB*, 657 F.3d 865 (2011) (dues deduction); and *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243 (1977), and *Litton Financial Printing v. NLRB*, 501 U.S. 190 (1991) (grievance arbitration). The relevant provisions referenced by the Company are set forth in Articles IV (Payroll Deduction of Union Dues), IX (Adjustment of Grievances) and X (Arbitration) of the contract.

[28] For similar reasons, I have given no significant weight to the subjective interpretations of the General Counsel's witnesses (Briggs and Freeburg) where unsupported by objective evidence. Various other arguments set forth in the Company's posthearing brief are likewise without merit. For example, the Company also cites Briggs' admission that his pretrial NLRB affidavit failed to mention that the MOA extended the contract to April 30, 2010 (Tr. 61–62,64). However, there is no dispute that the MOA extended the contract to that date. The Company also argues that the Union could have simply given notice of termination if it was truly concerned in July 2010 about whether the contract had expired on April 30. However, the Union's undisputed failure to give such notice is consistent with the Union's position that no notice was required.

1, 2011 violated its duty to bargain. As indicated above, although the Company argues that the changes were lawful even after contract expiration because they were consistent with previous changes during the contract term, the Board specifically rejected the same argument in the two previous DuPont cases. See 355 NLRB No. 176, slip op. at 2, and 355 NLRB No. 177, slip op. at 1 (unilateral changes made during the contract term under the authority of a management-rights provision do not establish a past practice permitting similar changes during a hiatus between contacts). I am bound to follow this Board precedent unless and until it has been reversed by the Supreme Court. *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004).

CONCLUSIONS OF LAW

By unilaterally implementing changes to the unit employees' Beneflex healthcare plan on January 1, 2011, the Respondent Company committed an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy under the Act for the Company's violation is an order requiring the Company to cease and desist and to take certain affirmative action. Specifically, the Company will be required to restore, on the Union's request, the unit employees' Beneflex healthcare benefits that existed before the unlawful unilateral changes were implemented on January 1, 2011, and maintain those benefits until the parties have reached a new collective-bargaining agreement or valid impasse, or the Union agrees to changes. It will also be required to make the unit employees whole by reimbursing them for any loss of benefits and any expenses resulting from the unlawful unilateral changes, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest compounded daily as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). Finally, the Company will be required to post a notice to employees in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[29]

ORDER

The Respondent Company, E.I. DuPont de Nemours & Co., Inc., Niagara Falls, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(a) Making unilateral changes to unit employees' benefits during periods when the parties are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(b) In any like or related manner failing or refusing to bargain in good faith with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC, as the exclusive bargaining representative of the unit employees.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the Union's request, restore the unit employees' benefits under the Beneflex plan to the terms that existed before the unlawful unilateral changes were implemented on January 1, 2011, 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.

(b) Make the unit employees whole by reimbursing them, with interest, for any loss of benefits and any expenses that they suffered as a result of the unlawful unilateral changes in their benefits.

(c) 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 amount of money to be reimbursed under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Niagara Falls facility copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since January 1, 2011.

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30 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."

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

Dated, Washington, D.C. January 24, 2012

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Jeffrey D. Wedekind
15 Administrative Law Judge

APPENDIX

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 make unilateral changes to your Beneflex healthcare plan during periods when we are engaged in negotiations with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC, for a collective-bargaining agreement covering your terms and conditions of employment and have not reached impasse.

WE WILL NOT in any like or related manner fail or refuse to bargain in good faith with the Union as your exclusive bargaining representative.

WE WILL, on the Union's request, restore your benefits under the Beneflex plan to the terms that existed before our unlawful unilateral changes were implemented on January 1, 2011, and maintain those terms in effect until we have bargained with the Union to a new agreement or a valid impasse, or until the Union has agreed to changes.

WE WILL make you whole by reimbursing you, with interest, for any loss of benefits and any expenses that you suffered as a result of the unlawful unilateral changes in your benefits.

E.I. DUPONT DE NEMOURS & CO., INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want

union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2387
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.