Board revamps past practice; unilateral change doctrine, overturns precedent

In *E.I. Du Pont de Nemours, Louisville Works,* the employer offered its employees a companywide benefits package. Within the package documents the company reserved itself the "sole right to change or discontinue the plan" during annual enrollment periods. As such DuPont consistently made annual changes to the benefits package that applied to both union, and nonunion employees. However, after the CBA expired, and parties were negotiating a new contract, the union resisted DuPont's plan changes. The union filed unfair labor practice charges, contending DuPont was required to bargain over these changes. DuPont responded, contending, that they were not required to bargain over such changes due to the company's past practice of making annual changes.

The NLRB found DuPont violated the Act by making unilateral changes to the benefits package during negotiations of a new CBA. In doing so the Board rejected DuPont's "past practice" defense as well as their attempt to analogize this case with the Board's 2004 decisions in the *Courier-Journal cases*. The Board reasoned that because DuPont's past practice defense was established by the management rights clause located in the contract, once the contract expired the clause that allowed the company to make unilateral changes to the benefits package also expired. Further, the Board distinguished the Board's prior ruling in the *Courier-Journal cases,* finding that in those cases the past practice was to make unilateral changes during the contract period and during hiatuses between contracts, where in this case the unilateral change in question occurred once the contract expired.

The D.C. Circuit found the NLRB had unjustifiably departed from its own precedent set in the *Courier-Journal cases,* and directed the NLRB to explain its return to rules followed prior to the *Courier-Journal cases.* According to the majority of the Board, the overturned cases were inconsistent with established Board Law, holding that management-rights clauses do not extend beyond a CBA's expiration. Further, the majority has found that the "past practice" defense for allowing unilateral changes to contracts shall be narrowly interpreted. The decision in *Courier-Journal* allows for an employer to make unilateral changes so long as such changes apply equally to union and non-union employees. The majority found here that this holding gave employers an immense amount of discretion to unilaterally alter contracts. As such the Board overturned its holding in *Courier-Journal* that allowed an employer to make unilateral changes to contracts when such changes treated union and non-union employees alike.

Member Miscimarra, the dissenting member, took issue with how the majority defined the term "change". Miscimarra believed that the changes DuPont was making to the benefits plan were not material alterations, therefore, could not be defined as being a change. Miscimarra instead believed DuPont violated the Act when the employer refused to bargain a mandatory subject upon request.

ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Boulevard, Suite 1900
Chicago, IL 60606 – 312.263.1500

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