Tecnocap LLC, *and* United Steel, Paper and Forestry Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC. Cases 06–CA–265111, 06–CA–268399, 06–CA–270171, 06–CA–270931, and 06–CA–273334

August 26, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX, AND PROUTY

On August 30, 2022, Administrative Law Judge Kimberly R. Sorg-Graves issued the attached decision. The General Counsel and the Charging Party Union each filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel and the Union each filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.

The main issue presented is whether the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by unilaterally changing the work schedules of unit employees to mandatory 12-hour and 11-hour work shifts. The Respondent argues in defense that its unilateral conduct was privileged because it had a past practice of changing employee work shifts. We find the Respondent's defense meritless under long-established past practice jurisprudence pursuant to the Supreme Court's controlling decision in *NLRB v. Katz*, 369 U.S. 736 (1962). The Board in *Wendt Corp.*, 372 NLRB No. 135 (2023), reaffirmed its commitment to the bedrock principle set forth in *Katz* that a unilateral change made during collective-bargaining negotiations "must of necessity obstruct bargaining . . . [and] will rarely be justified by any reason of substance," and thus, the narrow past-practice defense to such unilateral action applies only when the employer proves its action is consistent with a longstanding past practice and is not informed by a large measure of discretion.[1] The Board in *Wendt* accordingly overruled *Raytheon Network Centric Systems*[2] to the extent it had departed from the mandate of *Katz*. The rationale of *Wendt* is sound, and we reaffirm and apply its principles and those of *Katz* today to find, contrary to the judge, that the Respondent's unilateral change during bargaining to 12-hour and 11-hour mandatory work shifts is precisely the type of discretionary, irregular unilateral conduct that the Supreme Court forbade in *Katz*. We further overrule, for the reasons set forth below, *Raytheon*'s holding (which *Wendt* did not address) that a past practice developed under or pursuant to a collectively bargained management-rights (or other such) clause authorizing discretionary unilateral employer action constitutes a term and condition of employment that permits such continued unilateral conduct following expiration of the agreement containing the clause.

I. BACKGROUND

The Respondent manufactures metal lids for glass containers. Its production, maintenance, and warehouse employees have been represented for 30 years by the Union or its predecessor through successive collective-bargaining agreements. The parties' most recent collective-bargaining agreement was effective from March 21, 2018, to September 30, 2019 (2018 Agreement). This case arises in the context of the parties' bargaining for a successor collective-bargaining agreement to the 2018 Agreement.

That bargaining was marred by the Respondent's unlawful conduct. The judge found, and the Respondent does not dispute, that the Respondent committed multiple unfair labor practices during bargaining. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new healthcare plan which significantly increased health care expenses for employees in comparison to the prior policy. The judge further found that the Respondent violated Section 8(a)(5) and (1) of the Act by its delay in providing requested information which was relevant to the parties' bargaining and the Union's ability to understand one of the Respondent's main bargaining demands. Finally, the judge found that the Respondent violated Section 8(d)(3) of the Act by failing to notify the State of West Virginia of its desire to modify the parties' 2018 Agreement. We adopt these unfair labor practice findings of the judge in the absence of exceptions by the Respondent.

The amended consolidated complaint further alleged the Respondent violated Section 8(a)(5) and (1) of the

[1] See *Katz*, 369 U.S. at 746–747. There is no dispute that the burden of establishing the past-practice affirmative defense to a unilateral change allegation rests with the party asserting the defense. See, e.g., *Wendt*, slip op. at 7 (citing *The Atlantic Group*, 371 NLRB No. 119, slip op. at 2 (2022); *Bemis Co., Inc.*, 370 NLRB No. 7, slip op. at 32 (2020)).

[2] 365 NLRB No. 161 (2017).

Act by unilaterally changing employees' work schedules to 12-hour and 11-hour shifts while bargaining for the successor agreement was ongoing. The General Counsel and the Union have excepted to the judge's dismissal of this allegation.

The Respondent Changes Employee Work Shift Schedules

Article 9, Section 1 of the 2018 Agreement sets a "normal workweek" as 40 hours to be worked in three shifts: 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m.; 11 p.m. to 7 a.m. It further provides that "Management may request with reasonable notification from time to time the working hour schedule be adjusted due to production requirements or facility conditions." The judge found that during the term of the 2018 Agreement the Respondent frequently adjusted employees' work shifts based on Article 9, Section 1.

Bargaining for a successor collective-bargaining agreement commenced on September 20, 2019. The Respondent continued to make changes to shift schedules after the expiration of the 2018 Agreement until August 2020, when the Union filed the first of several unfair labor practice charges challenging the Respondent's unilateral implementation of the 12-hour and 11-hour shifts while bargaining for a successor agreement was ongoing. The Respondent continued to make unilateral shift changes through January 2021.

Between October 2018 and August 2020, the judge found that the Respondent unilaterally adjusted the shift schedule by implementing employee work shifts of 10 or 10.25 hours for a total of more than 31 weeks.[3] The Respondent announced these changes by posting the upcoming week's shift schedule the Thursday before the next week's commencement of work on Monday. The parties stipulated that this was the practice of the Respondent both before and after the 2018 Agreement.

The Union Opposes the Respondent's Implementation of 12-hour and 11-hour Shifts

In April 2020, the Respondent met and bargained with the Union about Covid-19 protocols and sought to implement two mandatory unit-wide 12-hour shifts to prevent its spread. This was the first time the Respondent had posted mandatory 12-hour shifts in the 30 years the employees had been represented by a union. The Union opposed the 12-hour shifts. The Respondent posted a notice to employees explaining that it would not implement 12-hour shifts because the Union did not agree to the change.[4]

Despite the Union's clear opposition to 12-hour work shifts, four months later, on August 20, 2020,[5] the Respondent posted the employee work schedule mandating 12-hour shifts for all unit employees. The Respondent unilaterally implemented the 12-hour work shifts on August 24. The mandatory, unitwide shifts ran Monday through Friday, requiring every unit employee to work five consecutive 12-hour workdays. Shifts of this length had never before been implemented.

At the parties' August 25 bargaining session following the unilateral implementation of the 12-hour work shifts, the Respondent asserted that it achieves higher production rates with 12-hour shifts. Thereafter, the Union, in a series of e-mails to the Respondent, objected to the 12-hour shifts, requested to bargain about the issue, offered alternative scheduling options, proposed a written temporary memorandum of understanding on the topic, and raised the negative safety and health effects on employees due to the 12-hour shifts.[6] The Respondent rebuffed

[3] The Respondent during that time period also unilaterally adjusted the shift schedule as follows: the start time for first shift was usually 7 a.m. but it was changed to 6 a.m. and 5 a.m. at various times. Sometimes the first shift ended at 3 p.m., but often it was extended 15 minutes to overlap with the second shift that started at 3 p.m. At other times, Respondent scheduled 3 eight-hour shifts, and employees were assigned to cover all three shifts. On other occasions, the Respondent operated 3 overlapping shifts of 8.25 hours. The Respondent also moved shift assignments of less senior employees to cover for employees on leave.

[4] The Respondent's posted notice provided: "You may have heard of the implementation of a modified schedule of the workload into two 12 hour long shifts. That unusual arrangement has been proposed by the Company to reduce the risk of spreading [Covid-19] . . . We regret to inform that [sic] has not been possible to reach an agreement on that. Consequently, we will continue operating on three shifts."

[5] All subsequent dates are in 2020 unless otherwise noted.

[6] On August 27, the Union's local president e-mailed the Respondent pleading that

> 12 hour shifts are extremely hard on the workforce. Mandatory 12 hour days is hard enough but to then assign 8 hours on Saturday on top of that is unheard of. This has never been done before and there is a reason for that. The workforce gets tired and the risk of injuries and accidents increases. At some point, the employees must rest. I am asking you to reconsider these 12 hour days and to figure out how to give the employees a break . . . we understand that you need to fill customer demands but you also need to make sure the employees are SAFE and well rested. These extreme work hours are way too hard on the employees. Please reconsider and do not schedule yet another 12 hour work week and Saturday assignment. It is not safe and it is too hard on the employees to do this long term without a break and rest. [Capitalization in original.]

On August 28, the Union's local president e-mailed the Respondent that the Union was

> working on language for a memorandum of understanding for working hours during this critical production time. We understand your need to meet production. At the same time we hope that you can understand the needs of your employees, to get some rest. That being said could you discuss with [the Respondent's president] the length of

the Union's efforts to bargain over the 12-hour shifts, did not respond to the Union's proposed memorandum of understanding, and chastised the Union that "with regards to safety, your point of view is found totally unacceptable . . . [t]o work according to safety procedures is 24/7 duty, no matter how many hours are worked."[7] Instead, the Respondent continued the 12-hour, 5-days a week, mandatory work shift schedule for seven consecutive weeks until October 11.[8] The Union responded by filing another unfair labor practice charge.

The Respondent operated under three 10-hour shifts for the remainder of October. On October 27, the Respondent posted a notice announcing that it would start two 11-hour shifts the following week due to increased Covid-19 rates. On October 30, the Union, by e-mail to the Respondent, again protested the implementation of the shifts:

> Regarding the Company's announcement of 11-hour shifts, the Union objects to this unilateral action and calls upon the Company to immediately desist from implementing them.

However, the Respondent refused to bargain and insisted on its right to act unilaterally:

> As for the 11-hour shifts, the Company has an established right under the expired agreement and past practice to change schedules. However, I will consider whatever proposals you have on the issue of scheduling . . . .

The imposition of mandatory, unit-wide, 5 consecutive days a week, 11-hour shifts started on November 2 and continued through November 29. The Union protested the 11-hour work shifts by filing another unfair labor practice charge.

The Respondent returned to 3 shifts of 8.5 hours through the month of December. For the weeks starting January 4 and 11, 2021, Respondent again implemented mandatory, unit-wide, 12-hour shifts, 5 days a week. The Respondent notified the Union of the change on December 17, 2020. On December 21, the Union objected and sought bargaining:

> The Union objects to the Company's unilaterally-announced decision to implement 12-hour shifts on January 4. We demand to bargain over this issue. Changes to shift times must be addressed at the bargaining table. We are happy to meet to bargain on this and any other mandatory subject. No change can be made absent an agreement or a lawful impasse.

The Respondent refused to bargain, stating that the decision "has been made" based on "exceptional workload." The Union responded by filing another unfair labor practice charge.

On February 15, 2021, the Respondent again unilaterally implemented 12-hour shifts, this time for seven weeks, until April 4, 2021.

II. DISCUSSION

A. Legal Standard for Evaluating the Respondent's Past-Practice Defense

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court set forth the legal standard for unilateral action during bargaining and the narrow availability of past practice as an employer defense to a Section 8(a)(5) allegation. The Court explained that a unilateral change is "a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal" to bargain. Id. at 743. The Court accordingly declared that a unilateral change, made during bargaining with a newly certified union for a first contract, "must of necessity obstruct bargaining, contrary to the congressional policy" and "will rarely be justified by any reason of substance." Id. at 747.

Further, the Court considered and rejected the employer's argument that its past practice of acting unilaterally permitted it to again make a unilateral change with respect to merit wage increases. The Court held that the employer's unilateral action

> 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 fact that the [merit] . . . 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 -- dif-

---

> the workday. Is there any way we can eliminate or reduce the number of hours employees work each day? 12 hour days are extremely difficult on everyone but especially on your older employees. Can we do 10 hour days? Can you limit the number of 12 hour days to two days a week or every other day, with the understanding that Saturday would be a 8 hour day. Please think on this and give us your input. Hopefully we can get something in place by Thursday of next week. I am trying to remain optimistic, that if we work together we can find a solution that we can all live with.

On September 1, the Union e-mailed the Respondent a memorandum of understanding on scheduling and asked that the Respondent "please review the attached overtime agreement that the union proposes to help with relief for our members and continue producing product for the company." The memorandum included inter alia a provision that "[n]o employee will be assigned to work more than 12 hours on any shift."

[7] The Union responded by e-mail of August 27 to the Respondent acknowledging that "safety is a 24/7 job. I just wanted to let you know that exhausted employees sometimes make mistakes that they would not normally make when they are rested."

[8] The Respondent did grant the Union's request that the 12-hour shifts be adjusted to start 2 hours earlier at 5 a.m. rather than 7 a.m., with the second 12-hour work shift commencing at 5 p.m.

> ferentiates them from the wage increases and the changes in the sick-leave plan. We do not think it does. 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.

Id. at 746-747 (emphasis added).

Under the plain language of *Katz*, changes in terms and conditions of employment that are "informed by a large measure of discretion" cannot be unilaterally implemented even if they might be characterized as consistent with past practice. See id. at 746-747. As the Supreme Court subsequently clarified, the *Katz* doctrine also prohibits employers from making unilateral changes in terms and conditions of employment in "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) (citing, e.g., *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988)).

In *Wendt Corp.*, 372 NLRB No. 135 (2023), the Board discussed the extensive body of jurisprudence which has applied the Supreme Court's instructions in *Katz* for evaluating an employer's past practice defense to unilateral changes during bargaining. *Wendt* and *Katz* preclude unilateral conduct, even when the employer has shown that the conduct is consistent with a longstanding past practice, where the unilateral action is informed by a large measure of discretion. Unilateral actions that were not a longstanding past practice, and not "automatic" and nondiscretionary, cannot be changes that, in the words of *Katz*, "in effect, were a mere continuation of the status quo." 369 U.S. at 746.[9]

In order to satisfy the requirement of *Katz* that the past practice be longstanding, a "past practice 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).[10] The Board in *Wendt* reaffirmed the centrality of these established regularity, consistency, and frequency requirements to the analysis of a whether a past-practice defense has been established. "These requirements are vital to ensuring that employees will recognize that a pattern of changes is in fact a practice that is part of their terms and conditions of employment." *Wendt*, slip op. at9.

With respect to the Supreme Court's express prohibition in *Katz* against unilateral action informed by a large measure of discretion, *Wendt* confirmed that the "key to the analysis is whether the unilateral 'change was fixed by an established formula containing variables beyond the employer's immediate influence' . . . based on nondiscretionary standards and guidelines." *Wendt*, slip op. at 6 (quoting *Aaron Bros. Co. v. NLRB*, 661 F.2d 750, 753 (9th Cir. 1981)). "The greater the discretion, the Court has reasoned, the greater the danger unilateral action will destabilize industrial relations by undermining a union's institutional credibility." Id. (quoting *Aaron Bros.*, 661 F.2d at 753).[11]

Wendt further considered the Board's 2017 decision in *Raytheon*, 365 NLRB No. 161, and found it to be incompatible with *Katz* and its longstanding construction by the Board and the courts. In *Raytheon*, a Board majority found that the employer's unilateral changes to its health benefits plans were privileged by its past practice developed under an expired management-rights clause and thus did not violate Section 8(a)(5) of the Act. The *Raytheon* majority held:

> an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past.

Id., slip op. at 16.

Contrary to the explicit holding in *Katz*, however, *Raytheon's* articulation of its kind-and-degree test interpreted the past-practice doctrine to privilege unilateral conduct even if that conduct involved substantial employer discretion. The Board in *Wendt* rejected this view and explained that *Raytheon* patently erred by dismissing a central teaching of *Katz* that the past-practice defense does not attach to conduct that is "informed by a large measure of discretion."[12] The Board in *Wendt* specifically rejected *Raytheon*'s claim that the Supreme Court's unwillingness in *Katz* to permit unilateral action based on discretionary past practices was a mere "factual observation" that the Court simply "mentioned." 372 NLRB 135, slip op. at 10 (quoting 365 NLRB No. 161, slip op. at 16). Rather, the Board in *Wendt* held that the prohibition on unilateral action based on discretionary practices was a constituent part of *Katz*. The *Wendt* Board found

[9] See *Wendt*, slip op at 4.

[10] See *Wendt*, slip op. at 4 and fn. 12 (collecting cases).

[11] See *Wendt*, slip op. at 5 (collecting cases applying the principle limiting the permissible scope of discretionary unilateral conduct).

[12] 369 U.S. at 746.

no caselaw support for *Raytheon*'s constricted interpretation of the express holding of Katz, declaring that:

> the Board and the courts have repeatedly and consistently deemed the discretion principle of *Katz* as a holding of law and viewed the absence of substantial employer discretion as a prerequisite for upholding a past-practice defense.

372 NLRB 135, slip op. at 10. The Board in *Wendt* accordingly found that "Raytheon's articulation of the kind and degree test to replace the discretion analysis wholly failed to acknowledge, adhere to, and apply binding Supreme Court precedent under *Katz* that discretionary conduct cannot be unilaterally implemented under the past-practice defense." 372 NLRB 135, slip op. at 9--.

In addition, the Board in *Wendt* further found *Raytheon*'s willingness to treat discretionary past practices as privileging unilateral action to be flawed policy that, apart from the holding of *Katz*, warranted reversal of *Raytheon*. The *Raytheon* majority asserted its rule was justified by the Board's obligation to foster stability in labor relations. See 365 NLRB No. 161, slip op. at 11 & fn. 48. The *Raytheon* majority neglected, however, to meaningfully account for the Board's statutory mandate to "encourag[e] the practice and procedure of collective bargaining" set forth in Section 1 of the Act.[13] *Wendt* explained that the harm to collective bargaining from unilateral action, and its concomitant undermining of the union's representative status, is long-established by the Supreme Court and Board and court precedent.[14] *Raytheon* ignored, however, that Section 8(a)(5) of the Act forbids unilateral action because it obstructs bargaining, and *Raytheon* was thus premised on, as *Wendt* made clear, "an erroneous and incomplete account of NLRA statutory policy because it omitted and ignored that encouraging collective bargaining is one of the fundamental purposes of the Act." See *Wendt*, slip op. at 12. *Wendt* further emphasized that Congress has already determined that it is collective bargaining itself that is vital to securing industrial stability and preventing disruptions of commerce. Id., slip op. at 12.[15]

Wendt accordingly overruled *Raytheon's* kind-and-degree test and its holding that Board and court caselaw in fact permits unilateral changes that involved substantial employer discretion. *Wendt*, slip op. at 9.[16] *Wendt* explained that partially overruling *Raytheon* restored full vitality to the Supreme Court's *Katz* decision and was desirable because the pre-*Raytheon* precedent better serves the policies of the Act of encouraging collective bargaining and achieving stability in labor relations.[17] The Board determined that its decision in *Wendt* overruling *Raytheon* was to be applied retroactively to all pending cases.[18]

Finally, in *Wendt*, the Board overruled *Mike-Sell's Potato Chip Co.*, 368 NLRB. No 145 (2019), a post-*Raytheon* decision from which then-Member McFerran had dissented, on the grounds that the employer there did not establish a regular and consistent practice of unilaterally selling sales routes. 372 NLRB 135, slip op. at 9 fn. 31. The Board explained that *Mike-Sell's* fell outside the ambit of longstanding precedent, including *Raytheon*, because it failed to meet the past-practice requirements of regularity and consistency. See *Wendt*, slip op. at fn. 31. The Board noted in *Mike-Sell's* there were more years in which there were no sales by the employer (10) than years with sales (7), along with multiple periods of 2-3 consecutive years in which there were no sales. The sales that did take place occurred on a sporadic, random, and intermittent basis and would not reasonably inform employees that a change would occur on a regular basis.

B. The Judge's Decision

The judge recognized that the Respondent's past practice of implementing unilateral changes in employee work shifts was wholly discretionary. The judge found that the Respondent "used its discretion to change employee shifts to meet production demands" and "fre-

[13] 29 U.S.C. § 151.

[14] See *Wendt*, slip op. at 11 (collecting cases) and citing, inter alia, *Litton v. NLRB*, 501 U.S. at 198 ("[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations."); *NLRB v. McClatchy Newspapers*, *Inc.*, 964 F.3d 1153, 1162 (D.C. Cir. 2002) (a unilateral change "injures the process of collective bargaining itself," and "interferes with the right of self-organization") (quoting *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 385) (1945)); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987) (the rule against unilateral changes "is intended to prevent the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them").

[15] Citing *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996) ("The object of the [Act] is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes[.]"); *Bloom v. NLRB*, 603 F.2d 1015, 1019 (D.C. Cir. 1979) ("The fundamental intent of the National Labor Relations Act as amended is to minimize industrial strife and promote industrial stability through collective bargaining.").

[16] Then Member-McFerran (along with Member Pearce) dissented in *Raytheon*, maintaining that the majority's interpretation "misse[d] the whole point" of *Katz*'s past practice holding: "that managerial discretion is determinative in deciding whether a past practice of unilateral changes may lawfully continue during contract negotiations." *Raytheon*, 365 NLRB No. 161, slip op. 29.

[17] See *Wendt*, slip op. at12. Member Kaplan dissented in part in *Wendt* and adhered to the *Raytheon* decision, in which he filed a concurring opinion and joined the majority decision. Id., slip op. at 22-33.

[18] See *Wendt*, slip op. at 16-17.

quently exercised broad leeway in establishing the number, length, and start and end times of shifts." The judge further acknowledged that the Respondent's changes in employee schedules were neither regular nor consistent but were implemented "on an inconsistent basis and in inconsistent ways" and had "no consistent pattern."

Nevertheless, the judge found the Respondent's past-practice defense to its unilateral implementation of the mandatory 12-hour and 11-hour work shifts to be meritorious, following *Raytheon*'s kind-and-degree test. The judge accordingly dismissed the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing those unilateral changes.

In applying the kind-and-degree test, the judge found that the Respondent "frequently altered shift schedules during the term of the contract and after its expiration" and that the implementation of the 12-hour and 11-hour shifts "was a continuance of its past practice of altering shifts in widely varying ways to meet production needs. The judge found that the significant increase in the length of employee work shifts – 45 minutes and 105 minutes longer than any prior shift[19] – did not comprise a change in kind or degree. The judge found irrelevant to the analysis of the Respondent's past-practice defense the Union's concerns whether the longer shifts heightened the possibility of injury to employees.

The judge further found the Respondent's unilateral implementation of the 12-hour and 11-hour work shifts was justified under Article 9, Section 1 of the expired 2018 Agreement. The judge found that the 2018 Agreement "contains explicit language that granted Respondent the privilege to alter work shifts based upon production needs and conditions in the facility and the language contains no explicit limits on how Respondent may alter the shifts." The judge concluded that the reasons for changing to 12-hour and 11-hour work shifts aligned both with the language of the expired 2018 Agreement and with the Respondent's past practice.

The judge's conclusion that the Respondent had met its burden of establishing a past-practice defense under *Raytheon* was subject to a significant caveat. The judge

> recognize[d] that an 11 or 12-hour shift is significantly different to employees than an 8-hour or even a 10.25-hour shift and that such inconsistent changes most likely would have been found unlawful under Board holdings immediately preceding *Raytheon.*

The judge nevertheless determined that the unilateral changes were lawful under *Raytheon* and *Mike-Sell's*, the latter, the judge described as a case where the Board "found lawful the sale of driver routes based upon a widely inconsistent past practice in the frequency and number of routes sold."

C. The Respondent's Unilateral Implementation of 12-Hour and 11-Hour Work Shifts is Unlawful Under Katz and Wendt

The Respondent's past-practice defense to its unilateral actions implementing 12-hour and 11-hour work shifts fails under the principles of *Katz* and *Wendt* because its actions were "informed by a large measure of discretion." As explained above, the past-practice defense is limited by *Katz* to situations where the employer's unilateral change is fixed by an established formula based on nondiscretionary standards and guidelines. For example, in *Eugene Iovine*, *Inc.*, the Board found that the employer's recurring unilateral reductions of employees' work hours were discretionary and therefore required bargaining with the union. The employer's past-practice defense failed because the unilateral action lacked a "'reasonable certainty' as to the timing and criteria for a reduction in hours" and "the employer's discretion to decide whether to reduce employee hours 'appear[ed] to be unlimited.'" 328 NLRB 294, 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001).[20]

The Respondent justified its unilateral conduct primarily based on its asserted production requirements and its judgment that 12-hour and 11-hour shifts were necessary to meet those needs. When it unilaterally implemented 12-hour work shifts for the first time in August 2020, it advised the Union that "running . . . regular three shifts and Saturdays . . . wasn't enough" to meet production needs and that its unilateral decision was thus "unavoidable." The Respondent further declared that it could not tell the Union when its production needs would ease and thus permit return to regular three-shift days, stating only that that determination "will be evaluated on a weekly

[19] While no party has filed exceptions to this factual finding of the judge, the record reflects that for one single week the Respondent implemented 10.5-hour shifts. This occurred on the first week following the effective date of the 2019 collective-bargaining agreement. The Respondent never again implemented shifts longer than 10.25 hours.

[20] See, e.g., *NLRB v. Allis-Chalmers Corp.*, 601 F.2d 870, 875-876 (5th Cir. 1979) (employer failed to meet its "heavy burden" of showing that its unilateral actions were "purely automatic and pursuant to definite guidelines," noting that the wage increases were not automatic but involved "considerable discretion"); *NLRB v. John Zink Co.*, 551 F.2d 799, 801-802 (10th Cir. 1977) ("In [*Katz*] the Court distinguished between automatic and discretionary wage increases and held that discretionary increases during contract negotiations violated the employer's duty to bargain in good faith" and finding the pay raises unlawful because they "resulted from the exercise of managerial discretion"). Compare *Post-Tribune Co*., 337 NLRB 1279, 1280 (2002) (employer "had a consistent, established past practice of allocating health insurance premiums on an 80/20-percent and 60/40-percent basis" and thus did not violate Sec. 8(a)(5) by unilaterally allocating premium increases at the same fixed ratio during bargaining), cited with approval in *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 68 (D.C. Cir. 2012).

basis." Similarly, the Respondent announced its unilateral implementation of 12-hour shifts in January 2021 by amorphously referring to the "exceptional workload" and the "manufacturing schedule that fit those needs."[21]

The judge's finding that the Respondent's unilateral implementation of the unprecedented 12-hour and 11-hour work shifts was discretionary and accomplished with broad leeway is fully supported by the evidence.[22] The Respondent's claims that its unilateral decisions were "unavoidable" and "necessary" to accommodate an "exceptional workload" is based on nothing more than the Respondent's subjective judgment and evaluation at the time of the decision to implement. The basis for its determination of the need for longer work shifts is entirely undefined and purely within the Respondent's discretion. Indeed, nothing in the record shows *any* criteria or guidelines establishing when production requirements necessitated a 12-hour or 11-hour work shift, as opposed to 10.25-hour shifts or three 8-hour shifts. The Respondent's unilateral conduct is the antithesis of an automatic nondiscretionary action but rather, in the words of *Katz*, is impermissibly "informed by a large measure of discretion." In fact, the Respondent's discretion is entirely unlimited.

Accordingly, the Union had no way of knowing, and explaining to the unit employees it represents, when or why or how often they will be required to work 12-hour or 11-hour work shifts as opposed to shorter shifts, *other than when the Respondent decided to announce that it was necessary*. The Union likewise had no basis to know or explain to the unit employees who are under compulsion to work the longer shifts, when those longer shifts might cease, and whether they might last for seven weeks (as in Fall 2020) or for two weeks (as in January 2021). This perfectly illustrates the vice identified by the Supreme Court in *Katz* of unilateral conduct informed by a large measure of discretion: "[t]here simply is no way in such [a] case for a union to know whether or not there has been a substantial departure from the past practice[.]" *Katz*, 369 U.S. at 746. Here, the Respondent's work shift changes had never over a 30-year period included 12-hour and 11-hour shifts. The Supreme Court held that the union in such circumstances "may properly insist that the company negotiate as to the procedures and criteria for determining" changes. Id. at 746–747.

The Union here sought to do so. It proposed a temporary memorandum of understanding setting forth procedures and criteria for implementation of work shift changes designed to ameliorate the impact on employees of long shifts.[23] The Union's proposals were exactly the effort to collectively bargain terms and conditions of employment the Act gives it the right to pursue and correspondingly obligates the Respondent to respond to in good faith.[24] The Respondent entirely rebuffed the Union's efforts to engage in bargaining on these issues and instead insisted on its right to act unilaterally. This is an unfair labor practice.[25]

The pernicious effect of the Respondent's unilateral conduct on the collective- bargaining process is patent. As the Board explained in *Wendt*, the Supreme Court has long recognized that unilateral action "minimizes the influence of organized bargaining" and "interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective-bargaining agent." *May Dept. Stores Co.*, 326 U.S. at 385.[26] That is precisely what occurred here. The Union, in representing unit employees, sought to bargain over what employees considered punishingly long and unsafe shifts worked on consecutive days and consecutive weeks. Indeed, the Union's proposed temporary memorandum of understanding sought to limit the harmful effect on employees of the longer shifts by assigning them every other day alternating with "only an 8-hour day" and "with every other weekend off to rest." The Union further feared that the Respondent would implement shifts longer than 12 hours and proposed that no employee be mandated to work more than 12 hours on any shift.[27] The Union's inability to compel the Respondent to engage in bargaining on the topic of work shifts sent an indelible message to employees "that their union is ineffectual, impotent, and unable to effectively represent them." *NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8th

[21] The Respondent's December 23 email to the Union provided: "In order to accommodate the exceptional workload and taking into account the booking, the necessary decision to deploy the manufacturing schedule that fits those needs at the best of our ability has been made."

[22] No exceptions were filed to the judge's finding that the scheduling changes at issue were discretionary.

[23] The very first point proposed by the Union was the criterion that the shifts "be determined by the number of **critical production lines** the Company needs to schedule." ((Bold in original.) This proposal thus presented a nondiscretionary metric upon which to base length of work shifts. The Union further proposed procedures for selecting employees to work by canvassing for volunteers first, and if that was insufficient, then by seniority on a rotating basis to ensure equal distribution of the shifts.

[24] It is well-settled that hours of work and work schedules are mandatory subjects of bargaining under the Act. See 29 U.S.C. § 158(d).

[25] See *Katz*, 369 U.S. at 747 (a unilateral change made during contract negotiations "must of necessity obstruct bargaining, contrary to the congressional policy").

[26] See *Wendt*, slip op. at 11 (collecting cases holding that unilateral action undermines the collective-bargaining process).

[27] The judge found, as discussed infra, that under *Raytheon* there were no limits whatsoever on the Respondent's ability to unilaterally alter the length of work shifts.

Cir. 2002). The Respondent's unilateral conduct while the parties were statutorily obliged to engage in the give-and-take of bargaining for an overall collective-bargaining agreement undermined and destabilized the collective-bargaining regimen that lies at the core of the Act and national labor policy.[28]

We accordingly find that, applying the prohibition against unilateral conduct informed by a large measure of discretion mandated by the Court in *Katz* and restored to full vitality in *Wendt*, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing 12-hour and 11-hour work shifts.[29]

C. The Respondent Failed to Establish a Regular and Consistent Past Practice of Implementing 12-Hour and 11-Hour Work Shifts

We further find that the Respondent's unilateral conduct of implementing 12-hour and 11-hour work shifts fails to satisfy the requirements of *Katz* that a past practice be "longstanding" and thus must be shown by the employer to have been regular and consistent. As the Board explained in *Wendt*, *Raytheon* fully acknowledged and upheld long-settled precedent that for past changes to constitute a "practice," the changes must have been "regular and consistent." *Raytheon*, 365 NLRB No. 161, slip op. at 19 fn. 89 (holding that "under *Katz*, an 'employer modification' that is a continuation of 'any *regular and consistent* past pattern of change' is 'not a "change" in working conditions at all'") (emphasis supplied).[30] As recognized in Wendt, *Raytheon*'s "kind and degree" test did not displace the established regular and consistent requirements. Thus, as explained above, the party asserting the existence of a past practice bears the burden of proving that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis. See *Wendt*, slip op. at 8-9.

While the Respondent, from October 2018 through August 2020, had made shift changes of up to 10.25 hours (and changes in the number of shifts and other adjustments), there is no dispute that in the thirty years that the Respondent's employees have been represented by a union, the Respondent had never before implemented 12-hour or 11-hour shifts. Thus, when the Respondent first implemented 12-hour shifts in August 2020, it had no past practice, let alone a regular and consistent one, of implementing such long shifts.[31] Indeed, when the Respondent first sought to implement 12-hour shifts in April 2020, the Respondent itself described the 12-hour shifts as "unusual" rather than as a continuation of a regular practice.[32] When the Respondent first unilaterally implemented mandatory 12-hour shifts in August 2020, the Union proclaimed, accurately, that "[t]his has never been done before."[33] These undisputed facts refute that the 12-hour and 11-hour work shifts had occurred with such regularity that employees could reasonably expect the practice to reoccur on a consistent basis.[34]

These facts further fully support the judge's findings that the 12-hour and 11-hour work shifts were significantly different "in the eyes of employees" than previous changes in shift length. The judge found that those previous changes in employee shift schedules were not regular but were implemented "on an inconsistent basis and

[28] "The statutory scheme recognizes that allowing an employer to make unilateral changes to the terms and conditions of employment during negotiations creates an untenable power imbalance infringing the employees' [Sec. 8(a)]5 rights to bargain and their [Sec. 8(a)]1 rights to organize." *NLRB v. Nexstar Broad., Inc.*, 4 F.4th 801, 806 (9th Cir. 2021); *NLRB v. McClatchy Newspapers, Inc.*, 964 F.3d 1153, 1162 (D.C. Cir. 2002) (a unilateral change "injures the process of collective bargaining itself.")

[29] To the extent the Respondent's unilateral conduct implementing 12-hour and 11-hour work shifts was initially animated by concerns regarding Covid-19, the Respondent presented neither to the Union nor in the record before us any criteria, guidelines, or objective evidence establishing when elongated shifts were necessary as a prophylactic health measure. The Respondent does not argue Covid-19 concerns constituted an economic exigency compelling prompt action that excused its unilateral conduct and its failure to satisfy its bargaining obligation. See *RBE Electronics of S.D., Inc.,* 320 NLRB 80, 81 (1995). In any event, the record shows that concerns regarding Covid-19 gave way to discretionary production determinations by the Respondent as its justification for unilateral conduct. We observe that the Respondent's reliance on its view of the health and safety concerns of employees to justify its discretionary unilateral conduct stands in stark contrast to its curt dismissal of the health and safety concerns expressed by employees to the Union, which the Union relayed to the Respondent.

[30] See *Raytheon*, supra, 365 NLRB No. 161, slip op. at 5 & fn. 24 ("[T]he case law (including the *Katz* decision itself) makes clear 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*.") (emphasis in original).

[31] Indeed, the judge found that the record did not establish that the Respondent ever altered shift lengths prior to October 2018.

[32] We reject our dissenting colleague's attempt to wave this statement away. It is a contemporaneous admission, prominently stated in the first paragraph of a memo sent to all employees from the Respondent's Director of Human Resources, and a fact confirmed based on the record as a whole.

[33] As noted, the Union added that there is a "reason" it has never been done before: "the risk of injuries and accidents." The Board takes administrative notice that such long shifts threaten employee health and safety. According to OSHA, "working 12 hours per day is associated with a 37% increased risk of injury." See www.OSHA.gov/worker-fatigue/hazards.

[34] See *PPG Industries*, 372 NLRB No. 78, slip op. at 2 (2023) ("[T]estimony from employees describing the mental, physical, and financial distress resulting from working such 12-hour shifts underscores the severity of the schedule change. In these circumstances, employees would not reasonably consider the action at issue to be consistent with what [the Respondent] has done in the past.").

in inconsistent ways" and had "no consistent pattern." The swiftness with which the Union reacted to the implementation of the 12-hour and 11-hour shifts, and its pleading efforts to oppose them, demonstrates that the employees and the Union did not and could not have expected such shifts to occur based on the Respondent's previous unilateral implementation of shifts of up to 10.25 hours (and in one single instance 10.5 hours) for the period from October 2018 through August 2020.

We further observe that the Union successfully opposed the 12-hour work shifts the first time the Respondent sought to unilaterally implement them in April 2020, and vigorously contested the 12-hour and 11-hour shifts on the next three occasions the Respondent unilaterally implemented them by, inter alia, requesting bargaining, proposing alternatives, and filing unfair labor practice charges. The Respondent's argument in its answering brief that the Union failed to timely request bargaining and therefore waived its rights and somehow acquiesced to the implementation of the 12-hour and 11-hour work shifts is a nonstarter in view of the Union's opposition each time the Respondent sought to implement those shifts. Similarly, the Respondent's contention that it provided timely notice of the implementation of the 12-hour and 11-hour work shifts is meritless. Each time the Respondent notified the Union of the shift changes, it had already made its decision to implement those shifts and presented the Union with a fait accompli.[35] A union cannot be held to have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli. See, e.g., *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip op. at 2 (2018); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001) (notice of a fait accompli is not timely notice for bargaining).

Further, under *Bottom Line Enterprises*,[36] when "the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it 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." 302 NLRB 373, 374. Thus, even if the Respondent had given adequate notice and, in fact, engaged in bargaining concerning work shifts (which it did not), and even if the Union had not protested and offered alternatives, the Respondent was still required to refrain from implementing the 12-hour and 11-hour work shifts until the parties reached an overall agreement or impasse.

E. The Respondent's Unilateral Conduct is Not Rendered Permissible by the Terms of the Expired 2019 Collective-Bargaining Agreement

The judge, in finding that the unilateral implementation of the 12-hour and 11-hour shifts was not unlawful, cited the Respondent's discretionary authority to adjust employee work shifts under Article 9, Section 1 of the 2018 Agreement.[37] The agreement had long since expired at the time of the Respondent's unilateral conduct, and Article 9, Section 1 contains no language suggesting that that the parties agreed that the provision survives contract expiration.[38] Nevertheless, the judge found that the Respondent's discretionary past practice developed pursuant to the expired clause during the term of the 2018 Agreement and after it expired was sufficient to establish its past-practice affirmative defense under Raytheon.[39] For the reasons set forth below, we overrule Raytheon's holding that a past practice developed under or pursuant to an expired collectively bargained management-rights (or other such) clause authorizing discretionary unilateral employer conduct constitutes a defense to a unilateral change allegation.

We do not write on a clean slate on the issue of whether discretionary unilateral changes ostensibly made pursuant to a past practice developed under an expired management-rights clause—or as in this case, a narrower subject-specific contractual reservation of managerial discretion—are unlawful. In two separate decisions in the companion DuPont cases,[40] the Board found that the employer acted unlawfully by unilaterally changing the terms of the employees' benefit plans following the expi-

[35] The Respondent in its e-mails to the Union variously stated the "decision . . . has been made" and the "decision . . . has been unavoidable" and "[a]s for the 11-hour shifts, the Company has an established right under the expired agreement and past practice to change schedules. However, I will consider whatever proposals you have on the issue . . . . " Mere consideration is no substitute for timely notice that permits timely bargaining, particularly in the face of the Respondent's insistence on the right to act unilaterally, and its actual unilateral conduct.

[36] 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

[37] As noted above, Article 9, Sec. 1 provides that "[m]anagement may request with reasonable notification from time to time the working hour schedule be adjusted due to production requirements or facility conditions."

[38] See *KOIN-TV*, 369 NLRB No. 161, slip op. at 2 (2020) (provisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration).

[39] The Respondent continued to make discretionary shift changes for about 11 months after the expiration of the 2018 Agreement prior to the Respondent's first implementation of the disputed shifts in August 2020.

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

ration of the applicable collective-bargaining agreements, and while the parties were negotiating for successor collective-bargaining agreements and were not at impasse. The respondent there asserted – as in the instant case – as an affirmative defense that its postexpiration discretionary changes to the benefit plans were privileged by its past practice. The Board rejected the defense, and found that because the asserted past practice was based on prior changes that were implemented pursuant to its discretion granted under a management-rights clause in the contracts, the employer's authority to continue to make such discretionary changes did not survive the expiration of those contracts.[41] The Board cited settled law that a "management-rights clause does not survive the expiration of the contract." See *DuPont-Louisville*, 355 NLRB at 1085.

On review, the District of Columbia Circuit observed that some Board precedent supported the Board's decision in the *DuPont* cases. See *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d at 70. Thus, the court acknowledged that in cases such as *Beverly Health & Rehabilitation Services*[42] and *Register-Guard*,[43] the Board had held that "unilateral changes made pursuant to a past practice developed under an expired management-rights clause were unlawful." 682 F.3d at 70. However, the court explained that the Board "took a different position" in later decisions, which stated that the legality of the postcontract expiration changes did not depend on "whether a contractual waiver of the right to bargain survives the expiration of the contract" but rather rested on whether the change "is grounded in past practice, and the continuance thereof." *Du Pont v. NLRB*, 682 F.3d at 69 (quoting *Courier-Journal*, 342 NLRB 1093, 1095 (2004)).[44] In this latter view, "it is the actual past practice of unilateral activity under the management-rights clause of the [collective-bargaining agreement], 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. at 69. The court, pointing to the Board's conflicting precedent, remanded the *DuPont* cases to the Board to conform its precedent to one of its lines of caselaw and to explain why it was doing so. Id. at 70.

The Board in *E.I du Pont de Nemours*, 364 NLRB 1648 (2016), accepted the court's remand and reaffirmed its earlier case precedent identified by the court, holding 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." Id., at 1650. The Board held that the Act's overarching policy to promote the practice of collective bargaining strongly supported its choice, citing Section 1 of the Act.[45] The Board anchored its decision in the Supreme Court's *Katz* decision and its progeny holding unilateral action to be contrary to the general duty to bargain under the Act and the corollary tightly cabined past-practice defense exception to the duty to bargain which does not apply when the practice is informed by a large measure of discretion.

The Board explained that parties may agree to a contractual provision that authorizes an employer to act unilaterally in its discretion with respect to one or more mandatory subjects of bargaining, and that such agreement may arise in the give-and-take of bargaining for an overall collective-bargaining agreement in the interest of concluding an agreement. Such a provision is commonly known as a management-rights clause. The Board cited settled law 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' intentions to continue the clause in effect beyond contract expiration.[46] The Board explained that a management-rights clause involves a consensual surrender of a fundamental statutory bargaining right, and such waivers permitting discretionary conduct are presumed not to survive the contract. 364 NLRB at 1652.[47] The Board

[41] See *DuPont-Louisville*, 355 NLRB at 1084-1086; *DuPont-Edge Moor*, 355 NLRB at 1096.

[42] 335 NLRB 635, 636–637 (2001) (*Beverly 2001*), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003).

[43] 339 NLRB 353, 355–356 (2003).

[44] The court also cited *Capitol Ford*, 343 NLRB 1058 (2004), 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 between contracts, and *Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319, 1319 fn. 5 (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." As we discuss below, the Board overruled these cases in *Wendt*. supra, slip op. at 13 fn. 56.

[45] Sec. 1 of the NLRA provides that "It is . . . the policy of the United States to . . . encourage[e] the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of . . . employment." 29 U.S.C. § 151.

[46] Citing, e.g., *Holiday Inn of Victorville*, 284 NLRB 916, 916–917 (1987). See also *American National Red Cross*, 364 NLRB 1390, 1393 (2016); *Buck Creek Coal,* 310 NLRB 1240, 1240 fn. 1 (1993); *Control Services*, 303 NLRB 481, 484 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992); *Kendall College of Art*, 288 NLRB 1205, 1212 (1988).

[47] See 364 NLRB at 1653 ("[W]hen 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"). The Board likened management-rights clauses to the other limited exceptions to the status-

underscored that "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." 364 NLRB at 1652 (quoting *Beverly* 2001, 335 NLRB at 636). Thus, discretionary changes made pursuant to a grant of authority contained in expired management-rights clause cannot constitute a past practice that an employer may continue after contract expiration. See id. The Board further emphasized that permitting postcontract discretionary changes following expiration of a management-rights clause under the guise of past practice cannot be reconciled with longstanding law under Katz forbidding unilateral conduct informed by a large measure of discretion. Id. at 1653–1655. The Board explained that allowing such changes would frustrate collective bargaining and undermine the union's bargaining representative status by permitting unilateral conduct during contract negotiations. Id.

In *Raytheon*, 365 NLRB No. 161, the Board overruled *Du Pont*, and articulated an expansive view of the past-practice defense. *Raytheon* held that even if the employer's asserted past practice was developed under or pursuant to a collective-bargaining agreement containing a management-rights clause authorizing unilateral employer action, the employer was privileged to continue that discretionary unilateral practice even after the expiration of the agreement embodying the clause. The limitation imposed by *Raytheon* was that the discretionary unilateral actions "do not materially vary in kind or degree from what has been customary in the past."[48]

In the view of the *Raytheon* majority, in determining whether the employer's unilateral actions constitute a "change" requiring bargaining, the focus of caselaw has been "on whether there has been 'a substantial departure from past practice,' with no scrutiny into whether [collective-bargaining agreements] existed when the employer's prior actions created the past practice, and regardless of whether any [collective-bargaining agreements] contained language expressly permitting the actions in question." *Raytheon*, 365 NLRB No. 161, slip op. at 6 (quoting *Katz*, 369 U.S. at 746). *Raytheon* found that the Board simply "compar[es] the challenged actions taken by the employer with what the employer had done in the past" without regard to contract expiration and even during the hiatus between contracts when bargaining for a successor contract is ongoing. Id., slip op at 7.[49] The *Raytheon* majority found this was the case, as discussed supra, even if the unilateral conduct "involved substantial employer discretion." Id., slip op. at 8, 16. In so concluding, the *Raytheon* majority primarily relied on the cases cited by the court in *Du Pont*[50] as well as earlier Board cases.[51]

The majority in *Raytheon* found that its decision was supported by the Board's responsibility to foster stable bargaining relationships by providing certainty that employers are "doing precisely what they have done in the past" until parties bargain to the conclusion of an overall collective-bargaining agreement. See *Raytheon*, 365 NLRB No. 161, slip op. at 11. *Raytheon* contended that *Du Pont* was unworkable because it required scrutiny of prior collective-bargaining agreements (possibly extending back in time over decades) to determine whether employers have effected a "change." Id., slip op. at 14–15. The *Raytheon* majority also determined that its broad interpretation of permissible unilateral employer conduct under the past-practice defense did not undermine collective bargaining because the employer is still obligated to bargain about the already changed subject if the union requests such bargaining. Id., slip op. at 11–12, 18–19.

The General Counsel in this proceeding requests that the Board overrule the holding in *Raytheon* that an employer is privileged to make unilateral changes postcontract expiration based on a practice developed under or pursuant to an expired management-rights clause.[52] Our decisionmaking on this issue is guided by three fundamental principles. First, we adhere to our obligation to comport with controlling Supreme Court precedent in

quo doctrine, which are also "fundamentally creatures of contract," including arbitration and no-strike/no-lockout clauses. Id. at 1651.

[48] *Raytheon*, 365 NLRB No. 161, slip op. at 16. Then-Member McFerran and former Member Pearce dissented, finding that conduct developed under a management-rights clause cannot privilege unilateral action following the expiration of the collective-bargaining agreement containing that clause. Id., slip op. at 33-34.

[49] See id., slip op. at 12 ("It does not matter whether or what type of CBA [collective-bargaining agreement] may exist, or may have existed, when evaluating whether a particular action constitutes a 'change.'").

[50] *Courier-Journal*, 342 NLRB 1093 (2004); *Capitol Ford*, 343 NLRB 1058 (2004); *Beverly 2006*, 346 NLRB 1319 (2006).

[51] See *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965), and *Shell Oil*, 149 NLRB 283 (1964).

[52] The Board did not reach this issue in *Wendt* because that case did not involve a past practice developed under a management-rights clause. *Wendt*, slip op. at 14 fn. 58. This case does involve a management-rights clause, which may be broad in scope or, as here, a narrower contractual reservation of managerial discretion addressing a specific subject of bargaining: work schedules. See *Du Pont*, 355 NLRB at 1085. "A management-rights clause is simply a contractual provision that authorizes an employer to act unilaterally, in its discretion, with respect to a mandatory subject of bargaining." Id. at 1089. See *Register-Guard*, supra, 339 NLRB at 355 (wages); *Ironton Publications*, 321 NLRB 1048, 1048 (1996) (merit pay increases); *Blue Circle Cement Co.*, 319 NLRB 954, 954 (1995) (vacation period and shift-starting time), enfd. in part mem. 106 F.3d 413 (10th Cir. 1997); *Furniture Rentors*, supra, 311 NLRB at 754 (subcontracting); *Control Services*, supra, 303 NLRB at 483–484 (scheduling).

Katz. Second, we are mindful of long-settled Board precedent disfavoring and prohibiting unilateral conduct under the Act. Third, we are guided by the importance of collective bargaining that lies at the core of the Act and which it is our statutory responsibility to encourage.

As the Board made clear in *Wendt*, and we have reiterated today, the Supreme Court in *Katz* held that an employer's unilateral change violates the duty to bargain under the Act, even where the change is consistent with a past practice of similar changes, if the change involves significant employer discretion. Today we find that the management-rights past-practice rule articulated in *Raytheon* is also incompatible with *Katz*, because it permits an employer to continue to make sweeping discretionary changes in employment terms even after a contractual provision authorizing such changes has expired and while the parties are seeking to reach a new collective-bargaining agreement. Because a rule that permits unbridled discretion is irreconcilable with the Court's holding in *Katz* that an employer violates the Act by making unilateral changes that are "informed by a large measure of discretion," 369 U.S. at 746, we cannot endorse it.

Indeed, the judge in this case found no limitation whatsoever on the Respondent's discretionary authority to unilaterally implement changes in employee work shifts under Article 9, Section 1 of the parties' expired collective-bargaining agreement. Under *Raytheon*, this practice developed under this contract provision permitted the Respondent to continue to make essentially unlimited discretionary changes to employee work schedules, even after the expiration of the 2018 Agreement. This included the unprecedented 12-hour and 11-hour shifts at issue in this case, which the Union fought to stave off by offering to bargain on behalf of what it described as exhausted and susceptible-to-injury unit employees. This is manifestly inconsistent with *Katz*.

The express promise of the Act is that employees who have chosen union representation are entitled to pursue collective bargaining on key terms and conditions of employment, like their work hours.[53] The Union rightfully sought that avenue regarding the 12-hour and 11-hour work shift changes the Respondent was unilaterally implementing. It further correctly sought that bargaining at a most appropriate time: when the prior collective-bargaining agreement had expired and the parties were under the legal obligation to negotiate a successor agreement. *Raytheon* foreclosed the opportunity to bargain to agreement or overall impasse on employees' working hours by granting the employer a virtually unlimited past-practice privilege based on an indisputably expired waiver of bargaining rights granted by the Union. That is antithetical to the policies favoring collective bargaining that are embedded in the heart of the Act.

The collective-bargaining process under the Act is not a piecemeal process that tolerates liberal exemption of terms and conditions of employment from the duty to bargain. As the Board underscored in *Wendt*, piecemeal bargaining is disfavored under the Act.[54] Rather, the collective-bargaining process envisions good-faith give-and-take on the range of terms and conditions of employment to reach an overall agreement. That is why when "the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it 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." See *Bottom Line Enterprises*, 302 NLRB at 374. That *Raytheon* permits an employer's discretionary, unilateral carve-out from the bargaining obligation of key topics like work hours and work shifts fragments and undermines the collective-bargaining process. It is the embodiment of the pernicious unilateral conduct that has long been prohibited during bargaining by the Supreme Court from *May Department Stores*[55] in 1945, to *Katz*[56] in 1962, to *Litton*[57] in 1991.[58] Yet *Raytheon* endorsed such discretionary unilateral conduct. We cannot place our imprimatur on such a scheme.

In the 2018 Agreement, the Union consented to Article 9, Section 1, which the judge found granted the Respondent discretionary authority to make changes in employees work schedules and shifts. That agreement, which was concluded on the heels of the Respondent's

[53] Sec. 1 of the Act provides that "[e]xperience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . and promotes the flow of commerce by . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, *hours*, or other working conditions." 29 U.S.C. § 151 (emphasis supplied.) Sec. 8(d) of the Act provides that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Id. § 158(d). See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (Sec. 8(a)(5), read together with Sec. 8(d), "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . . . '").

[54] See *Wendt*, slip op 12.

[55] 326 U.S. 376 (1945).

[56] 369 U.S. 736 (1962).

[57] 501 U.S. 190 (1991).

[58] See *Honeywell International, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001).

commission of unfair labor practices,[59] was effective for only an 18-month period. The parties' right to negotiate an agreement includes the Union's decision to voluntary waive its rights with respect to scheduling and grant the Respondent discretion to unilaterally act on that topic for the term of the agreement.[60] Under *Raytheon*, however, the Union's waiver of its rights for a limited 18-month time period is transformed into a privilege for the Respondent to act unilaterally effectively in perpetuity under the rubric of a past practice developed pursuant to that waiver.[61] Our decision today does not relieve the Union of its obligations under the 2018 Agreement, contrary to the claim of the dissent, but recognizes that the 2018 Agreement does not contain any language providing that the Article 9, Section 1 waiver survives contract expiration. The dissent would hold the Union to an agreement it never struck.

The damage done by *Raytheon* to the collective-bargaining process is unmistakable. The Union is significantly hindered from meaningfully revisiting the issue of employees' schedule and work shifts in subsequent collective bargaining for a successor agreement when an employer is permitted to continue making discretionary changes to those very terms and conditions of employment by virtue of an expired component of the predecessor agreement.[62] Moreover, the damage is not undone by the *Raytheon* majority's assertion in *Raytheon* that collective bargaining is not undermined because the Respondent is still required to bargain on request about changing that practice for the future.[63] As the Supreme Court recognized in *Katz*, "[u]nilateral action by an employer without prior discussion with the union . . . must of necessity obstruct bargaining, contrary to the congressional policy." 369 U.S. at 747. Further, "an employer's unilateral change in conditions of employment under negotiation . . . frustrates the objectives of § 8 (a)(5) much as does a flat refusal [to bargain]." Id. at 743. Thus, authorizing a unilateral change made while bargaining for the successor agreement, as permitted by *Raytheon*, is the very corrosion of the collective-bargaining process at which *Katz* took aim and which *Litton* confirmed is prohibited during negotiations for a successor agreement. Permitting an employer to continue to make unilateral discretionary changes to employees' terms and conditions of employment during negotiations for a successor collective-bargaining agreement harms the bargaining process by forcing unions to bargain to regain terms of employment lost to postexpiration unilateral changes. See *Du Pont*, 364 NLRB at 1659. The fact is, "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." *Du Pont*, 364 NLRB at 1653.

For these reasons, *Raytheon* also discourages unions from agreeing in the first place to give employers any right to make unilateral changes during the term of a contract for fear that they may never be able to limit in subsequent contract negotiations the scope of unilateral changes the employer may implement on a discretionary basis. Contractual grants of managerial discretion can be an important tool in parties' management of issues that arise midterm. A rule that discourages agreement to management-rights provisions would significantly impair collective bargaining.

The view of the *Raytheon* majority that its approach to collective bargaining— permitting continued discretionary unilateral conduct pursuant to an expired management-rights clause—provides stability in labor relations

[59] See *Tecnocap*, 368 NLRB No. 70 (2019), enforcement granted in part and denied in part 1 F.4th 304 (4th Cir. 2021). The Respondent's unlawful conduct in the negotiation of what became the 2018 Agreement is discussed further infra.

[60] While it is not clear that Art. 9, Sec. 1 grants Respondent discretionary authority over scheduling, the judge found that it did, as does our dissenting colleague. However, Art. 9, Sec. 1 merely states that the Respondent "may request" schedule changes. The Union rejected the Respondent's April 2020, "request" for 12-hour shifts, and the Respondent did not implement them at that time because the Union did not agree, which lends support to the view that this contractual clause did not establish the Union's grant to the Respondent of the unilateral discretion that the judge found. Nevertheless, we assume for this analysis that the Union did grant the Respondent the right to act unilaterally on scheduling in Art. 9, Sec. 1 of the 2018 Agreement.

[61] 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 postcontractual unilateral changes.

[62] As the Board observed in *Beverly 2001*, 335 NLRB at 637, the rule endorsed in *Raytheon* makes the expiration of a management-rights clause "meaningless wherever the employer had taken advantage of the waiver to make changes." As the Board explained in *Du Pont*, 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. See *Du Pont*, 364 NLRB at 1652.

[63] See *Raytheon*, 365 NLRB No. 161, slip op. at 4 fn. 11 ("[E]ven though *Katz* permits the employer to take unilateral actions to the extent they are consistent with past practice and therefore not a 'change,' the employer must engage in bargaining regarding those actions whenever the union requests such bargaining, unless an exception to the duty to bargain applies"). A panel majority later explained that this language does not require bargaining over unilateral action that is consistent with past practice, but "was only meant to underscore the separate principle that an employer still has the obligation to bargain, upon the union's request and at times when Sec[.] 8(d) requires bargaining, about changing that status quo for the future." *Mike-Sell's*, 368 NLRB No. 145, slip op. at 4.

is meritless. In this case, the unit employees were whipsawed by the Respondent's discretionary implementation of 12-hour and 11-hour work shifts, never knowing when they might occur, how long they would last, and when they would next be implemented. They clearly saw that even the promise of negotiating a new collective-bargaining agreement afforded them no respite from unilaterally imposed mandatory consecutive 60-hour work weeks (and even longer with Saturday work hours). Rather than provide, as asserted by the *Raytheon* majority, "certainty and predictability"[64] while bargaining was ongoing, the *Raytheon* rule licensed the opposite. The only certainty was that the parties know that employers can act wholly unchecked, while unions and the employees they represent can do nothing about it. This tolerance of unilateral changes during bargaining undermines collective bargaining as a means to diffuse workplace discontent, and therefore, to protect the free flow of commerce as envisioned by the Act. It also obviously damages the Union's stature in the eyes of the employees they represent and shows them the Union is helpless to prevent an employer from acting on its own. A rule that undermines of the union's status as bargaining representative by permitting discretionary unilateral conduct is in direct contravention of the Act's policies.

We recognize the Respondent made unilateral changes to work shift schedules other than implementing 12-hour and 11-hour work shifts following the expiration of the 2018 Agreement. The Union did not object to these other changes, and they are not alleged to be unlawful and were not litigated. However, "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).[65] Thus, the Union's acquiescence to these unilateral changes does not establish a waiver of its right to bargain over the employer's postexpiration unilateral changes that the Union did oppose. See *Du Pont*, 364 NLRB at 1653. The Union vigorously and repeatedly objected to the unilateral implementation of the unprecedented 12-hour and 11-hour shifts at all times, as fully discussed above.

The majority in *Raytheon* contended that its rule granting essentially limitless discretion to employers to act unilaterally is necessary because without it employers will be unable to determine "when they may safely continue to act as they have in the past." *Raytheon*, 365 NLRB No. 161, slip op. at 16. We disagree. It is clear that no great burden is placed on employers to determine their rights. As explained in the *Raytheon* dissent:

> [The employer need[s] only to fairly assess whether the course of action under consideration involved the exercise of discretion (and thus required bargaining) or was sufficiently fixed as to timing and criteria as to essentially be automatic (no bargaining required).[66] . . . If the changes made pursuant to an established past practice involved an exercise of significant discretion, the employer could no longer continue to make such unilateral changes post-expiration.

365 NLRB No. 161, slip op. at 32.[67] The Respondent here does not dispute the substantial discretionary nature of its conduct under Article 9, Section 1, instead insisting on its right to engage in that discretionary conduct. Its violation of the rule envisioned by *Du Pont*, and adopted by the Board today, is clear. We do not find it onerous for an employer to be required to evaluate the discretionary nature of its conduct. It is, after all, the employer who bears the burden of proving its past-practice affirmative defense purportedly legitimating its unilateral action. It should not be difficult for an employer to recognize and forego unilateral conduct informed by a large measure of discretion, even that previously permitted under an expired contract, while it bargains for a new labor agreement.

For all these reasons, we overrule *Raytheon*'s holding that a past practice developed under a management-rights clause authorizing discretionary unilateral employer action constitutes a term and condition of employment that permits continued unilateral conduct following expiration of the agreement containing the clause.[68]

---

[64] *Raytheon*, 365 NLRB No. 161, slip op. at 18.

[65] See, e.g., *NLRB v. Miller Brewing Co*., 408 F.2d 12, 15 (9th Cir. 1969).

[66] Compare *Garrett Flexible Products*, 276 NLRB 704, 706-707 (1985) (discretionary allocation of increase in health insurance premium between employer and employees required bargaining) with *Post-Tribune Co.*, 337 NLRB 1279, 1280–1281 (2002) (no bargaining required where employer continued practice of allocating health insurance premiums according to a fixed-percentage ratio). See also *American National Red Cross*, 364 NLRB at 1394 (differentiating past practices involving significant management discretion from narrowly circumscribed changes that would be expected to continue in a nondiscretionary manner).

[67] "Whether a pre-expiration past practice may properly be deemed a term and condition of employment depends on whether it was fixed as to timing and criteria. If not—if the practice was infused with significant employer discretion—then the practice is not a term and condition of employment, and it most certainly is not part of the 'status quo.'" 365 NLRB No. 161, slip op. at 34 (dissenting opinion).

[68] We find further support for overruling *Raytheon*'s holding in our recent overruling of the *Courier-Journal* cases, *Capitol Ford*, and the "*Shell Oil*" line of cases relied on in *Raytheon,* including *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965) and *Shell Oil*, 149 NLRB 283 (1964). See *Wendt*, supra, slip op. at 13 fn. 56. Further, we disavow dicta in *Beverly Health* 2006, to the extent that this case conflicts with our rationale here and departed from well-established statutory bargaining principles.

F. Response to Dissent

The dissent's main disagreement is not with the today's majority decision but with *Katz* itself. We have recited verbatim the standard set forth by the Supreme Court in *Katz*: that a unilateral change is only justified by past practice when the practice is both "long-standing" and not "informed by a large measure of discretion." 369 U.S. at 746–747. We have affirmed the Board's adherence to that controlling Supreme Court standard. Our dissenting colleague views this standard—explicitly articulated by the Supreme Court—as overly "restrictive." The Court made clear, however, that the integrity of the collective-bargaining process at the core of the Act demands that past practice rarely negate the statutory duty to bargain. The Court expressly declared that unilateral action "will rarely be justified by any reason of substance." Id. at 747. This is so because unilateral changes "must of necessity obstruct bargaining," which "is contrary to the congressional policy" under the Act. Id. The dissent's advocacy for a more expansive past-practice standard is antithetical to the very design of the bargaining obligation under the Act and contrary to *Katz.* As the Court pronounced in *Katz*, a unilateral change is "a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal" to bargain. Id. at 743. Thus, contrary to the dissent's assertions, our decision today does not pay mere "lip service" to the *Katz* standard, nor does it announce a new standard that "any" discretion disqualifies a past-practice defense.[69] Instead, we simply return to precise adherence to the standard set forth in *Katz*.[70]

Our dissenting colleague's quarrel with our recitation of the *Katz* discretion standard cannot obscure that in *Raytheon*, the Board found that the Supreme Court did not articulate any legal standard concerning discretion at all, but merely "mentioned" it as a "factual observation." See *Raytheon*, 365 NLRB No. 161, slip op. at 16.

However, legions of Board and court cases have applied the controlling legal standard articulated in *Katz*, including the discretion principle, as we explained infra and in *Wendt*, supra.[71] The dissent so acknowledges, but claims that most of this precedent was limited to wage increase cases. To the contrary, the Board and courts have applied the *Katz* discretion principle to unilateral changes involving the full spectrum of mandatory subjects of bargaining including wages, layoffs, reduction in working hours, health insurance benefits, and rental rates and mileage surcharges on cab drivers. See Wendt, supra, slip op at 13 (citing cases). The dissent nevertheless attempts to dismiss the significance of the discretion principle by noting that certain Board cases, like *Post-*

Because the instant case involves the legality of the Respondent's discretionary implementation of 12-hour and 11-hour work shifts, we need not address the issue whether an employer could continue postexpiration a practice of automatic change based on fixed timing and criteria, if that practice was established pursuant to a management-rights clause.

Finally, we overrule *Raytheon* and similar cases to the extent they have held that an employer's discretion may be characterized as constrained or limited based on the employer's past practice of treating union and nonunion employees alike, as established by either an employer's own requirement or pursuant to a requirement established in a collective-bargaining agreement. See *Raytheon*, slip op. at 19 fn. 89 (employer's discretion in making past changes to healthcare costs and benefits was "significantly constrained" by the requirement [as written by the employer in its benefits program] that the benefits plan offered to [] to unit employees would be the same plan offered on the same basis to all" nonunit employees); *Courier-Journal*, 342 NLRB at 1093-1094 (employer's discretion in making past changes to healthcare costs and benefits was "limited" by a contractual requirement that it make such changes on "'same basis as for non-represented employees.")

We reject this precedent because such requirements provide "no limitation at all" on an employer's ability to make changes and accordingly, any past practice established under such requirements would still be informed by a large measure of discretion, within the plain meaning of *Katz*. See id. at 1096-1097 (Mbr. Liebman, dissenting) (under a "same basis as" clause in a contract, an employer "could do exactly as it pleased with regard to [non-union employees'] coverage, and therefore, by extension, it could do the same for unit employees."). Unsurprisingly, the Board has recognized that an employer's even-handed application of unbounded discretion to both unit and nonunit employees does not make the employer's conduct any less discretionary. See *Larry Geweke Ford*, 344 NLRB 628, 632 (2005) (in the case of a newly certified union, an employer's history of providing the same health plan to all employees, companywide, did not exempt it from its bargaining obligation pertaining to represented employees); *Mid-Continent Concrete*, 336 NLRB 258, 259, 268 (2001) (rejecting an employer's argument that it had no obligation to bargain over changes to health insurance benefits where the changes "were company-side and as such involved both unit and nonunit employees.), enfd. sub nom. *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002); *United Hospital Medical Center*, 317 NLRB 1279, 1282 (1995) (same basis as language in an expired contract did not "relieve [an employer] of its obligation to bargain over" changes to unit employees' health benefits "during negotiations for a successor contract.").

[69] The dissent contends that the Board's decision in *Garrett Flexible Products*, 276 NLRB 704 (1985) is an exemplar of the standard we endorse, and that it demonstrates that the exercise of "any" amount of discretion will defeat a past practice defense. To the contrary, the Board there held:

> [T]he Respondent did not have an established past practice regarding the payment of premium increases. Rather, it exercised *substantial discretion* in allocating the increases between the Company and the employees.

Id. at 704 fn. 1 (emphasis supplied).

[70] The Court in *Katz* explicitly stated that "[w]hatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer had already committed himself, the raises here," which the Court found unlawful, "were in no sense automatic, but were informed by a large measure of discretion." 369 U.S. at 746. The dissent objects to this language as restrictive. But it is the very language used by the Supreme Court.

[71] See footnotes 14, 20, supra. See *Wendt*, Sec. III, A.

Tribune,[72] did not address whether the employers' unilateral changes involved discretion. *Post-Tribune* did turn on discretion, however, as the Court of Appeals for District of Columbia Circuit has specifically observed.[73] The dissent further cites cases that turned on *Katz*'s regularity requirement that a past practice be longstanding.[74] These regularity cases do not in any way diminish the *Katz* discretion principle, contrary to the dissent.

The dissent objects that most employers will find it impossible to comply with the *Katz* standard. The simple answer is that the parties should bargain before making unilateral changes, as required by *Katz*. This is the fundamental point of national labor policy under the NLRA requiring bargaining, as explicated and applied in *Katz*. Congress long ago determined that "bargaining collectively safeguards commerce . . . and promotes the flow of commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions."[75] In other words, the duty to bargain is intended to apply to a case like this one. The dissent's view that bargaining should be subject to an expansive past-practice exemption, is antithetical to the Act and *Katz*.[76]

Although we have explained at length how adherence to *Katz* promotes the Act's policy of collective bargaining and achieving industrial stability,[77] the dissent nevertheless sees no evidence that *Raytheon*'s departure from *Katz* undermines the bargaining process. However, the Supreme Court itself has repeatedly held, including in *Katz,* that unilateral conduct undermines bargaining.[78] The courts and the Board have uniformly held the same.[79] Further, the pernicious fragmented, piecemeal bargaining that is disfavored under the Act – and that is the inevitable product of *Raytheon* – is well-illustrated in this case. The Union here consistently opposed the Respondent's unilateral implementation of required 12-hour and 11-hour work shifts based on the health and safety concerns of employees working prolonged shifts, and it sought to bargain. The dissent concedes that elongated shifts pose health and safety concerns and does not dispute OSHA statistics so finding. The dissent nevertheless finds that this evidence "does not have any relevance" to the legal issue before us. We disagree. That is precisely the problem with the dissent's position advocating an expansive past-practice defense. Employee health and safety are established mandatory subjects of bargaining (as are work hours).[80] Yet, under *Raytheon*'s expansive past-practice doctrine as interpreted by the dissent, these employees' health and safety concerns over 11- and 12-hour shifts must be voiced in a context where the shifts are unilaterally imposed at the discretion of the Respondent. This state of affairs gives inadequate weight to *Katz's* recognition that "[u]nilateral action by an employer without prior discussion with the union . . . must of necessity obstruct bargaining, contrary to the congressional policy." 369 U.S. at 747. The *Raytheon* standard thus left the Union here to bargain over hours of work in the midst of unilateral action, "contrary to the congressional policy."

The dissent further takes issue with our overruling of *Raytheon*'s holding that a past practice developed pursuant to an expired collectively bargained management-rights clause authorizing discretionary unilateral employer conduct constitutes a defense to a unilateral change allegation. The Board has had conflicting precedent on this issue, as we have acknowledged.[81] We believe that

[72] Supra, 337 NLRB 1279.

[73] As the Board explained in *Wendt*, the District of Columbia Circuit cited *Post-Tribune* as an example of conduct falling within "an acceptable degree of discretion" under *Katz* because the employer's unilateral change to the allocation of health insurance premium increases to employees was informed by a "fixed ratio" rather than by discretion. See *DuPont v. NLRB*, 682 F.3d at 67; *Wendt*, supra, slip op. at 13. Indeed, the District of Columbia Circuit specifically applied the *Katz* discretion principle in *DuPont v. NLRB*. Id. at 68 ("There are, however, limits to the scope of the unilateral changes an employer may lawfully make during negotiations. More specifically, the Act does not permit a unilateral change 'informed by a large measure of discretion' because '[t]here simply is no way in such [a] case . . . to know whether or not there has been a substantial departure from past practice.'" (Court's ellipses and bracketing) (quoting *Katz*, 369 U.S. at 746).

[74] The dissent cites, inter alia, *Caterpillar, Inc.*, 355 NLRB 521 (2010), enfd. mem. 2011 U.S. App. LEXIS 11163 (D.C. Cir. 2011); *Santa-Barbara News Press*, 358 NLRB 1415, 1416 (2012), reaffd. 362 NLRB 252 (2015), enfd. 2017 WL 1314946 (D.C. Cir. 2017); *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349 (2003), enfd. mem. 112 Fed. App'x 65 (D.C. Cir. 2004); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001).

[75] See Sec. 1 of the Act and fn. 53, supra.

[76] The Respondent does not contend that it faced an exigent economic emergency in operating its business that excused it from its bargaining obligation. See *RBE Electronics,* 320 NLRB 80 (1995); *Bottom Line Enterprises*, supra, 302 NLRB 373.

[77] See Secs. II, A, C, E, supra. See *Wendt*, Sec. IV, E.

[78] See *Litton Financial Printing Division v. NLRB*, supra, 501 U.S. 190; *May Department Stores v. NLRB*, supra, 326 U.S. 376.

[79] See *Wendt*, Sec. III, E.

[80] See, e.g., *NLRB v. American Nat'l Can Co.*, 924 F.2d 518, 524 (4th Cir. 1991) (health and safety conditions are mandatory bargaining subjects), enfg. 293 NLRB 901 (1989); *Novotel New York*, 321 NLRB 624, 629 (1996) ("Unions have played a central role in efforts to improve workplace safety. Unions frequently negotiate collective-bargaining agreements that create programs for identifying and rectifying safety and health issues at the workplace.") (footnotes omitted); *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) ("[T]he particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain").

[81] See Sec. II, E.

our overruling of *Raytheon* in this regard best effectuates collective bargaining and fully comports with *Katz*'s prohibition against unilateral conduct informed by a large measure of discretion which undermines bargaining, as we have explained supra. The effectuation of the collective-bargaining process wholly supports our choice between conflicting Board precedent.

Finally, our dissenting colleague repeats the argument he made in *Wendt* that the Board's partial overruling of *Raytheon* and overruling of *Mike-Sell's* in *Wendt* are outside the scope of the court's remand of that case. The Board in *Wendt* fully explained that our decision is consistent with the court's remand. In any event, we reiterate and affirm in this case the rationale of *Wendt* partially overruling *Raytheon* and overruling *Mike-Sell's*.

G. Retroactive Application

We shall apply our partial overruling of *Raytheon* retroactively to this case and to all pending cases. "The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). Under Supreme Court precedent, "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). The Board will thus apply a new rule to the parties in the case in which the new rule is announced and to parties in other cases pending at the time so long as retroactive application does not work a manifest injustice. See, e.g., *Cristal USA, Inc.*, 368 NLRB No. 141, slip op. at 2 (2019); *SNE Enterprises*, 344 NLRB at 373. "In determining whether the retroactive application of a Board rule will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *SNE Enterprises*, supra at 373.

We find that retroactive application of our decision today will not result in manifest injustice. An agency's substitution of new law for old law that is reasonably clear typically may justify refraining from applying a rule retroactively. See *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001). This "'protect[s] the settled expectations of those who had relied on the preexisting rule.'" Id. (quoting *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)). The rule we adopt today, however, forbidding unilateral conduct informed by a large measure of discretion, restores long-established Supreme Court endorsed principles that clearly had been departed from in *Raytheon* and similar cases overruled today.[82] As a result, those cases could not reasonably have supported any "settled expectations."

Moreover, at the time this case arose, the Board's policy under *Raytheon* with respect to employer past practice developed under a management-rights clause had been announced in a decision issued less than three years before. Prior to that, the Board's policy had vacillated. See *Du Pont de Nemours & Co. v. NLRB*, 682 F.3d at 69-70. This aspect of the case is accordingly not one where a party relied on clearly established old law, which militates against retroactive application. Compare *Epilepsy Foundation v. NLRB*, 268 F.3d at 1102 ("At the time when this case arose, the Board's policy . . . was absolutely clear."). Further, with respect to a past practice developed under an expired management-rights clause, the rule announced today does not involve an abrupt departure from well-established Board law, but instead resolves an evolving question under our jurisprudence, again in a manner that more faithfully adheres to governing Supreme Court precedent. See *SNE Enterprises*, 344 NLRB at 674 (retroactive application appropriate where the Board clarified an area of Board law that had been inconsistent). So here too, the Respondent could not in these circumstances have acted with settled expectations under this portion of *Raytheon*.[83]

Finally, any reliance by parties on *Raytheon* is far outweighed by the mischief of continuing to allow unilateral discretionary changes based on a past practice developed under an expired management-rights clause – conduct that is contrary to the fundamental principle of *Katz* and detrimental to collective bargaining. *Katz* explained that unilateral conduct in general, and its discretionary variety in particular, is antithetical to the system of collective bargaining that the Act envisions. This is amply illustrated in this case by the Respondent's discretionary unilateral implementation of the exhausting and unprecedented 12-hour and 11-hour workshifts, which

[82] We have also found that the Respondent's past-practice defense fails because it does not satisfy the long-established regularity, frequency and consistency requirements of that defense which flow from *Katz*. *Raytheon* did not disturb these settled requirements, but rather upheld them, and thus no issue of retroactivity is raised. As noted supra, the Board in *Wendt* retroactively overruled *Mike-Sell's*, 368 NLRB. No. 145, explaining that it fell outside the ambit of longstanding precedent applying the regularity, frequency, and consistency requirements necessary to establish the past-practice defense.

[83] See *Epilepsy Foundation v. NLRB*, 268 F.3d at 1102 (retroactive effect is appropriate for clarification of existing law); *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 180–181 (3d Cir. 2002) (holding that new standard in unsettled area was properly applied retroactively).

fragmented and undermined the parties' bargaining and left the Union powerless to represent the unit employees on the key topic of their working hours. Permitting the Respondent, or other employers, to continue to immunize similar unlawful discretionary conduct would further impede collective bargaining and allow further conduct undermining the statutory design. See *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. at 203.[84] This is precisely the type of "mischief" the Supreme Court has held makes retroactive application proper: to ensure the integrity of the Act's essential promise to "encourag[e] the practice and procedure of collective bargaining."[85] Id. Effectuation of this fundamental statutory aim fully warrants retroactive application. The dissent's position against retroactivity fails to attribute any meaningful weight to these core bargaining values under the Act.

In sum, we have fully balanced this substantial "mischief" against any ill effects caused by retroactive application. The former predominates here not only because of its significance, but additionally because there can be no previously "settled expectations" where the Board has clarified an area of Board law that has been inconsistent.[86] In these circumstances, we reject the dissent's claim that an employer's reliance on contrary preexisting Board cases should predominate, and we will follow the Board's usual practice and apply our decision retroactively.

III. REMEDIAL RELIEF

A. The Respondent is a Recidivist Labor Law Violator

The Respondent's commission of unfair labor practices during the parties' bargaining for the successor to the 2018 Agreement is not the first time the Respondent has engaged in unlawful misconduct during the parties' bargaining for a collective-bargaining agreement. Prior to the instant case, the parties had a collective-bargaining agreement effective from November 29, 2015, through November 18, 2017, which they voluntarily extended through February 28, 2018. The parties met and bargained for a successor agreement from October 2017 through March 2018. The Respondent during that bargaining committed serious unfair labor practices. In *Tecnocap*, 368 NLRB No. 70, the Board unanimously found that the Respondent:

- violated Section 8(a)(1) of the Act by telling employees that it will only lock out union members and impliedly soliciting their resignations from the Union;

- violated Section 8(a)(3) and (1) of the Act by locking out unit employees who are members of the Union while permitting unit employees who are not union members to continue working; and

- violated Section 8(a)(5) and (1) of the Act by locking out union members in support of a demand that the Union agree to change the scope of the bargaining unit, a permissive subject of bargaining; bypassing the Union and dealing directly with unit employees by soliciting them to enter into individual employment contracts offering them employment during a partial lockout on the condition that they abandon their membership in the Union; and partially implementing its last, best and final offer by establishing new job classifications without reaching a good-faith impasse.

The Fourth Circuit enforced the Board's unfair labor practice findings, except for the direct dealing finding. See *Tecnocap, LLC v. NLRB*, 1 F.4th 304 (4th Cir. 2021).

The parties, despite the Respondent's unfair labor practices, thereafter, ultimately concluded the 2018 Agreement. However, the parties' bargaining for a successor agreement was hindered, again, by the Respondent's commission of yet more unfair labor practices in this proceeding. As noted, the Respondent does not except to the judge's findings in this case that it unlawfully unilaterally implemented a new health care plan for employees in the absence of an overall impasse,[87] as well as other violations of its bargaining obligations.[88] Thus, the Respondent has prematurely declared impasse and taken unlawful unilateral action in each of the parties' last two bargaining cycles. In addition, we find today that the

[84] The dissent also argues that retroactive application is "unnecessary" because we find that the Respondent violated the Act even under *Raytheon*. Retroactive application is the Board's usual practice, however. See *SNE Enterprises*, supra. It need not be proven "necessary."

[85] See Sec. 1 of the Act. 29 U.S.C. § 151.

[86] See *SNE Enterprises*, supra, 344 NLRB at 674.

[87] The Respondent has not excepted to the judge's finding that under the unlawfully implemented health care plan "employee out-of-pocket expenses would significantly increase because of increased co-pay costs and a decrease in the percentage of healthcare expenses the plan would cover in comparison to the policy in place in 2020."

[88] As noted above, the Respondent has not excepted to the judge's findings that it violated Sec. 8(a)(5) and (1) of the Act by its delay in providing requested information which was relevant to the parties' bargaining on key topics, and that it violated Sec. 8(d)(3) of the Act by failing to notify the State of West Virginia of its desire to modify the parties' 2018 Agreement.

Respondent engaged in further unlawful unilateral conduct by implementing the 12-hour and 11-hour work shifts. Under these circumstances, it is incumbent on the Board to consider what remedies are necessary and appropriate to remedy the Respondent's repetitive misconduct, and to ensure that its employees fully understand their rights under the Act, feel free to exercise them in the future, and regain confidence in the integrity of the collective-bargaining process.

B. The Respondent's Conduct Warrants Additional Remedial Relief

Broad remedial orders are appropriate where the respondent has shown a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' rights. See *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). The Respondent's recidivist conduct here is clear.

The Respondent in two consecutive, closely-spaced bargaining cycles has taken unilateral action absent impasse. In the instant case, the Respondent unlawfully declared impasse and unilaterally implemented its health care plan, which was a significant financial disadvantage to employees; unlawfully unilaterally implemented the 12-hour and 11-hour shifts; and further undermined bargaining by failing to timely provide information that was directly relevant to bargaining.[89] The Respondent in the previous case also unlawfully declared impasse and discriminated against union members by locking them out. The Respondent's repeated unlawful conduct over a relatively short period of time demonstrates a proclivity to violate the Act which fully justifies a broad remedial order here.

Further, in addition to posting of the Board's remedial notice, we find that the Respondent's conduct warrants a reading of the notice. The Board orders a notice reading in cases where the Respondent's unlawful conduct has been "sufficiently serious and widespread" to ensure that the content of the notice is disseminated to all employees.[90] The Respondent's recurring unlawful conduct described above affecting the entire unit over two bargaining cycles and encompassing two Board cases fully meets this standard. The Respondent's misconduct has had a serious deleterious effect on the parties' ability to engage in good-faith bargaining negotiations. The Respondent's unlawful conduct has also been of the type to have widespread effect on all unit employees. Notably, we find that over the last five years, the Respondent's repeated unlawful conduct would have a tendency to negatively impact employees' perceptions regarding the viability of the exercise of their rights under the Act and the Respondent's willingness to abide by its obligation to respect those rights when the parties meet to negotiate a collective-bargaining agreement.[91]

Thus, the notice reading is appropriate here because it ensures "that employees will fully perceive that [the employer] and its managers are bound by the requirements of the [Act]."]". *Federated Logistics and Operations v. NLRB*, 400 F.3d 920, 930 (D.C. Cir. 2005). This is particularly important here because the Respondent's lead negotiator in the two last bargaining cycles was its Human Resources Director Darrick Doty. There is no indication that the Respondent's management or ownership has changed since the Respondent's most recent commission of unfair labor practices.

Accordingly, because the Respondent is both a recidivist violator of the Act and has committed multiple, serious, and widespread unfair labor practices in this case, we shall order the Respondent to hold a meeting or meetings during working hours at its Glen Dale, West Virginia, facility, scheduled to ensure the widest possible attendance of employees, at which the remedial notice is to be read to employees by a high-ranking manager in the presence of a Board agent and a union representative if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of management and, if the Union so desires, a union representative. A copy of the notice will be distributed by a Board

[89] The information sought by the Union was relevant to one of the Respondent's three main bargaining demands: ending dues deductions. The request remained outstanding and unfulfilled at the time the Respondent declared premature unlawful impasse. The judge found that without the timely supply of the requested dues deduction information (and other requested information as well), the Union's ability to make proposals on key issues like dues deductions and other topics was hindered. The Respondent has not filed exceptions to any of the judge's findings respecting the Respondent's failure to timely provide requested information.

[90] *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007) (citing *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003)), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008). See, e.g., *Farm Fresh Co.*, 361 NLRB 848, 849 fn. 3 (2014).

[91] Indeed, the Respondent was committing additional unfair labor practices in this proceeding in 2020, even prior to the issuance of the Fourth Circuit's decision on June 17, 2021, enforcing the Board's 2019 decision which ordered the Respondent to cease and desist its earlier unlawful conduct. See *Wendt Corp*., 371 NLRB No. 159 (2022) ("[I]t is recognized by the Board that unremedied unfair labor practices . . . undermine a [u]nion's bargaining power as a matter of law").[92] See *Noah's Ark Processors*, *LLC d/b/a WR Reserve*, 372 NLRB No. 80, slip op. at 6 (2023) ("In broad order cases where a reading of the notice . . . is ordered, we will also require the Board agent to distribute the notice . . . to employees at the meeting before the reading. Such distribution will facilitate employee comprehension as employees will be able to follow as the notice [is] read aloud.")

agent during this meeting or meetings to each unit employee in attendance before the notice is read.[92]

C. Additional Remedial Issues

With respect to the Respondent's unlawful unilateral implementation of the new health care plan and the concomitant negative economic effects on employees, we shall, in accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), amend the make-whole remedy here and modify the judge's recommended order to provide that the Respondent shall also compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the Respondent's unlawful implementation of the new health care plan for employees on January 21, 2021, in the absence of an overall impasse. Compensation for these harms shall be calculated separately from taxable net backpay, 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).[93] Finally, the Respondent having violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union by engaging in unilateral conduct implementing a new employee healthcare benefit plan and 12-hour and 11-hour work shifts, we order the Respondent to resume bargaining at the Union's request, if it is not already doing so.[94]

IV. CONCLUSION

Raytheon endorsed increased unilateral conduct and permitted wholly discretionary action during bargaining, mislabeling it as stability. We reject that approach as foreclosed by *Katz* and impermissible as a policy choice. We instead hew closely to the Act's policy encouraging collective bargaining, to Supreme Court precedent, and to the wealth of court and Board caselaw implementing that policy. As the Supreme Court has declared:

> The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves. [Citations omitted.]

Teamsters Local 24 v. Oliver, 358 U.S. 283, 295 (1959). That is precisely the goal of our decision today: to maintain conditions that are conducive to bringing parties together for collective bargaining. That is why today we overrule *Raytheon* in part and, in conjunction with the *Wendt* decision, have overruled *Raytheon* in its entirety.

ORDER

The National Labor Relations Board orders that the Respondent, Tecnocap LLC, Glen Dale, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC (Union) by failing and refusing to timely furnish the Union with requested information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees.

(b) Unilaterally changing the terms and conditions of employment of its unit employees by implementing 12-hour and 11-hour work shifts without first notifying the Union and giving it an opportunity to bargain or at time when it has not reached a valid overall impasse in bargaining.

(c) Unilaterally changing the terms and conditions of employment of its unit employees by implementing a new health care plan for unit employees at a time when it has not reached a valid overall impasse in negotiations with the Union for a new collective-bargaining agreement.

(d) Failing and refusing to bargain in good faith with the Union by unilaterally implementing changes in the terms of the unit employees' healthcare benefit plan on January 1, 2021, without giving notice to the State of West Virginia that it sought termination and modification

---

[92] See *Noah's Ark Processors*, *LLC d/b/a WR Reserve*, 372 NLRB No. 80, slip op. at 6 (2023) ("In broad order cases where a reading of the notice . . . is ordered, we will also require the Board agent to distribute the notice . . . to employees at the meeting before the reading. Such distribution will facilitate employee comprehension as employees will be able to follow as the notice [is] read aloud.")

[93] We decline the Union's request that remedial relief include reimbursement for the Union's bargaining expenses. The Union has not proven that such an award is warranted in the circumstances where the Respondent's unlawful conduct, while serious, has not been shown to have been responsible for causing the Union to waste its bargaining resources.

[94] Because the Respondent did not except to the judge's recommended affirmative bargaining order, we find it unnecessary to provide a justification for that remedy. See *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998), cert. denied 525 U.S. 1067 (1999); *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001).

of the collective bargaining agreement as required in Section 8(d)(3) of the Act.

(f) In any other 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) To the extent not already done so, furnish the Union in a timely manner with the information requested in Stephen Shane Carlin's July 16, 2020 email to Darrick Doty and the information requested in Katherine Horigan's November 11, 2020 email to Darrick Doty.

(b) On request by the Union, rescind the changes in the employees' healthcare benefit plan terms that were unilaterally implemented on January 1, 2021. Nothing in this Order is to be construed as requiring the Respondent to rescind any changes that benefited the unit employees unless the Union requests it to do so.

(c) Make unit employees who were subject to the change in the employee healthcare benefit plan whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful change in the employee healthcare benefit plan, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate employees who were subject to the change in the employee healthcare benefit plan for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 6, 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 these individuals.

(e) File with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the corresponding W-2 forms reflecting the backpay awards to employees who were subject to the change in the employee healthcare benefit plan.

(f) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All hourly rated production and maintenance employees, including warehousemen; excluding employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

(g) 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 backpay due under the terms of this Order.

(h) Post at its facility in Glen Dale, West Virginia, copies of the attached notice marked "Appendix."[95] Copies of the notice, on forms provided by the Regional Director for Region 6, 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. 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. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 16, 2020.

(i) Hold a meeting or meetings during worktime at its facility in Glen Dale, West Virginia, scheduled to ensure the widest possible attendance of employees, at which the attached notice marked "Appendix" will be read to employees by a high-ranking management official of the Respondent in the presence of a Board Agent and an

[95] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted and read within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted and read within 14 days after the facility reopens and a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This is the same notice previously [sent or posted] electronically on [date]." 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."

agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a high-ranking management official of the Respondent and, if the Union so desires, the presence of an agent of the Union. A copy of the notice will be distributed by a Board agent during this meeting or meetings to each unit employee in attendance before the notice is read.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 6 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, 2023

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

Today, my colleagues have decided to overrule *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), a decision that I joined, because in their view that decision is contrary to the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962).[1] They explain that *Katz* prohibits employers from justifying a unilateral action as consistent with a past practice so long as the action at issue is informed by "substantial" discretion. I disagree with my colleagues' position that *Raytheon* is contrary to the Supreme Court's holding in *Katz*, as I will explain herein. But although my colleagues claim to base their decision on *Katz*, they do not actually apply *Katz*. Instead, my colleagues' decision establishes that they have returned to the impossibly restrictive past-practice standard that an employer's unilateral action will always constitute an unlawful "change" under *Katz* whenever the employer's actions involve "any" discretion. Not only is that standard not consistent with *Katz*, but it relies upon an assumption that the Supreme Court intended to make it virtually impossible for an employer to justify a unilateral action based on a past practice. I do not believe that is a reasonable interpretation of *Katz*. My colleagues further err by applying *their* overly restrictive standard that any discretion precludes a past practice retroactively to all pending cases, which will invariably result in finding that almost every action taken consistent with an established past practice will now be deemed unlawful.

Applying the well-supported *Raytheon* standard, I would affirm the judge's finding that the Respondent demonstrated that it acted consistent with an established past practice in adjusting employees' work schedules to include 12-hour and 11-hour work shifts on three separate occasions. Accordingly, I would dismiss the complaint.

I. MY COLLEAGUES' CRITICISMS OF *RAYTHEON* AND *MIKE-SELL'S* ARE WITHOUT MERIT AND THOSE DECISIONS SHOULD NOT BE OVERRULED

A. The Board's Decision in Raytheon

Generally, a unionized employer violates Section 8(a)(5) and (1) if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the Union notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. at 743. "'[T]he vice involved . . . [in this conduct] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.'" *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (quoting

[1] My colleagues have also decided to overrule *Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145 (2019), which followed *Raytheon*. In *Wendt Corp.*, 372 NLRB No. 135 (2023), also issuing today, my colleagues purported to overrule both *Raytheon* and *Mike-Sell's* and to, in effect, reinstate part of the short-lived standard in *E.I. Du Pont de Nemours,* 364 NLRB 1648 (2016) *(DuPont)*. They did not, however, actually make any such changes to the law in that case because that issue was not before the Board; any reconsideration of the validity of *Raytheon* and *Mike-Sells* was clearly beyond the scope of the court's remand in *Wendt Corp. v. NLRB*, 26 F.4th 1002, 1013–1014 (D.C. Cir. March 21, 2022). As discussed in my concurrence in *Wendt*, the issue whether either of those cases should be revisited was not raised by any party to the Board, nor was it raised to the court, prior to the court's remand decision. Furthermore, nothing in the court's clear and express remand instructions suggested that the court intended for the Board to revisit the validity of those cases. Id., slip op at 24-27 (Member Kaplan, concurring). Because the issue of the validity of *Raytheon* and *Mike-Sell's* exceeded the scope of the court's remand in *Wendt*, the Board lacked jurisdiction to address the validity of those cases upon remand. See, e.g., *United States v.* Thrasher, 483 F.3d 977, 982 (9th Cir. 2007) (finding that district court lacked jurisdiction to consider an additional basis for finding ineffective assistance of counsel when that basis was beyond the scope of the court's remand instructions), cert. denied 553 U.S. 1007 (2008). Accordingly, my colleagues' decision upon remand in *Wendt* did not overrule the Board's decision in Raytheon and they cannot simply "reaffirm" the decision in *Wendt* here.

NLRB v. Dothan Eagle, 434 F.2d 93, 98 (5th Cir. 1970)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). Under *Katz*, however, when an employer takes unilateral action "in line with [its] long-standing practice," such action is "a mere continuation of the status quo," not a *change*. 369 U.S. at 746; see *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002) ("[W]here an employer's action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate Section 8(a)(5) and (1). . . . [a]n established past practice can become part of the status quo. Accordingly, the Board has found no violation of Section 8(a)(5) and (1) where the employer simply followed a well-established past practice.") (internal citations omitted); see also *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d 705, 711 (9th Cir. 1986) (noting that "[i]n *Katz*, the Court held that unilateral changes in working conditions would not violate section 8(a)(5) if they were a mere continuation of the status quo") (internal quotations omitted); *Queen Mary Restaurants v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977). As a result, the employer does not have an obligation to give the union notice and opportunity to bargain when taking such action.[2]

Relying on these core principles set forth in the *Katz* doctrine, the *Raytheon* decision properly overruled the restrictive definition of past practice endorsed in *DuPont*, and the precedent upon which that holding relied. In its place, *Raytheon* restored precedent dating back to 1964 under which an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer had done in the past. 365 NLRB No. 161, slip op. at 13, 16. The Board also held that its standard applies regardless of whether a collective-bargaining agreement existed when the past practice was created and regardless of whether a collective-bargaining agreement was in effect when the disputed action occurred; the relevant inquiry is whether the conduct at issue represents a material departure from past practice, regardless of how that past practice arose. Id., slip op. at 13.

Finally, the Board held in *Raytheon* that unilateral action that is consistent with an established past practice does not constitute a change triggering the duty to give the union notice and opportunity to bargain merely because it involves discretion. Id, slip op. at 16. Specifically, the Board "reject[ed] the *DuPont* majority's conclusion that every action constitutes a 'change' within the meaning of *Katz*, regardless of what an employer has done in the past, if the employer's actions involve *any* 'discretion.'" Id., slip op. at 13 (emphasis added). The *Raytheon* decision explained that "[t]he Supreme Court [in *Katz*] 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." Id., slip op. at 16.

Applying these principles to the facts presented in *Raytheon*, the Board found that the employer's changes to employees' benefits in January 2013, after the parties' contract expired, were consistent with its past practice. The Board observed:

> the [r]espondent's past practice was fixed as to timing (changes occurred annually in January from 2001 to 2012) and as to regularity (changes were made in each of those years) with premium increases occurring every year. Further, the changes were of the same kind and degree each year, consistently addressing premium increases and benefits availability. . . . Finally, the Respondent's discretion was significantly constrained by the requirement that the benefits plan offered to the 35 unit employees would be the same plan offered on the same basis to all of Raytheon's 65,000 domestic employees. . . . Therefore, the structure and design of Respondent's benefits program—which applied to an extremely large number of participants—constituted a significant limitation on the Respondent's discretion when evaluating changes affecting the 35-employee bargaining unit at issue here.

Id., slip op. at 19 fn. 89. Accordingly, the Board concluded that the employer's changes to employees' benefits were consistent with its established practice and did not trigger a duty to bargain merely because some employer discretion was involved.[3]

[2] It is true, as my colleagues note, that *Katz* found that unilateral action "will rarely be justified by any reason of substance." 369 U.S. at 747. But, as set forth above, the Court clearly recognized that unilateral actions may be justified by the past-practice defense. Further, contrary to my colleagues' assertion, the *Katz* decision does *not* state "that [a] past practice rarely negate[s] the statutory duty to bargain." Accordingly, it is bewildering to me that my colleagues say that I disagree "with *Katz* itself."

[3] I reject my colleagues' assertion that *Raytheon* set forth "an expansive view of the past-practice defense." To the contrary, the decision in *Raytheon* significantly constrains employers by limiting them to what they have done in the past. And that is precisely what the past-practice theory is supposed to do. The cases applying *Raytheon* bear this out. See *The Atlantic Group, Inc.*, 371 NLRB No. 119, slip op. at 3 (2022) (finding that the employer did not establish a past practice of laying off employees due to lack of work where its previous layoffs which resulted from the COVID-19 pandemic were different in kind than those in dispute); *NBCUniversal Media, LLC*, 371 NLRB No. 5, slip op. at 1 n.1 (2021) (rejecting the employer's defense that it had a past practice of rescinding merit-wage increases where the employer's action in rescinding wages was a departure from the employer's usual operations); *E. I. DuPont de Nemours*, 368 NLRB No. 73, slip op. at 1 (2019) (finding that the benefit changes to corporate-wide employee cafeteria-style

B. The Majority's Holding Effectively Reinstates the Dupont Standard that "Any" Discretionary Action Taken, Even if Consistent with a Past Practice, is a Change Requiring Bargaining.

My colleagues' chief criticism of *Raytheon* is that it "patently erred by dismissing a central teaching of *Katz* that the past-practice defense does not attach to conduct that is 'informed by a large measure of discretion.'" Throughout their decision, my colleagues repeatedly assert that "*Katz* preclude[s] unilateral conduct, even when the employer has shown that the conduct is consistent with a longstanding past practice, where the unilateral action is informed by a large measure of discretion." And my colleagues maintain that they are reinstating the "long-established," "well-settled" pre-*Raytheon* case law by returning to this purported mandate of *Katz*.

However, the majority pays little more than lip service to their interpretation of *Katz*. Throughout their analysis, my colleagues refer to discretionary unilateral conduct, failing to mention that it has to be "significant." My colleagues argue that "under *Katz* . . . discretionary conduct cannot be unilaterally implemented under the past-practice defense." They observe "that the prohibition on unilateral action based on discretionary practices was a constituent part of *Katz*." They then explain that in determining whether an employer has demonstrated a past practice, the "key to the analysis is whether the unilateral 'change was fixed by an established formula containing variables beyond the employer's immediate influence' . . . based on nondiscretionary standards and guidelines." And they conclude that unilateral conduct must be "'automatic' and nondiscretionary" to be consistent with a longstanding past practice. This restrictive language precisely tracks the language used in *DuPont*, where the Board stated that "[i]n 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 . . . ." 364 NLRB at 1654 (internal quotations omitted).

My colleagues misrepresent my position by asserting that I view *Katz* as "overly 'restrictive.'" I have never stated as much, nor do I believe that to be the case. Rather, it is my colleagues' *interpretation* of *Katz* that I view as overly restrictive. My colleagues claim that they have "simply return[ed] to precise adherence to the standard set forth in *Katz*." But, as discussed above, their discussion of their standard plainly shows otherwise. For instance, in *Garrett Flexible Products, Inc*., 276 NLRB 704, 706 (1985), the Board found that "where . . . implementation involves no elements of discretion, [an] employer's bargaining obligation is not violated [but] when [an] employer, as here, has retained discretion with respect to the terms and conditions of employment, unilateral exercise of that discretion will be found violative of Section 8(a)(5)." This case clearly demonstrates that, under my colleagues' standard, the exercise of any discretion will defeat a past practice defense.

Further, my colleagues only cite one case where the Board actually found that the employer established a past practice. *Post-Tribune*, 337 NLRB at 1280. This case involves the very discrete area of health insurance in which the Board found that the employer had an established practice of sharing healthcare premium costs with employees based on a set percentage ratio each year. My colleagues speak about *Katz*'s holding with respect to substantial discretion, but it is clear that they would not permit unilateral conduct involving any discretion.

C. My Colleagues Wrongly Assert that a Past-Practice Defense Turns on the Existence or Non-Existence of Substantial Employer Discretion.

Further, I disagree with my colleagues' premise that the Board has found that the "absence of substantial employer discretion [is] a prerequisite for upholding a past-practice defense . . . ." I acknowledge that the Board has rejected an employer's past practice defense on the basis that the unilateral action was informed by a large measure of discretion in *certain* Board and court cases.[4] It is telling, however, that this supposedly critical "prerequisite" has not been mentioned, let alone relied upon, by the Board in key decisions defining the parameters of the past practice doctrine.

In *Post-Tribune*, which has been regularly cited in Board decisions for defining the Board's past practice jurisprudence, the Board does not address whether the

benefits plan were consistent with an established past practice because they occurred at the identical time as in previous years, covered both unit and nonunit employees, and "did not materially differ in terms of discretion from actions taken in past years"). These cases demonstrate that *Raytheon* does not give employers unbridled authority to do whatever they want whenever they want and that the application of the *Raytheon* standard does not permit, as my colleagues claim, an "expansive past-practice exemption, [that] is antithetical to the Act and *Katz*." Again, *Katz* retained a past-practice defense to unilateral actions. Indeed, to the extent my colleagues' standard will effectively eliminate past practice as a defense, it is their standard that is antithetical to *Katz*.

[4] My colleagues argue that the "courts have repeatedly and consistently deemed the discretion principle of *Katz* as a holding of law . . . ." But most of the court precedent cited by my colleagues involves a line of court decisions in a discrete area where the employer unilaterally increased wages as part of a merit wage review program, arguing that it was maintaining the status quo, and the court found the increases were unlawful because the employer exercised substantial discretion in determining the increases. See, e.g., *NLRB v. Allis-Chalmers Corp*., 601 F.2d 870, 875–876 (5th Cir. 1979); *NLRB v. John Zink Co.*, 551 F.2d 799, 801–802 (10th Cir. 1977).

employer's unilateral changes were informed by any level of discretion in its analysis. 337 NLRB at 1280.[5] Likewise, in *Caterpillar, Inc.*, 355 NLRB 521 (2010), enfd. mem. 2011 U.S. App. LEXIS 11163 (D.C. Cir. 2011), another case often cited in setting forth the Board's past-practice jurisprudence, the Board explained that

> An employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in wages, hours, or other terms and conditions of employment, provided that the change is material, substantial, and significant and that no claim of privilege applies. If, of course, the alleged "change" actually maintains the status quo, then Section 8(a)(5) is not violated.

Id. at 522 (internal notes omitted). The Board also noted that, under a past practice defense, an employer must demonstrate that the practice is regular and consistent. Id. But the Board did not say a word about the "discretion principle" in defining past practice, let alone apply it as a "prerequisite" in its past practice analysis. In that case, the employer contended that it was justified in implementing a generic-first prescription drugs program because it had a longstanding practice of unilaterally implementing changes to its health care plan. In rejecting the employer's assertion of a past practice, the Board found, among other things, that the past changes were dissimilar and that "there [was] no thread of similarity running through and linking the several types of change at issue . . . ." Id. Moreover, the Board found that "even assuming that the past changes were sufficiently similar among themselves to constitute a 'practice,' the implementation of 'generic first' represented a material departure from that past practice." Id. at 523.[6]

Although the Board in some cases has found that an employer did not establish a past practice on the basis that the unilateral change was informed by a large measure of discretion, in other cases, the Board simply did not address the issue. Accordingly, as recognized in *Raytheon*, my colleagues are wrong that the past-practice defense prior to *Raytheon* turned on the existence or nonexistence of discretion.

D. The Majority's Holding Effectively Reinstating the Dupont Standard Prohibiting Unilateral Changes Made Pursuant to a Past Practice Developed Under an Expired Management-Rights Clause is Contrary to Board and Court Precedent.

For much the same reasons as summarized above, my colleagues also overrule the holding in *Raytheon* that an employer is privileged to make unilateral changes after the expiration of the parties' contract based on a practice developed pursuant to a management-rights clause. My colleagues conclude that "discretionary changes made

---

[5] The *Raytheon* Board relied on *Post-Tribune* to explain the principle that an employer may lawfully take unilateral action that "does not alter the status quo." *Raytheon*, 365 NLRB No. 161, slip op. at 5 fn. 21.

Despite the fact that the "discretion principle" is not mentioned in *Post-Tribune*, my colleagues still claim that the case turned on discretion. They note that in *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012), the United States Court of Appeals for the D.C. Circuit cited *Post-Tribune* as involving an acceptable degree of discretion. However, the court addressed *Post-Tribune* in one sentence, and nowhere did it say that the case turned on the issue of discretion. Further, the court also cited several cases, including *Courier Journal,* 342 NLRB 1093 (2004), *Courier Journal*, 342 NLRB 1148 (2004), and *Capitol Ford*, 343 NLRB 1058 (2004), all three of which my colleagues overrule today, where the respective employers clearly exercised discretion but the court did not mention the issue in its analyses of these cases. 682 F.3d at 69-70.

[6] Nor did the D.C. Circuit, in enforcing the Board's order, rely on the employer's "exercise of significant managerial discretion" in its analysis. The court stated:

> The Board also reasonably concluded that Caterpillar's prior changes to its employees' prescription drug benefits did not establish a past practice such that its employees could have expected further changes like the "Generic First" program. . . . The facts before the Board were easily distinguishable from precedent in which an employer's past practice occurred with such regularity and frequency that it became the status quo.

Caterpillar Inc. v. NLRB, 2011 U.S. App. LEXIS 11163, at 5.

Numerous other Board cases similarly do not turn on what my colleagues have deemed the "discretion principle." See, e.g., *Santa-Barbara News Press*, 358 NLRB 1415, 1416 (2012), reaffd. 362 NLRB 252 (2015), enfd. 2017 WL 1314946 (D.C. Cir. 2017); *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349 (2003), enfd. mem. 112 Fed. App'x 65 (D.C. Cir. 2004); *DMI Distrib. of Delaware*, 334 NLRB 409, 411 (2001); *Luther Manor Nursing Home*, 270 NLRB 949 (1984), affd. 772 F.2d 421 (8th Cir. 1985.

My colleagues assert that these cases did not mention the "discretion principle of *Katz*" because they "turned on *Katz*'s regularity requirement that a past practice be longstanding." I disagree. To begin, *Caterpill*ar and *Philadelphia Coca-Cola Bottling* addressed whether the respective employers had established a practice in addition to determining whether the asserted practice was longstanding. In *Caterpillar*, as set forth above, the Board found that its implementation of a generic-first prescription drugs program was materially different from its past changes. This was clearly a separate issue as to the frequency of this practice. Similarly in *Philadelphia Coca-Cola Bottling*, 340 NLRB at 354, the Board found that even if the employer's previous distribution of bonuses constituted a past practice, the bonuses at issue were "a substantial deviation from, that practice." Further, *Luther Manor Nursing Home* did not turn on whether an employer's asserted past practice was longstanding. Finally, it is true that in both *Santa-Barbara*, 358 NLRB at 1416, and *DMI Distrib. of Delaware,* 334 NLRB at 411, the Board found that the employers' asserted past practices were not regular and frequent. However, my colleagues say that the Board has defined a past practice to apply "only when the employer proves its action is consistent with a longstanding past practice and is not informed by a large measure of discretion." If this is an accurate representation of Board law, the Board presumably would have explained in *Santa-Barbara* and *DMI Distrib. of Delaware* that the "*Katz* discretion principle" was not at issue. The Board's silence on this supposedly fundamental aspect of past practice is telling.

pursuant to a grant of authority contained in [an] expired management-rights clause cannot constitute a past practice that an employer may continue after contract expiration." My colleagues find that this holding of *Raytheon* violates their reading of *Katz* because it permits "an employer to continue to make unilateral discretionary changes to employees' terms and conditions of employment during negotiations for a successor collective-bargaining agreement."

Notably, however, my colleagues have not cited any cases to support their return to *DuPont*'s holding that a past practice cannot develop under a management-rights clause because it violates what they characterize as the discretion principle of *Katz*. The reason for this is that the Board and courts have long recognized that a past practice is a past practice regardless of whether or not the practice developed under the auspices of a management-rights clause in an expired contract. This is so even if the disputed action involves the exercise of discretion and is not automatic.

In *Shell Oil Co*., 149 NLRB 283 (1964), the parties' collective-bargaining agreement contained a subcontracting clause that permitted the employer to subcontract bargaining-unit work. Pursuant to this provision, the employer had a history of subcontracting "miscellaneous construction and maintenance work" during the term of the agreement. Id. at 284. When the contract expired, the employer subcontracted three construction and/or maintenance jobs without giving the union notice and opportunity to bargain. Id. at 285-286. The Board found that the three unilateral subcontracting actions during the hiatus between contracts were consistent with the employer's "frequently invoked practice of contracting out occasional maintenance work on a unilateral basis . . . ." Id. at 289.

Consistent with *Shell Oil*, numerous court and Board decisions have found that a past practice that arose pursuant to a management-rights clause may survive contract expiration even when the clause itself does not.[7] In *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002), for example, the Sixth Circuit, relying on *Shell Oil* and its progeny, specifically held that unilateral action developed under a management-rights clause may become part of the parties' past practice and an employer does not alter the status quo by continuing that past practice:

> [I]f an employer has frequently 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 the CBA is permissible to maintain the status quo. Thus, 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.

Likewise, in *E.I. du Pont de Nemours & Co. v. NLRB*, (*DuPont* remand),[8] the United States Court of Appeals for the D.C. Circuit held that "Du Pont, by making unilateral changes to [its employee benefit plan] after the expiration of the CBAs, maintained the status quo expressed in the Company's past practice." 682 F.3d at 68. Relying on the Board's decisions in *Courier-Journal,* 342 NLRB 1093 (2004) (*Courier-Journal I*), *Capitol Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services, Inc*., 346 NLRB 1319, 1319 fn. 5. (2006) *(Beverly Health 2006)*, the court recognized that the Board has found that, following a collective-bargaining agreement's expiration, employers may lawfully take unilateral actions pursuant to a past practice, even though the practice arose when a previous collective-bargaining agreement was in effect. 682 F.3d at 69. In *Courier-Journal I*, 342 NLRB 1093, 1094-1095, the Board had found that the employer lawfully made unilateral changes in costs and benefits to its health care plan pursuant to a provision in its contract permitting the employer to make changes to the plan during a hiatus period, reasoning that the changes were consistent with the employer's history of making these changes for the past 10 years. The Board noted that its finding did not depend on "whether a contractual waiver of the right to bargain survives the expiration the contract," but rather upon whether the challenged action "is grounded in past practice, and the continuance thereof." Id. at 1095. See also *Courier-Journal*, 342 NLRB 1148 (2004) (*Courier-Journal II)*.

Similarly, in *Capitol Ford*, 343 NLRB 1058, 1058 (2004), the Board found that the employer did not violate Section 8(a)(5) by unilaterally implementing and modifying bonus programs because the employer's predecessor had used similar bonus programs. The Board acknowledged the successor employer's unilateral action was not

[7] In addition to the Board precedent discussed below, the Board also applied *Shell Oil* in *Saints Mary & Elizabeth Hospital*, 282 NLRB 73, 78 fn. 13 (1986), *Cummins Component Plant*, 259 NLRB 456, 465 (1981), and *Winn-Dixie Stores*, 224 NLRB 1418, 1432-1434 (1976), enfd. in part on other grounds 567 F.2d 1343 (5th Cir. 1978).

[8] The court remanded companion cases *E.I. DuPont de Nemours, Louisville Works (DuPont-Louisville)*, 355 NLRB 1084 (2010), and *E.I. DuPont de Nemours & Co. (DuPont-Edge Moor)*, 355 NLRB 1096 (2010).

justified by the expired management-rights clause of the predecessor's contract. Id. at 1058 fn. 3. Rather, the Board found that the "past practice [was] not dependent on the continued existence of the [expired] collective-bargaining agreement." Id. According to the Board, "the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice." Id. See also *Beverly Health 2006*, 346 NLRB at 1319 fn. 5 (stating 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").[9] Indeed, in the *DuPont* remand, the D.C. Circuit observed that "[b]ecause an employer may make unilateral changes insofar as doing so is but a continuation of its past practice, we see no reason it should matter whether that past practice first arose under a CBA that has since expired." 682 F.3d at 69.

My colleagues overrule *Shell Oil*, the *Courier-Journal* cases, *Capitol Ford*, and *Beverly Health 2006*, to the extent they are contrary to their decision today.[10] However, in the *DuPont* remand, the D.C. Circuit did not in any way suggest that these cases violated what my colleagues characterize as "the discretion principle of *Katz."* If the D.C. Circuit had found those cases to be inconsistent with Supreme Court precedent, I have no doubt it would have said so and it certainly would not have given the Board the option of applying the past practice principles set forth in these cases on remand. Nor did the Sixth Circuit in *Beverly Health & Rehab. Servs.* find that *Shell Oil* was contrary to "the discretion principle of *Katz."*

In sum, the longstanding past-practice principles set forth in the above cases support *Raytheon*'s holding that following a collective-bargaining agreement's expiration, employers may lawfully take unilateral actions consistent with a past practice, even though the practice may have developed pursuant to the agreement's management-rights clause. These cases squarely reject the position taken by my colleagues today. And apart from the short-lived decision in *DuPont*, neither the Board nor any court has ever found that any of these cases were contrary to what my colleagues characterize as "*Katz*'s prohibition against unilateral conduct informed by a large measure of discretion."

E. DuPont, rather than Raytheon, Undermines Labor Relations

To support their decision to overrule *Raytheon*, my colleagues assert "[t]hat *Raytheon* permits an employer's discretionary, unilateral carve-out from the bargaining obligation of key topics like work hours and work shifts fragments and undermines the collective-bargaining process." They also hypothesize, at length, about the potential harm to collective bargaining that will result from permitting the unilateral changes found lawful in *Raytheon.* For the reasons set forth in *Raytheon*, and as summarized below, I do not find merit in my colleagues' dire predictions. 365 NLRB No. 161, slip op. at 16, 18-19.

The Board decided *Raytheon* in 2017 and *Mike-Sell's* in 2019. In the intervening years, there has been no indication whatsoever that those decisions "corroded" the collective-bargaining process, "significantly impair[ed] collective bargaining, or discouraged agreement to management-rights provisions.[11] In fact, my colleagues fail to cite to any evidence in support of their position that parties' ability to reach collective-bargaining agreements has been detrimentally affected by the decisions in *Raytheon* and *Mike-Sell's*. Nor did my colleagues seek input from our stakeholders to gain insight into the effects that those decisions have had on parties' collective bargaining. Simply put, one would think that if my colleagues were correct that "[t]he damage done to the collective-bargaining process is unmistakable," they would be able to point to *some* damage to the collective-bargaining process that has taken place in the six years following the issuance of *Raytheon* and in the four years following the issuance of *Mike-Sell's*.

Further, given the Board's duty to foster stable labor relations, I fear my colleagues' return to the impossibly restrictive definition of past practice in *DuPont* may have a detrimental effect on that fundamental statutory goal. My colleagues acknowledge that an employer's past practice defense will be "tightly cabined" and that actions consistent with a past practice "will rarely be justified." In reality, "most employers will find it impossible to comply" with the standard adopted by my colleagues. *Raytheon*, 365 NLRB No. 161, slip op. at 14. As recog-

[9] In overruling *Raytheon,* my colleagues reaffirm the rationale in *DuPont*, which relied on *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636-637 (2001) (*Beverly Health 2001*), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003). In *Beverly Health 2001*, the Board found that unilateral actions taken pursuant to a management-right clause are not part of the status quo because a contractual waiver of the right to bargain does not survive the expiration of the contract. But as set forth in *Raytheon*, "*Beverly [Health 2001]* . . . [was] [a] short-lived departure[] from preexisting case law . . . ." 365 NLRB No. 161, slip op. at 9.

[10] As with *Raytheon* and *Mike-Sell's*, my colleagues attempted to overrule these cases in *Wendt*. As discussed above, however, *Wendt* lacks precedential value in this respect.

[11] Similarly, then-Member McFerran predicted, in dissent, that *Mike-Sell's* was "an invitation to more unilateral action . . . ." 368 NLRB No. 145, slip op. at 11 (Mbr. McFerran, dissenting).

nized in *Raytheon*, such an impossible standard disrupts the collective-bargaining process by illogically imposing a duty on employers to negotiate, potentially to good-faith impasse, over each and every decision involving any modicum of discretion—even if those decisions are precisely the same ones that the employer has taken innumerable times before. Id., slip op. at 11. The majority's approach preventing employers from taking actions consistent with a past practice until the parties reach a complete contract or overall impasse will unduly interfere with their ability to operate their businesses despite the fact that absolutely no change has occurred in employees' terms and conditions of employment.

F. Mike-Sell's Properly Applied the Regularity and Consistency Requirements for the Past Practice Defense and Should Not Be Overruled.

Relying on then-Member McFerran's dissent, my colleagues also overrule *Mike-Sell's Potato Chip Co.,* 368 NLRB No. 145 (2019), finding that the Board there erred in concluding that the employer established that its unilateral sale of sales routes was privileged by a regular and frequent practice. For all the reasons set forth in *Mike-Sell's*, I believe that the Board there properly rejected then-Member McFerran's dissenting position and found that the employer's sale of the sales routes in 2016 was consistent with its 17-year past practice of unilaterally selling sales routes to independent distributors during which time it sold 51 company driver routes. Id., slip op. at 3-4.[12]

G. My Colleagues' New Standard Should Not Be Applied Retroactively

"The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co*., 121 NLRB 995, 1006–1007 (1958)). Under Supreme Court precedent, "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp*., 332 U.S. 194, 203 (1947)). The Board will therefore retroactively apply a new standard so long as it does not work a manifest injustice. See, e.g., *Cristal USA, Inc*., 368 NLRB No. 141, slip op. at 2 (2019); *SNE Enterprises*, 344 NLRB at 373.

My colleagues find that retroactive application would not work a manifest injustice. They observe that "[t]he rule we adopt today . . . forbidding unilateral conduct informed by a large measure of discretion, restores long-established Supreme Court endorsed principles that clearly had been departed from in *Raytheon* and similar cases overruled today." They further contend that, the "policy under *Raytheon* with respect to employer past practice developed under a management-rights clause" has "vacillated." "As a result, those cases could not reasonably have supported any 'settled expectations.'"

As discussed above, however, the *DuPont* standard, which my colleagues have effectively reinstated today, represented a short-lived, sharp departure from decades of Board and court precedent.[13] *Raytheon* prudently corrected this aberration by overruling *DuPont*. Employers have relied on the longstanding precedent consistent with, and cited in, *Raytheon* to take actions consistent with their past practice—actions that now will very likely be deemed unlawful under my colleagues' near zero-tolerance standard. As a result, employers will face costly liability based on the retroactive application of the majority's standard. See *Loomis Armored US, Inc.*, 364 NLRB 144, 150 (2016) (finding retroactive application of new rule inappropriate where employers had relied for years on pre-existing law); *Piedmont Gardens*, 362 NLRB 1135, 1135 (2015) (finding retroactive application of new rule would work a manifest injustice where the employer relied on the previous rule).

Finally, my colleagues further argue that retroactive application is necessary here "to ensure the integrity of the Act's essential promise to 'encourag[e] the practice and procedure of collective bargaining.'" I reject my colleagues' accusation that *Raytheon* was contrary to the purpose of the Act and therefore, retroactive application will correct the "mischief" it has caused. *Raytheon* began with the fundamental principle under the Act that "Section 8(a)(5) requires parties to bargain in good faith, upon request, regarding mandatory subjects of bargaining, which the Act defines as 'wages, hours, and other terms and conditions of employment.'" 365 NLRB No. 161, slip op. at 4. And, as discussed above, the Board's application of *Raytheon* in several subsequent cases has borne out the fact that the holding in *Raytheon* is consistent with that principle.

[12] My colleagues' claim that their decisionmaking in this case is guided by three "fundamental" principles: "First, we adhere to our obligation to comport with controlling Supreme Court precedent in *Katz*. Second, we are mindful of long-settled Board precedent disfavoring and prohibiting unilateral conduct under the Act. Third, we are guided by the importance of collective bargaining that lies at the core of the Act and which it is our statutory responsibility to encourage." As discussed above, each of these "fundamental principles" counsels in favor of retaining *Raytheon* and *Mike Sell's*, not returning to *DuPont*.

[13] Accordingly, my colleagues' reliance on *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 180–181 (3d Cir. 2002), is misplaced. Unlike *Allegheny Ludlum*, this case does not involve an unsettled area of the law as discussed above.

II. UNDER *RAYTHEON* AND *MIKE-SELLS'S*, *THE* RESPONDENT'S IMPLEMENTATION OF THE 12-HOUR AND 11-HOUR WORK SHIFTS WAS CONSISTENT WITH ITS PAST PRACTICE OF ALERTING EMPLOYEES' WORK SHIFTS TO MEET PRODUCTION DEMANDS.

A. Facts

The Respondent manufactures metal lids for food and other glass containers. The Union or its predecessor has represented the Respondent's production, maintenance, and warehouse employees for 30 years through successive collective-bargaining agreements. The parties' most recent collective-bargaining agreement was effective from March 21, 2018, through September 30, 2019 ("2018 Agreement"). Article 9, Section 1 of the 2018 Agreement established a normal workweek as 40 hours to be worked in three shifts: 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m.; 11 p.m. to 7 a.m. The provision further provided: "Management may request with reasonable notification from time to time the working hour schedule be adjusted due to production requirements or facility conditions." The parties stipulated that the "reasonable notification" requirement in this provision is satisfied by the Respondent's long-standing practice of posting schedules every Thursday setting out the next week's schedule. During the term of the 2018 Agreement, the Respondent frequently unilaterally adjusted employees' work shifts pursuant to Article 9, Section 1.

On September 20, 2019, the parties began bargaining for a successor collective-bargaining agreement. While these negotiations were ongoing, the Respondent continued to make changes to shift schedules. Between October 2018 and August 2020, the Respondent had unilaterally adjusted the shift schedules by implementing employee work shifts of 10 or 10.25 hours for a total of more than 31 weeks. Also, during that timeframe, the Respondent unilaterally adjusted employees' work schedules to modify start and end times, cause shifts to overlap, and reassign less senior employees to cover for shifts for employees on leave.

In April 2020, the Respondent negotiated with the Union concerning COVID-19 protocols. The Respondent recommended instituting two 12-hour shifts as a means to prevent the spread of COVID-19. The Union objected to the 12-hour shifts. Nevertheless, on August 20, 2020,[14] the Respondent posted the employee work schedule for the following week consisting of 2 mandatory 12-hour shifts for all unit employees. The 12-hour shifts continued from August 24 through October 11, when the Respondent returned to operating three 10-hour shifts for the remainder of October. On October 27, in response to an increase in COVID-19 positivity rates, the Respondent posted a notice stating that it would implement two 11-hour shifts the following week. The Respondent returned to 3 shifts of 8.5 hours through the month of December. For the weeks starting January 4 and 11, 2021, the Respondent again instituted 12-hour shifts.

[14] All subsequent dates are in 2020 unless otherwise noted.

B. Judge's Decision

Applying *Raytheon* and *Mike-Sell's*, the judge found that the Respondent did not violate Section 8(a)(5) because it met its burden of establishing that its implementation of the 12-hour and 11-hour work shifts was consistent with its past practice of changing employee work shifts. The judge pointed to the express provision in the 2018 Agreement that gave the Respondent the right to adjust employee work shifts due to production requirements and conditions in the facility and noted that the language did not include any restrictions on how the Respondent could adjust the shifts. The judge further found that the Respondent frequently adjusted employees' shift schedules during the term of the 2018 Agreement and after it expired. The judge rejected the arguments by the General Counsel and Charging Party that, because the 12-hour and 11-hour shifts at issue were a substantial increase from previous shift adjustments, the shift changes were a material departure from the Respondent's past practice.

C. Discussion

Applying their new standard, my colleagues find that the unilateral change to 11-hour and 12-hour shifts—like all of the other shift changes—were discretionary, rather than "purely automatic." As a result, they find that the Respondent failed to establish that it had a past practice of making such changes consistent with their view of *Katz*. My colleagues further find that the actions taken consistent with the managements-right clause contained in the 2018 Agreement did not privilege its post-expiration changes. They therefore reverse the judge and conclude that the Respondent violated Section 8(a)(5) and (1) by making the shift changes at issue here.

As I indicated above, I believe that the Board should not apply my colleagues new standard to this case. Applying *Raytheon* and *Mike-Sell's*, I would find that the Respondent acted consistent with an established past practice in adjusting employees' work schedules to include 12-hour or 11-hour shifts. Accordingly, I would affirm the judge's dismissal of the allegation that the Respondent's implementation of these shift changes violated Section 8(a)(5) and (1) of the Act.

As the judge found, Article 9, Section 1 of the expired 2018 Agreement contained express language that gave the Respondent the authority to modify work shifts to

address "production requirements or facility conditions." The record shows that, based on these needs, the Respondent made unilateral changes to work shifts for more than thirty-one weeks over the course of nearly two years prior to the shift-length modifications alleged to be unlawful here. The Respondent therefore had a regular and frequent practice of altering employees' shift schedules. Such a finding is consistent with *Mike-Sell's*, a case involving subcontracting, where the Board found that "the concepts of regularity and frequency sufficient to prove a past practice do not require that the challenged unilateral actions must have taken place at set intervals and in the same number on each and every occasion of change." 368 NLRB No. 145, slip op. at 3. The Board observed that *Raytheon* "specifically referred to and reaffirmed two prior cases—*Shell Oil Co*., 149 NLRB 283 (1964), and *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 157 (1965)—where the finding of a past practice was based on longtime and frequent subcontracting actions whenever the need arose." *Mike-Sell's*, 368 NLRB. No 145, slip op. at 3. Based on these cases, the Board concluded that "[t]he frequency of [the employers' subcontracting actions] over a prolonged time period, standing alone, was sufficient to establish a past practice of unilateral subcontracting actions that could continue without bargaining about new subcontracting decisions." Id. Here too, the Respondent made frequent schedule changes over a long period of time whenever "production requirements or facility conditions" demanded it.

I would also find that the 12-hour and 11-hour shifts were similar in kind and degree to the prior changes. The record demonstrates that the Respondent changed work schedules—changing starting and quitting times, moving employees from one shift to another, adding or reducing shifts and increasing or decreasing hours—as business or facility conditions required.[15] And as the judge recognized, there was "no prior history of complaints about kind or degree of these changes that varied as much as 2 ¼ hours more than the regular shift and varied from 2 to 3 shifts per day." I believe that the employees would reasonably view the addition of an extra 45 minutes or 1 hour and 45 minutes on top of these other changes as part and parcel of the Respondent's standard practice of altering shift schedules.

"To establish the existence of a past practice, it is enough to show that frequent, recurrent, and similar actions have been taken, for whatever reasons, such that employees would recognize an additional action as part of 'a familiar pattern comporting with the [r]espondent's usual method of conducting its manufacturing operations.'" *Mike-Sell's*, 368 NLRB No. 145, slip op. at 4 (quoting *Westinghouse*, 150 NLRB at 1576). I believe that the Union and employees here would recognize the changes here as part of the Respondent's familiar pattern.

For my colleagues, however, all of the pernicious effects of *Raytheon* are "well-illustrated in this case." They say that the "Respondent's unilateral conduct is the antithesis of an automatic nondiscretionary action." Compounding this flaw, they assert that *Raytheon* transforms "the Union's waiver of its rights for a limited 18-month time period [under the 2018 Agreement] . . . into a privilege for the Respondent to act unilaterally effectively in perpetuity . . . ." Citing *Katz*, they state that "'[t]here simply is no way in such [a] case for a union to know whether or not there has been a substantial depar-

[15] My colleagues highlight the judge's conclusion that "an 11 or 12-hour shift is significantly different to employees than an 8-hour or even a 10.25-hour shift." They cite to *PPG Industries*, 372 NLRB No. 78, slip op. at 2 (2023), explaining that the employees could not reasonably expect that the Respondent would have instituted 12-hour and 11-hour work shifts based on its previous changes because of the unique "physical, and financial distress resulting from working such 12-hour shifts." In this regard, my colleagues also take administrative notice of OSHA statistics. Eleven-hour and 12-hour shifts may indeed impose onerous requirements on employees, but this evidence does not have any relevance to the legal issue whether an action is similar in kind and degree to what was done before. See id., slip op. at 2 fn. 5 ("In finding that the scheduling change here was not similar in kind and degree to the prior scheduling changes, Member Kaplan does not rely on employees' testimony concerning how the instant change will affect them."); cf. *Mike-Sell's*, 368 NLRB. No 145, slip op. at 4 ("Nothing in . . . controlling Board precedent . . . suggests that an employer must have the same reasons, economic or otherwise, in order to establish that actions in line with a prolonged pattern of recurrent actions are similar in kind and degree to prior actions.").

Moreover, I believe that *PPG Industries*, is distinguishable from the instant case. In *PPG Industries*, I agreed with my colleagues that the employer did not demonstrate that its change to employees' work schedules from 8-hour to 12-hour shifts was in accordance with an established past practice where the employer's scheduling change was materially different from previous scheduling changes. 372 NLRB No. 78, slip op. at 2. The Board found that, during the decade prior to the changes at issue in that case, the respondent had made three schedule changes that were not of the same kind or degree. The Board further found that the change at issue there was again different in kind and degree from the prior three changes. The Board observed, among other things, that prior to the disputed schedule change, the employer had never required all unit employees to work 12-hour shifts and had never completely eliminated the base 8-hour shift. Id. In contrast, in this case, the Respondent frequently altered shifts in varying ways during the term of the 2018 Agreement and following its expiration. Therefore, as discussed above, the Respondent's implementation of the 12-hour and 11-hour work shifts on three occasions was a continuance of its past practice.

My colleagues also observe that "the Respondent itself described the 12-hour shifts as 'unusual' rather than as a continuation of a regular practice." But my colleagues know very well that the determination as to whether the Respondent demonstrated a past practice is not based on a statement by the Respondent's Director of Human Resources describing the Respondent's conduct but rather by the application of well-established precedent to the record.

ture from the past practice[.]' *Katz*, 369 U.S. at 746." My colleagues claim that the Respondent "whipsawed" its employees through its exercise of this "wholly unchecked" power. They speak of how this leads to "the very corrosion of the collective-bargaining process" itself. My colleagues conclude that "[t]he Union's inability to compel the Respondent to engage in bargaining on the topic of work shifts sent an indelible message to employees 'that their union is ineffectual, impotent, and unable to effectively represent them.' *NLRB v. Hardesty Co*., 308 F.3d 859, 865 (8th Cir. 2002)."

My colleagues see a "simple answer" to this problem: more bargaining. I do not disagree with my colleagues that collective bargaining is fundamental to the Act. Here, the Respondent *did* engage in "prior discussion with the union," and the fruit of that discussion was embodied in the parties' collective-bargaining agreement. *Katz*, 369 U.S. at 747. Although the Union may now regret the bargain it struck in good faith with the Respondent, I do not believe that the Board has the authority to relieve the Union of that bargain. Nor do I believe that ordering piecemeal bargaining is the answer. As my colleagues aptly observe, "pernicious fragmented, piecemeal bargaining . . . is disfavored under the Act." I am, therefore, at a loss to explain why my colleagues would order that very result here. *Raytheon*, on the other hand, upholds both of these policy imperatives: it holds the parties to the bargains they struck and it avoids the ill-effects of piecemeal bargaining.[16]

For all of these reasons, I would affirm the judge's dismissal of the allegation that the Respondent's implementation of the 12-hour and 11-hour employee work shifts violated Section 8(a)(5) and (1) of the Act. [17]

CONCLUSION

As set forth above, I believe the judge properly applied *Raytheon* and *Mike-Sell's* in this straightforward case to find that the Respondent established that its implementation of the 12-hour and 11-hour employee work shifts was a lawful continuation of its past practice of altering shifts to meet production demands, and therefore, the Respondent did not violate Section 8(a)(5) and (1) of the Act. My colleagues, however, have used this case as a vehicle to overrule *Raytheon* and *Mike-Sell's* and implicitly return to the overly restrictive past practice standard from *DuPont*. My colleagues maintain that they are reinstating the pre-*Raytheon* case law and returning to this purported mandate of *Katz* that employers may act unilaterally pursuant to a longstanding practice only if the changes do not involve the exercise of significant managerial discretion. But their decision makes clear that they have reinstated the standard from *DuPont* that "any" discretion associated with an employer's action means the action constitutes a change requiring bargaining, even if consistent with a past practice. In addition, the majority further limits the past practice defense by finding that an employer cannot make discretionary changes pursuant to an expired management-rights clause. Accordingly, despite purporting to embrace the Board's "long-

[16] The majority also asserts that the union's acquiescence to the Respondent's unilateral changes to work shift schedules following the expiration of the 2018 Agreement did not establish a waiver of its right to bargain over the disputed changes. In this vein, my colleagues correctly observe that the Union objected to the 12-hour work shifts the first time the Respondent sought to unilaterally institute them in April 2020, and opposed the 12-hour and 11-hour shifts on the next three occasions the Respondent unilaterally implemented them. But this has no relevance to whether the Respondent met its burden to establish that it acted consistent with an established past practice.

Here, we are concerned with whether the Respondent had a past practice and whether it acted consistent with that practice, not with whether the Union waived its right to bargain.

[17] As noted by my colleagues, there were no exceptions to the judge's findings that the Respondent violated: Sec. 8(a)(5) by unilaterally implementing a new healthcare plan and by its delay in providing requested information; and Sec. 8(d)(3) by failing to notify the State of West Virginia of its desire to modify the parties' 2018 Agreement. Also, as noted by my colleagues, the Respondent is a repeat offender. *Tecnocap*, 368 NLRB No. 70 (2019), enfd. in part 1 F.4th 304 (4th Cir. 2021). I agree with my colleagues that a remedial notice-reading is appropriate here. But like my colleagues, I would not order the Respondent to reimburse the Union for its bargaining expenses.

My colleagues have modified the judge's recommended Order in accordance with *Thryv, Inc.*, 372 NLRB No. 22 (2022), and *Paragon Systems, Inc*., 371 NLRB No. 104 (2022). I acknowledge and apply *Paragon Systems* as Board precedent, although I expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance Service, Inc*., 369 NLRB No. 68 (2020). Additionally, consistent with my partial dissent in *Thryv*, I would require the Respondent to compensate employees for other pecuniary harms only insofar as the losses were directly caused by the unlawful unilateral implementation of the new health care plan, or indirectly caused by that act where the causal link between the loss and the unlawful unilateral implementation of the new health care plan is sufficiently clear.

Contrary to my colleagues, however, I would not order the Respondent to distribute copies of the notice to employees at the meeting where the remedial notice is read. See *Noah's Ark Processors, LLC d/b/a WR Reserve*, 372 NLRB No. 80, slip op. at 6 (2023) (Member Kaplan, dissenting.).

In addition, I disagree with my colleagues that a broad cease-and-desist order is warranted under the circumstances of this case. The Respondent has not engaged in such egregious or widespread misconduct "as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods, Inc*., 242 NLRB 1357 (1979). See also *Postal Service*, 345 NLRB 409, 410 (2005) (observing that a broad order is not warranted in every instance of recidivist misconduct, and determination is based on "the totality of circumstances"), enfd. as modified 477 F.3d 263 (5th Cir. 2007). Further, the General Counsel could have sought contempt proceedings to the extent that she believed that the Respondent was failing to abide by the Board's previous order.

established past practice jurisprudence," my colleagues have effectively eliminated the past practice defense for an employer. Because I believe that *Raytheon* and *Mike-Sell's* were correctly decided, and my colleagues' decision today is not supported by *Katz*, long-standing Board precedent, or the purposes of the Act, I respectfully dissent.

Dated, Washington, D.C. August 26, 2023

Marvin E, Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

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 refuse to bargain collectively with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC (Union) by failing to timely furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT unilaterally change your terms and conditions of employment by implementing 12-hour and 11-hour work shifts without first notifying the Union and giving it an opportunity to bargain, or at time when we have not reached a valid overall impasse in bargaining.

WE WILL NOT unilaterally change your terms and conditions of employment by implementing a new health care plan for you at a time when we have not reached a valid overall impasse in negotiations with the Union for a new collective-bargaining agreement.

WE WILL NOT fail and refuse to bargain in good faith with the Union by unilaterally implementing changes in your healthcare benefit plan without giving notice to the State of West Virginia that it sought termination and modification of the collective bargaining agreement as required in Section 8(d)(3) of the Act WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, to the extent we have not already done so, furnish to the Union in a timely manner the information requested by the Union in Stephen Shane Carlin's July 16, 2020, email to Darrick Doty and the information requested in Katherine Horigan's November 11, 2020, email to Darrick Doty.

WE WILL, on request by the Union, rescind the changes in your healthcare benefit plan terms that were unilaterally implemented on January 1, 2021, but WE WILL NOT rescind any changes that benefited you unless the Union asks us to do so.

WE WILL make unit employees who were subject to the change in the healthcare benefit plan whole for any loss of earnings and other benefits resulting from the unlawful change in the healthcare benefit plan, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful change in the healthcare benefit plan, plus interest.

WE WILL compensate employees who were subject to the change in the healthcare benefit plan for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 6, 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 these individuals.

WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the corresponding W-2 forms reflecting the backpay awards for the employees who were subject to the change in the healthcare benefit plan.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All hourly rated production and maintenance employees, including warehousemen; excluding employees on jobs covered by contracts with other unions, salaried

supervisors, office clerical and other employees excluded by law.

WE WILL hold a meeting or meetings during worktime at our facility in Glen Dale, West Virginia, scheduled to ensure the widest possible attendance of employees, at which the attached notice marked "Appendix" will be read to employees by a high-ranking management official of the Respondent in the presence of a Board Agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a high-ranking management official of the Respondent and, if the Union so desires, the presence of an agent of the Union. A copy of the notice will be distributed by a Board agent during this meeting or meetings to each unit employee in attendance before the notice is read.

TECHNOCAP, LLC

The Board's decision can be found at https://www.nlrb.gov/case/06-CA-2651111 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, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Julie R. Stern, Esq., for the General Counsel.
Nathan Kilbert, Esq., for the Charging Party.
John A. McCreary Jr., Esq. and *Alexandra Farone, Esq*., for the Respondent.

DECISION

STATEMENT OF THE CASE

KIMBERLY R. SORG-GRAVES, Administrative Law Judge. Between August 2020 and February 2021, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (Union) filed the charges in Cases 06–CA–265111, 06–CA–268399, 06–CA–270171, 06–CA–270931, and 06–CA–273334 with Region 6 (Region) of the National Labor Relations Board (Board). The charges, as amended, allege that Tecnocap LLC (Respondent): 1) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by making changes to employees work shifts and healthcare benefits without giving the Union opportunity to bargain over these changes and without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement; 2) violated Section 8(a)(5) and (1) of the Act by refusing to provide requested information relevant to the Union's duty to bargain on behalf of bargaining unit employees; 3) violated Section 8(d)(3) of the Act by unilaterally implementing a proposed change in healthcare benefits without first providing notice to the State of West Virginia as required by Section 8(d)(3). After issuing earlier complaints, on September 14, 2021, the Region issued the amended consolidated complaint in this matter.[1] On September 27, 2021, Respondent filed an answer to the amended consolidated complaint. (GC Exh. 1(a)-(dd).)[2]

I heard this matter on November 8 and 9, 2021, via Zoom government videoconference. The parties and witnesses participated via videoconference from various locations in Pennsylvania and West Virginia. I afforded all parties a full opportunity to appear, introduce evidence, examine, and cross-examine witnesses, and argue orally on the record. General Counsel, Charging Party, and Respondent filed posttrial briefs in support of their positions.

After carefully considering the entire record, including my observation of the demeanor of the witnesses and the parties' briefs, I make the following findings and conclusions.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a limited liability corporation with an office and a place of business in Glen Dale, West Virginia where it is engaged in the manufacture and nonretail sale of metal lids for glass containers. In conducting its operations, Respondent annually sales and ships from Respondent's facility goods valued in excess of $50,000 directly to points outside the State of West Virginia. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(y) and (aa).) I find that this dispute affects commerce, and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES FACTS AND ANALYSIS

A. Background

Respondent manufactures metal lids for food and other glass containers. (Tr. 128.) Respondent has a 30-year history of collective bargaining with the Union and its predecessor with re-

[1] The Counsel for General Counsel (General Counsel) gave notice of intent to amend the amended consolidated complaint and made an oral motion on the record to with the allegations in paragraph 18 and 21(b) and references thereto in paragraphs 20 and 22 and in the "wherefore" paragraph. There were no objections to the amendments, and I granted the motion. (Tr. 15–16.)

[2] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt. Exh." for joint exhibits, "GC Exh." for the General Counsel's exhibits, "GC Brief" for General Counsel's posthearing brief, "R. Exh." for Respondent's exhibits, and "R. Brief" for Respondent's posthearing brief. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive. My findings and conclusions are not based solely on the record citations contained in this decision, but rather are based upon my consideration of the entire record for this case.

gards to Respondent's production, maintenance, and warehouse employees (unit).[3] (Tr. 109–110.) The most recent collective-bargaining agreement (CBA) covering the unit was effective from March 21, 2018, to September 30, 2019. (Jt. Exh. 1.)

On June 10, 2019, Respondent notified the Union of its intent to bargain for a successor to the agreement scheduled to expire on September 30. (Jt. Exh. 1, p. 5; Jt. Exh. 27(a).) A long-term representative of the Union, Stephen Shane Carlin (Carlin) was the Union's lead negotiator in contract negotiations with Respondent until August 2020. Katherine Horigan (Horigan) works for the Union and specializes in negotiating healthcare benefits for various bargaining units. (Tr. 45.) Horigan assisted Carlin, in contract negotiations and then became the lead negotiator in August of 2020. (Tr. 46, 75.) Respondent's director of human resources, Darrick Doty (Doty), was its lead negotiator.

B. Changes in Unit Employee Shifts

1. Positions of the parties and background facts

While contract negotiations were ongoing, Respondent implemented 11 and 12-hour shifts for unit employees. Such long shifts had never been implemented before. General Counsel and Charging Party contend that Respondent unlawfully implemented these shifts without first giving the Union notice and opportunity to bargain and without bargaining to a contract or an overall impasse in contract negotiations. Respondent contends that it was privileged to implement the shifts, because it was maintaining the status quo as is evidenced by language in the expired CBA and past practice.

Article 9, Section 1 of the expired CBA sets a normal workweek as 40 hours to be worked in three shifts: 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m.; 11 p.m. to 7 a.m. A cursory review of Respondent's weekly work schedules illustrates that these shifts were frequently adjusted. Article 9, Section 1 also states that "Management may request with reasonable notification from time to time the working hour schedule be adjusted due to production requirements or facility conditions." The parties stipulated that the "reasonable notification" requirement in this provision is satisfied by Respondent's long-standing practice of posting schedules every Thursday setting out the next week's schedule. (Tr. 130; Jt. Exh. 57.)

The weekly schedules illustrate that Respondent most often ran first and second shifts of 8 hours. Yet, it frequently adjusted the shift schedule in various ways and announced these changes by posting the upcoming week's schedule the Thursday before. (Jt. Exhs. 2 and 3; Tr. 110–111, 127–128, 130.) For example, the start time for first shift was usually 7 a.m. but it fluctuated to 6 a.m. and 5 a.m. at various times. Sometimes the first shift ended at 3 p.m. but often it was extended 15 minutes to overlap with the second shift that started at 3 p.m. Less senior employees are often moved from one shift to another to cover for employees on leave. At other times, Respondent schedules 3 eight-hour shifts, and employees are assigned to cover all three shifts. On other occasions, Respondent operated 3 overlapping shifts of 8.25 or 8.5 hours. (Jt. Exhs. 2 and 3; Tr. 127–128.) Between October 2018 and August 2020,[4] before the allegedly unlawful shifts were implemented, Respondent operated shifts of 10 or 10.25 hours for a total of more than 31 weeks. These longer shifts were implemented for periods before and after the contract expired. The length of time that these alternate shifts were implement varied from a couple of days to 9 weeks of operating a 10.25-hour and a 10-hour shift in the spring of 2019.

In April 2020, Respondent met and bargained with the Union about COVID-19 protocols. Respondent recommended implementing two 12-hour shifts as a measure to prevent the spread of COVID-19, but the Union opposed the measure. Respondent posted a notice to employees explaining that it offered to implement 12-hour shifts as a COVID-19 preventative measure, but the Union did not agree to the change. (GC Exh. 4; Tr. 116.)

2. The alleged changes to unit employees' shifts

On Thursday, August 20, 2020, Respondent posted the schedule for the following week consisting of 2 mandatory 12-hour shifts for all employees without work hour restrictions. Respondent did not give the Union prior notice or opportunity to bargain about the implementation of 12-hour shifts.[5] (Jt. Exh. 3, p. 47; Tr. 113–114.) This was the first time that Respondent had posted mandatory 12-hour shifts. (Tr. 112–113.) After seeing the posted schedule, Union President Lisa Wilds (Wilds) requested that the shifts be adjusted to start 2 hours earlier. Wilds request was granted the next week. (Tr. 122–123, 186; R. Exh. 11.) At the August 25 bargaining meeting, Doty commented that they achieve higher production rates with 12-hour shifts. (Tr. 155.) The Union objected to the 12-hour shifts, requested to bargain the issue, and raised safety and health concerns for the employees. (Jt. Exhs. 14, 15, 16, 17.) Respondent referenced the need to increase production to meet customer demands in its responses to the Union's requests to shorten the shifts and committed to returning to shorter shifts "as soon as possible." (Jt. Exh. 14; Tr. 114.) The 12-hour shifts continued from August 24 through October 11, then Respondent operated three 10-hour shifts for a few weeks.

On October 27, Respondent posted a notice announcing that it would start two 11-hour shifts the following week to reduce the risk of exposure to COVID-19 between employees on the shifts due to a local spike in COVID-19 positivity rates. The notice solicited the employees' preference for the 5 a.m to 4 p.m. shift or the 5 p.m. to 4 a.m. shift. (GC Exh. 3.) During contract negotiations, Doty told Horrigan that the 11-hour shifts were implemented to cover absences due to COVID-19 testing and quarantine requirements. (Tr. 74.) The 11-hour shifts start-

[3] All hourly rated production and maintenance employees, including warehousemen; excluding employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

[4] The record contains shift schedules starting in October 2018. The record is unclear as to whether Respondent ever altered shift lengths prior to October 2018.

[5] Charging Party witnesses raised the possibility that Respondent failed to abide by Article 9, Section 11 of the CBA which covers the selection of employees for overtime work but there is insufficient evidence in the record to support such a conclusion. I note that the complaint does not allege that the assignment of overtime or the assignment of employees to particular shifts constituted unilateral changes.

ed on November 2 and continued through November 29. Respondent returned to 3 shifts of 8.5 hours through the month of December. For the weeks starting January 4 and 11, 2021, Respondent again implemented 12-hour shifts due to "exceptional workload." (GC Exh. 6, p. 1.) Although not alleged as a violation in the complaint, Respondent again implemented 12-hour shifts from February 15 through April 4, 2021. (Tr. 74; Jt. Exh. 3.)

3. Analysis

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally makes a material, substantial, and significant change to the wages, hours, or other terms and conditions of employment of bargaining unit employees without first providing the collective-bargaining representative with notice and a meaningful opportunity to bargain. *NLRB v. Katz,* 369 U.S. 736 (1962); *Ivy Steel & Wire, Inc.,* 346 NLRB 404, 419 (2006). A violation of Section 8(a)(5) does not require a finding of bad faith. *Katz*, supra at 743 and 747. Subjects falling under the language of Section 8(d) are mandatory subjects of bargaining.[15] "Section 8(a)(5) … read together with Section 8(d), requires an employer to bargain collectively with the representative of his employees 'with respect to wages, hours, and other terms and conditions of employment." *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 902 (2000), citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Therefore, changes to employees' shifts are mandatory subjects of bargaining. *Hedison Mfg. Co.,* 260 NLRB 590, 592–594 (1982) (holding that a 5-minute change in employee starting time is a mandatory subject of bargaining).

Where, as in this case, the collective-bargaining agreement has expired, an employer has a statutory duty to maintain the status quo of mandatory subjects of bargaining until the parties reach a new agreement or a valid impasse in negotiations. See *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999). Failure by the employer to maintain the status quo constitutes a violation of Section 8(a)(5) and (1). To determine the status quo, the Board considers the substantive terms of the expired collective-bargaining agreement and any past practices that are "regular and long-standing, rather than random or intermittent" and do not vary in kind or degree from what has been customary in the past. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Wendt Corp.*, 369 NLRB No. 135, (2020); *Asociacion De Empleados Del Estado Libre Asociado De Puerto Rico*, 370 NLRB No. 71, slip op. at 3 (2021); *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 369 NLRB No. 61, slip op. at 3 (2020); *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019). The party asserting the existence of a past practice bears the burden of proving that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis. *Sunoco*, supra, at 244*; Mikesell's Potato Chip Co.*, 368 NLRB No. 145, slip op. at 3 (2019).

Here, the expired CBA contains explicit language that granted Respondent the privilege to alter work shifts based upon production needs and conditions in the facility and the language contains no explicit limits on how Respondent may alter the shifts. Respondent frequently altered shift schedules during the term of the contract and after its expiration. Thus, the question here is whether the allegedly unlawful 11 and 12-hour shifts imposed by the Respondent varied in kind and degree enough from past practice to constitute a change. I find that nothing in the record contradicts Respondent's stated reasons for the shift changes of production needs and its attempts to prevent the spread of COVID-19 for the benefit of its employees and for production purposes. Thus, I find that the reasons for changing the shifts align with past practice and the language of the expired CBA.

General Counsel and Charging Party point to the significant increase in the length of the shifts, to support their arguments that shift changes varied in degree from the status quo.[6] The shifts were 45 minutes and 105 minutes longer than any prior shift. Charging Party relies upon *Raytheon Network Centric System*, 365 NLRB No. 161 (2017) and *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900 (2000) to support its claim that the 11 and 12-hour shifts were unlawful material, substantial, and significant changes to past practice. In *Pepsi-Cola Bottling*, the Board found that a 15-minute change to the employees' start time was a material and substantial change to their working conditions. I do not find the Board's holding in *Pepsi-Cola Bottling* instructive here, because the employer, unlike in the instant case, did not have a past practice of altering employees' shifts or contract language relevant to the issue.

Here, Respondent frequently exercised broad leeway in establishing the number, length, and start and end times of shifts. Over the preceding 2 years, these changes in shifts varied significantly and often lasted for weeks. Respondent also apparently exercised leeway in assigning employees to the various shifts, especially when it operated 3 shifts. Even long-term employee witnesses noted checking the weekly shift assignments to verify their assigned shifts. I find no consistent pattern amongst Respondent's changes to the shifts before or after the expiration of the CBA. I also find no prior history of complaints about kind or degree of these changes that varied as much as 2 ¼ hours more than the regular shift and varied from 2 to 3 shifts per day.

I find that the facts of this case more closely aligned with cases in which the Board has determined whether an employers' subcontracting of work constituted a past practice. The standard for what constitutes a substantial change in subcontracting has vacillated over the years with the most recent standard set forth in *Raytheon* and clarified in *Mikesell's Potato Chip Company*, 368 NLRB No. 145 (2019) (noting that in *Raytheon*, the Board reaffirmed *Shell Oil Co.*, 149 NLRB 283 (1964) and *Westinghouse Electric Corp. (Mansfield Plant*), 150 NLRB 1574 (1965)). In *Mikesell's Potato Chip*, the Board held that under *Raytheon,* it is not necessary to show mathematical consistency in the subcontracting of work to establish a past

[6] General Counsel and Charging Party also argued that the long shifts heightened the possibility of injuries caused by fatigue. While I understand the Union's desire to argue against the implementation of such long shifts, I do not find the safety and personal arguments relevant to whether Respondent was privileged to implement the shifts. I further note that there is no evidence in the record of increased safety issues caused by the longer shifts.

practice of subcontracting. The Board noted that the subcontracting of work is often based on the varying nature of workflow, and therefore, despite a frequent practice of subcontracting, it will likely not be mathematically consistent and require some discretion on the part of the employer. In *Mikesell's Potato Chip*, the Board found that the company's selling/contracting out of 51 driver routes over a 19-year period constituted a past practice, even though the yearly sales of such routes varied from 0 in many of those years to 30 in 1 year. Id.

Much like cases involving subcontracting of work, in the instant case, the expired CBA language allowed for changes in the regular shift in response to changes in workflow. The record established that over the last few years Respondent frequently, but on an inconsistent basis and in inconsistent ways, used its discretion to change employee shifts to meet production demands. I recognize that an 11 or 12-hour shift is significantly different to employees than an 8-hour or even a 10.25-hour shift and that such inconsistent changes most likely would have been found unlawful under Board holdings immediately preceding *Raytheon*. Yet, under current Board precedent as applied in *Mikesell's Potato Chip*, where the Board found lawful the sale of driver routes based upon a widely inconsistent past practice in the frequency and number of routes sold, I find that Respondent's implementation of the 11 and 12-hour shifts was a continuance of its past practice of altering shifts in widely varying ways to meet production needs.

4. Conclusion

Accordingly, I find that the 11 and 12-hour shifts were a lawful continuation of Respondent's past practice of altering shifts to meet production demands, and therefore, the implementation of the 11 and 12-hour shifts did not violate Section 8(a)(5) and (1) of the Act.

C. Requests for Information

1. The facts

On July 16, Carlin sent Doty an email requesting information. (Jt. Exh. 24(a).) Carlin's email stated that the "information is relevant and necessary in order for the Union to analyze the Company proposal(s), formulate our own proposals, and to otherwise bargain on an informed basis and to perform our function as the exclusive bargaining representative of bargaining unit employees." Doty noted in a July 27 email to Carlin that he was working on the information requests, but there are no further communications specifically in response to the July 16 email. (Tr. 36, 37, 76; Jt. Exh. 24(b).) Respondent's counsel questioned Carlin about whether he received answers to some of these requests at the bargaining table to which Carlin responded that he did not recall receiving the information. (Tr. 40.) Respondent provided no evidence to contradict this testimony.

For ease of reference, I have copied each of the requests from the July 16 email below. After each request, I note the date that the parties stipulated that the information was provided or that the request became moot because the related contract proposal had been withdrawn or modified. (Jt. Exh. 57, par.24.)

– Information Request:

1. List all "objective measurements" that presently exist and have been and/or may be applied to sustain discipline under the company's proposal relative to ARTICLE 5 -Hiring, Releasing, Quitting and Discharging.
--Relevant proposal was withdrawn March 18, 2021.

2. Describe and define with specificity the meaning of "balancing shift skills" as set forth in the company's proposal relative to ARTICLE 8 - Seniority and describe how that language would practically operate.
--Information provided on October 27, 2021.

3. Provide the total amount of savings that the company would experience in the first year of a new agreement, by paying employees $10 for their lunch break(s) as proposed in the company's proposal relative to ARTICLE 9 - Work Hours and Overtime Premium Pay. Please include all calculations used. Additionally, please describe the need for this change, the resulting savings, and how/where any savings will be applied.
--Relevant proposal was withdrawn March 18, 2021.

4. Provide the amount of overtime pay that is attributed to hours worked on Saturday(s), pursuant to ARTICLE 9 - Work Hours and Overtime Premium Pay, Section 3 of the current agreement, that has been paid to bargaining unit employees over the past 24 months (include total hours worked and total hours paid. Additionally, please provide the projected savings to the company in the first year of a new agreement, if the Saturday overtime requirement were to be eliminated pursuant to the company's proposal relative to this article and section. Please provide an explanation of the necessity for this proposed change and how/where any savings would be applied.
--Information provided on October 27, 2021.

5. Provide the number of emergency vacation requests that the company has received over the last 24 months (include the number that were denied and the number that were approved as well as the reason for each approval and each denial).
--Information provided on October 27, 2021.

6. Explain the basis for proposing to provide payment of any unused vacation pay in the subsequent year rather than in the current year as is presently required. Additionally, please describe any tax consequences (to each the company and employees) that may be experienced as a result of the company's proposed change.
--Information provided on October 27, 2021.

7. Provide a list of all past practices that the company believes are presently in effect including but limited to the past practice described by the company at our recent bargaining session regarding the payment, by the company, of the employee's health insurance premium share while the employee is off from work due to sickness or disability.
--Relevant proposal was withdrawn May 20, 2021.

In a November 2 email, Doty told Horigan that he believed he had responded to the outstanding information requests except for one on which he was working and which is not at issue

here. Doty went on to state, "If you will specify what information you believe we still owe you I will address it." (Jt. Exh. 26, p. 7.) On November 4, Horigan responded by email stating, "Contrary to your statements in the email below, the Company has not responded to any of the requests for information I made on September 24, and there are multiple other requests for information outstanding (including, for example, regarding temporary employees, mask warning letters, and employee health reimbursement account balances)." (Jt. Exh. 26, p. 7.)

After providing a significant amount of additional information on November 10, Doty again stated "that we are not aware of any request for information, many indeed, that is still pending. Should you need anything else, please do not hesitate to ask." (Jt. Exh. 26, p. 5.) Horigan and Doty emailed back and forth about information requests and other issues on November 10 and 11. Horigan never raised the issue of Carlin's July 16 request in response to Doty's inquiries as to whether he had provided all the requested information, and there were no further interactions about the July 16 request until the Respondent provided information after the charges in this matter were filed. (Tr.76.)

The Union's request for information about the administrative cost for Respondent to perform dues deductions and remittance to the Union, which is at issue here, was discussed in this email chain. In a November 10 email from Doty to Horigan, he provided Respondent's calculation of its administrative cost in performing dues deductions and remittance to the Union. Respondent's calculation was based upon 15 minutes of administrative time per unit member per month. Horigan responded by requesting information about the specific tasks that required 15 minutes per employee per month. (Jt. Exh. 26, p. 4.) On November 11, Doty responded, I do not have to justify our position. The Company has an absolute right under NLRB precedent to discontinue dues checkoff and has determined to exercise that right." (Jt. Exh. 26, p. 3.) Horigan responded by email on November 11 that the Union wanted the specific information about the expenses in performing the dues deduction to make proposals that could possibly reduce the costs. This November 11 request was not discussed again until October 27, 2021, when Respondent made it clear that it simply did not want to make dues deduction and that costs was not the issue. (Tr. 77.)

2. Legal standards

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). An employer has a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *A–1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956). Typically, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). Information concerning non-unit employees is not presumptively relevant, requiring the union to provide an explanation as to how the information is relevant to its bargaining duty. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994).

Where a showing of relevance is required because the request concerns non-unit matters, the burden is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983); *Shoppers Food Warehouse*, 315 NLRB at 259. "The Board uses a broad, discovery-type of standard in determining relevance in information requests." *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006); *NLRB v. Acme Industrial Co.*, supra, at 437. The issue is whether the Union's request for information is of "probable" or "potential" relevance. *Transport of New Jersey,* 233 NLRB 694, 694 (1977) (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967)); *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991) ("the information need not be dispositive of the issue between the parties but must merely have some bearing on it"). *W–L Moulding Co.*, 272 NLRB 1239, 1240 (1984), quoting *NLRB v. Rockwell–Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969) and *Acme Industrial*, supra at 437. It is not the Board's role to pass on the merits of the Union's claim, "[t]he Board's only function in such situation is in 'acting upon the possibility that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'"

For information that is not presumptively relevant, the union must demonstrate that it had "a reasonable belief supported by objective evidence for requesting the information." *Shoppers Food Warehouse*, 315 NLRB at 259. "The union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, 350 NLRB at 1258 fn. 5. Actual relevance is not required, but the union must demonstrate a probability that the data is useful for the purpose of bargaining intelligently. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Brown Newspaper*, supra. To make this showing, "the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the respondent under the circumstances." *Murray American Energy, Inc.*, 370 NLRB No. 55 (2020) (*Murray II*), quoting *Murray American Energy, Inc.*, 366 NLRB No. 80 (2018) (*Murray I*), enfd. mem. 765 Fed.Appx. 443 (D.C. Cir. 2019.

Once the burden of showing the relevance of non-unit information is satisfied, the duty to provide the information is established. Information that is not presumptively relevant may have "an even more fundamental relevance than that considered presumptively relevant." *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir.), cert. denied 396 U.S. 928 (1969). The refusal of an employer to provide information that is request by a union and relevant to its bargaining duties is a per se violation of [Section 8(a)(5) of] the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.,* 220 NLRB 189, 191 (1975)*; Procter & Gamble Mfg. Co.* 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

The Board has also found that "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all."

Monmouth Care Center, 354 NLRB 11, 41 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012). "[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable, good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). "In evaluating the promptness of the employer's response, 'the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.'" *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005).

3. Analysis

Not all of the requests at issue were for presumptively relevant information about employees' terms and conditions of work, but the requests were prompted by bargaining proposals made by Respondent. I find that the relevance of the information requests should have been apparent to Respondent based upon the circumstances. Furthermore, the requests themselves noted that they were directly related to bargaining proposals advanced by Respondent. Therefore, I find that the Union met its burden of informing Respondent of the relevance of the requested information and triggered Respondent's duty to provide the information promptly after the requests were made.

Ultimately, the requested information was provided or became moot due to changes in bargaining proposals. Therefore, the issue is whether the information was timely provided. Respondent does not dispute that Doty received Carlin's July 16 request for information and in a July 27 email Doty acknowledges that he is working to provide information. Instead, Respondent contends that it should be excused from failing to timely provide the information requested on July 16 because the Union did not renew this request in response to Doty's emails in early November inquiring about whether there was still outstanding information. The problem with this argument is that nearly 4 months had passed between when the request was made and Doty's November email. The parties were exchanging proposals and conducting bargaining sessions throughout this time. By November, Respondent already failed to timely provide the information. The record contains no evidence that would excuse the 4-month delay in responding to the request. Furthermore, the information requested in the July 16 email remained relevant to bargaining until Respondent changed its proposals or provided the relevant information months later. Thus, I find that Respondent's failure to timely provide the information requested in Carlin's July 16 email violated Section 8(a)(5) and (1) of the Act.

Regarding the Union's request for cost information about performing dues deductions, the Union was seeking the information in response to statements made by Respondent at the bargaining table about the administrative costs of deducting dues. Respondent provided an estimate of the costs to which the Union requested clarification on November 10. Instead of providing the information, on November 11 Doty responded that he did not have to justify Respondent's position and that Respondent had decided to exercise its right to stop dues deductions. On that same date, Horigan renewed the Union's request for the specific information about the expenses in performing the dues deduction to make proposals on that issue.

While I agree with Doty that Respondent did not have to justify its position on dues deduction and, absent an effective contract provision requiring otherwise, it could discontinue dues deduction, those are separate issues from Respondent's duty to provide information relevant to bargaining proposals. Doty's email did not provide the requested information and Horigan's response clarified that the Union was still seeking the information to be used in contract negotiations. It was not until October 27, 2021, that Respondent clarified that it simply did not want to make dues deduction and costs was not the issue. Such information was germane to contract negotiations, especially since Respondent contended that the Union's refusal to agree to exclude dues deduction from a subsequent collective-bargaining agreement was one of its justifications for declaring impasse.

4. Conclusion

Accordingly, I find that Respondent failed and refused to timely provide the information requested in Carlin's email on July 16 concerning bargaining proposals and the information requested in Horigan's email on November 11 concerning the tasks involved in deducting dues from employees' wages, in violation of Section 8(a)(5) and (1) of the Act.

D. Implementation of Changes to Unit Employees' Healthcare Benefits

1. The facts

The parties started bargaining in the fall of 2019. Respondent made clear that it wanted to remove the arbitration procedure from any future collective-bargaining agreement. Over time, Respondent asserted 3 main objectives in bargaining: rid any future agreement of an arbitration clause; discontinue dues deductions; and negotiate a new healthcare benefit package.

As the end of 2019 approached, Respondent expressed its intent on implementing a new healthcare package in 2020. Respondent contends that the parties negotiated healthcare benefits separately in the past and should have done so at the ends of 2019 and 2020. The record establishes that there was a practice of notifying employees of premium increases and allowing employees to add, drop, or change type of coverage under the established benefit plan not a new benefit plan. These limited changes were contemplated by the prior collective-bargaining agreement and were discussed with union leadership each year before the information was provided to the employees. (Tr. 167–168; CP Exh. 1, Art. 16.) The yearly election forms provided to the employees noted at the bottom of the form that premium increases were divided 33 percent and 66 percent between the employees and the company per the existing contract. Other healthcare benefit changes are not reflected in these forms. (R. Exhs. 18 and 19.) Ultimately, the 2019 healthcare benefits were continued into 2020. (Tr. 49–51; Jt. Exh. 21(a).)

Negotiations continued into 2020 with Respondent presenting its first wage proposal on February 14. (Tr. 80; Jt. Exh. 35, p. 30.) At the March 13, 2020, bargaining session, Respondent

presented a chart outlining 4 healthcare benefit options offered by the provider. (Tr. 51; Jt. Exh. 36.) Initially, the parties' discussions centered around Option 3, which mostly dealt with healthcare cost increases by increasing premiums for the employer and the employees, and Option 6, which minimized premium increases by requiring higher Health Reimbursement Arrangement (HRA) contributions by the employer and out-of-pocket expenses by the employees.[7] (Tr. 53.)

During contract negotiations, Company representatives repeatedly noted that continuing the 2019 plan into 2020 without sharing the increased expenses with employees had already cost Respondent $330,000 and that costs would continue to accrue if a new plan was not implemented. Respondent sought to regain these losses through concessions on the Union's part in contract negotiations. (Tr. 49–51.)

As negotiations wore on, Respondent's focus shifted from Option 3 to Option 6. Horigan testified that she understood Option 6, as set forth in the benefit plan chart, to contain a significant decrease in Respondent's contribution to the HRA from the current benefit plan. Under the 2020 plan, Respondent was contributing $4750 to individual and $9500 family plans' HRAs. Horigan read the Option 6 to show a reduction in those amounts to $1300 and $2600. (Tr. 54, 80.) Based upon the chart and the testimony of Doty, I find that the credible evidence does not support this claim.[8] (Tr. 157–160.) Her interpretation of the chart may have stemmed from Respondent's insistence in negotiations on regaining the increased costs of health benefits that it was shouldering while contract negotiations continued even if that resulted in large financial losses for the employees. (Tr. 56, 94, 96.)

While I do not find that Option 6 of the chart reads as Horigan testified, it is clear that Respondent sought to share the rising cost of healthcare benefits with employees differently than it had in the past and that is reflected in the plan choices chart. Option 3 achieved that goal by increasing employee premiums. Option 6 achieved that goal by increasing HRA donations and premiums for Respondent and significantly increasing out-of-pocket expenses for employees and employee premiums. Under Option 6, employee out-of-pocket expenses would significantly increase because of increased co-pay costs and a decrease in the percentage of healthcare expenses the plan would cover in comparison to the policy in place in 2020. (Jt. Exh. 36.) As discussed more below, the parties continued to negotiate over how to share the increased costs of the healthcare benefit Option 6 and the split of those costs that were implemented on January 1, 2021, is not reflected in the benefit plans chart.

The Union's proposal dated August 25 specified that Option 3 would be offered. The Company's August 25 proposal also offered only Option 3 and contained proposed language on how to handle yearly premium changes during and after the proposed collective-bargaining agreement expired.[9] Horigan testified that despite the written proposals during the August 25, 2020, bargaining session, Respondent representatives stated that it was no longer offering Option 3 and that Option 6 was the only healthcare benefits option on the table. (Tr. 57; Jt. Exh. 40, 41 and 42.)

In response, the Union offered a packaged counterproposal on August 25, 2020, indicating that any offers made in the proposal required acceptance of the entire contract proposal. (Tr. 60–61; Tr. Jt. Exh. 42.) Respondent representatives asserted that its priority in contract negotiations at that time was healthcare benefits. The Union's counterproposal offered to agree to healthcare Option 6; all tentative agreements, base wage increases of $1.00 on October 1, 2020, and $1.05 on October 1, 2021; pension increase of $0.10/hour; the company's proposed drug testing policy with some changes; and all other articles would revert to the expired CBA's language. This proposal by the Union was a shift to Respondent's desired healthcare benefits but left the arbitration procedure and the dues deduction provisions in place, which Respondent opposed.

On September 24, 2020, Respondent submitted a counterproposal again omitting the articles covering arbitration and dues deductions. (Jt. Exh. 43.) Respondent expressed throughout negotiations that it did not want to agree to a collective-bargaining agreement with an arbitration provision and did not want to deduct and remit union dues. (Tr. 100, 102.) The Union took differing positions on a grievance and arbitration provision based upon other things it offered in its various contract proposals. At their September 24, 2020 meeting, the Union indicated their willingness to negotiate a contract without an arbitration provision. (Tr. 101.) None of the Union's proposals acquiesced to all 3 of Respondent's demands for no arbitration clause, no dues deduction, and the implementation of healthcare benefits Option 6.

At the October 28, 2020 bargaining session, the parties discussed healthcare Option 6 as the Union was no longer insisting on Option 3. The parties discussed their positions on healthcare and other proposals during the morning bargaining session. (Tr. 61, 62; Jt. Exh. 44.) The parties took a lunchbreak and when they met in the afternoon, Respondent presented the Union with

[7] Option 3 included relatively modest increases in primary care, specialist care, and emergency room copays and would increase Respondent's premiums by $163,889 96and employees' premiums by 8.4 percent. Option 6 included the same copay increases as Option 3, decreases in percentages covered by the insurance benefits after deductibles are reached, resulting in increases in out-of-pocket spending for employees. Option 6 also requires additional employer funding for HRA of $1300 for individual and $2600 for family benefits. The net result in premium increases for Option 6 is $44,327 for Respondent and 2.3 percent for employees. I assume that premium amounts for the employer are monthly versus yearly increases, but the record is not clear.

[8] Line 10 is labeled "Increase to Proposed HRA Funding" and in front of the figures for that line under Option 6 there is a "+" sign. Line 11 notes the "Maximum HRA Liability Increase" with a total $240,500. Finally, line 49 "Estimated HRA Funding" notes an estimated increase in HRA funding costs from the 2020 plan of $41,939. Therefore, I find that a full reading of the document illustrates that Option 6 required Respondent to increase its contributions to the HRA by $1,300 for individual and $2,600 for family plans, but that did not eliminate higher premiums and out-of-pocket expenses for unit employees.

[9] Respondent's proposal allowed it to change providers of such coverage, negotiate yearly premium increases for employees, contribute a limited amount towards employee deductibles, etc. (Tr. 58, Jt. Exh. 41.)

a letter declaring impasse. (Jt. Exh. 30.) The letter states:

> We have told you that we will not sign an agreement with an arbitration clause in it - it is the company's most important issue. We have asked directly whether the union would sign a contract without arbitration. Instead of providing an answer to that direct question the Union has stated that it is willing to negotiate. There is nothing to negotiate about, and if that is your position then we are at impasse.

Horigan questioned Doty as to whether he stood by the declaration of impasse and he stated that he did. (Tr. 64.) When discussing impasse, Respondent's representatives always mentioned Respondent's position on dues, arbitration, and healthcare, but the letter stated that the company was declaring impasse over the arbitration issue. (Tr. 79.) Horigan stated that the Union did not agree that they were at impasse and eventually asked if Respondent had an implementation date, but no date was set. Horigan requested another bargaining session before any implementation date to which Doty eventually agreed. (Tr. 64.)

In a November 11 email to Horigan, Doty explained Respondent's decision "that effective January 1, 2021, the USW members will be enrolled into option 6 plan that has been presented throughout negotiations and tentatively agreed by the union with HRA funding by the Company $1,0000/$2000 with member contribution split 50/50 of the increase which is under calculation and will be presented at the table tomorrow."[10] Horrigan responded by email denying such an agreement.

The parties met again on November 12 for bargaining and Doty admitted that the parties did not have a tentative agreement to implement option 6 healthcare as he had stated in his email. (Tr. 65.) Respondent presented a counter to the Union's October 28 proposal, and the Union presented a counterproposal. (Jt. Exh. 45 and 47.) At the table Doty, again complained about Respondent's ongoing healthcare expenses under the existing plan. Respondent provided the Union with 2021 healthcare benefit premium increases for carrying the 2019 plan forward and premium information for Option 6. (Tr. 66, 67; Jt. Exh. 46.)

On November 24, Respondent provided the Union with an outline of its counter to the Union's November 12 proposal and commented that: "Please also be aware the timing of health insurance and the fact that unless there is agreement sufficiently in advance of when changes need to be communicated to the carrier, the Company will implement its last proposal on health insurance." (Jt. Exh. 48 and 49.)

The Union provided a counterproposal on November 24. (Jt. Exh. 50.) On November 25, Doty emailed Horigan stating that he believed if the Union had not presented their proposal as a package, they could have made progress on the Union's proposals for "Article 3 Labor-Management Committee, Article 9 Work Hours and Overtime Premium Pay, Article 15 Vacations, Article 18 Relief /Breaks, Article 26 No Strike or Lockout, and the deletion of Article 27 and Article 28 Grievance and Arbitration." Doty sent Horigan Respondent's latest proposal and questioned whether the Union wanted to meet on December 3. (Jt. Exh. 21(b).)

The parties recapped their positions taken at the December 3 negotiation meeting through emails. (Jt. Exh. 23.) Doty inquired as to whether the Union would agree to a Memorandum of Understanding (MOU) separating the issue of healthcare from overall contract negotiations and allowing for Option 6 to be implemented with premium increases split 50/50 and company contributions to HRA accounts of only $1000 for single and $2000 for family plans. While the Union did not oppose Option 6, it did oppose this split of the cost increases and Respondent ultimately did not present the Union with a proposed MOU on healthcare. (Tr. 69; Jt. Exh. 23, p. 1 and 2.) Doty declared in his December 3 email that they were at impasse over healthcare, since the healthcare insurance provider's deadline was the next day and they had not reached an agreement on the issue. (Jt. Exh. 23, p. 2.) By email, Horigan rejected Doty's claim of an impasse. (Jt. "Exh. 34.) A few hours after bargaining ended on December 3, the Union sent a revised proposal to the Respondent. (Tr. 70; Jt. Exhs. 23 and 51.) While the healthcare benefits continued to be the focus at the bargaining table, the Union's proposals and statements at the table expressed willingness to negotiate towards an agreement on arbitration clause and dues deduction issues as it had in its November 24 proposal. (Jt. Exh. 21(b) and 34.)

In his emails, Doty repeatedly speaks of resolving the healthcare issue by the carrier's deadline amidst ongoing negotiations. For example, in his December 5 email Doty stated, "We believe that is unlikely to achieve an overall bargaining agreement by the holidays and the purpose of my e-mail is to hear the decision of the Union on the possible options offered by the selected health care provider or please submit your proposals." (Jt. Exh. 21(a), p. 8.)

At some date before December 16, 2020, Respondent distributed a healthcare election form to unit employees. (Tr. 71, 72; Jt. Exh. 13.) The form instructed unit employees to indicate their selection of single, family, or no healthcare benefits on the form and return it by December 16. The election form was not for the continuation of the 2019 healthcare benefits but for the new healthcare plan outline in Option 6 and scheduled to start on January 1, 2021. The form noted that it was for "Option 6 ($5000/10,000 Deductible $10 PPO & $10/20/50 Rx" with Respondent paying HRA contributions to cover only $1000 of the $5,000 deductible for the single plan and $2000 of the $10,000 deductible for the family plan. (Jt. Exh. 13.) Respondent distributed the form without giving the Union prior notice and implemented the Option 6 healthcare benefits on January 1, 2021, midst ongoing contract negotiations that continued well into 2021. (Jt. Exh. 52–56.) Respondent did not implement a last, best, final overall contract proposal.

2. Were the parties at Impasse?

Section 8(a)(5) of the National Labor Relations Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining sub-

[10] The HRA contributions mentioned here and apparently implemented on January 1, 2021, are less than what was listed under Option 6 of the plan chart resulting in higher healthcare expenses for unit employees than the Option 6 list on the plan chart indicates.

ject. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co.,* 343 NLRB 385 (2004). Pensions and insurance benefits of active employees is a mandatory subject of bargaining. *Allied Chemicals*, 404 U.S. 157 (1971). A unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change." *Alamo Cement Co.,* 281 NLRB 737, 738 (1986). During contract negotiations, an employer has the duty to maintain the status quo until a contract or a valid impasse in negotiations has been reached.

As discussed above, I find that the changes to the healthcare benefits were material, resulting in significant changes to employees' out-of-pocket expenses, deductibles, and premiums. Indeed, Respondent urged the Union to negotiate concerning healthcare benefits because of the substantial increases in benefit costs and the variation in what expenses or percentage of expenses the offered benefit plans covered. Furthermore, the plans being offered contained substantial changes to the structure of the provided benefits that effected the out-of-pocket expenses for employees and/or the percent of expenses covered. Respondent argues that the parties always negotiated such changes separate from overall contract negotiations. To the contrary, the changes contained in the offered benefit options were substantially different than the changes in just the premiums under the same plan offered throughout the life of the CBA. On January 1, 2021, Respondent did not just implement new premiums, but it implemented a new benefit plan that substantially changed the expenditures covered and increased out-of-pocket expenses for unit employees. Because it was a substantial and material change to the employees' healthcare benefits, Respondent was required to maintain the status quo until the parties negotiated a successor contract or bargained to an overall impasse in negotiations.

To determine whether a party has violated its statutory obligation to bargain in good faith to a valid impasse before implementing changes, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage*, 370 NLRB No. 83, slip op. at 2 (February 10, 2021); *Phillips 66*, 369 NLRB No. 13, slip op. 4 (2020). The Board considers a party's conduct for evidence of good or bad faith in bargaining, including delay tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, and efforts to bypass the union. *Atlanta Hilton & Tower*, supra at 1603. In addition, the Board has reiterated that in some instances, specific bargaining proposals "may become relevant in determining whether a party was making a sincere effort to reach an agreement." *Phillips 66*, supra, slip op. at 4, fn. 9. In analyzing these factors, the Board looks at the totality of the circumstances and one or two factors alone, however, may be sufficient to demonstrate the absence of impasse. See *Monmouth Care Center v. NLRB,* 672 F.3d 1085 (D.C. Cir. 2012), *American Security Programs, Inc.*, 368 NLRB No. 151 (2019). A party claiming an impasse as the basis for its unilateral actions bears the burden of proving that an impasse in negotiations existed. *Tom Ryan Distributors, Inc*., 314 NLRB 600, 604 (1994), *Wayneview Care Center*, 664 F.3d 341, 347 (D.C. Cir. 2011). Whether a bargaining impasse exists is "a matter of judgment." *North Star Steel, Co.*, 305 NLRB 45, 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992).

"Although impasse over a single issue does not always create an overall bargaining impasse that privileges unilateral action, it may do so when the single issue is "of such overriding importance" to the parties that the impasse on that issue frustrates the progress of further negotiations." *Calmat Co*., 331 NLRB 1084, 1097 (2000) (employer lawfully implemented its last best offer where the parties failure, during good faith bargaining, to agree on the pension issue resulted in impasse, and destroyed any opportunity for reaching an agreement); *In Re Richmond Elec. Servs., Inc.*, 348 NLRB 1001, 1002 (2006); *Cotter & Co.,* 331 NLRB 787, 787 (2000) (whether an impasse exists depends, among other things, on "the importance of the issue or issues as to which there is disagreement"). A party contending that an impasse on a single, critical issue justified its implementation of other bargaining proposals must demonstrate three things: (1) the actual existence of a good-faith bargaining impasse; (2) that the issue as to which the parties are at impasse is a critical issue; (3) that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved. *Calmat Co*., 331 NLRB 1084, 1097 (2000).

At different times Respondent asserted to the Union that they were at impasse with regards to eliminating the arbitration clause and dues deduction and then later with regards to healthcare benefits. Respondent contends that the Union's failure to agree to these conditions resulted in an overall impasse that allowed it to implement the healthcare benefit changes. The totality of the circumstances does not support that Respondent met the first and third requirements under the test set forth in *Calmat*.

At the outset of bargaining, Respondent informed the Union that its most important goal was for the successor contract to not have an arbitration procedure. As bargaining wore on, Respondents expanded its non-negotiable goals to include the elimination of dues deductions and agreeing upon a new healthcare benefit program by the benefit provider's December deadline. Respondent contends that the Union's failure to agree to these demands resulted in an impasse that allowed it to implement the healthcare benefits on January 1, 2021.

On October 28, Respondent presented a letter to the Union declaring impasse because the Union had not agreed to a contract with no arbitration clause. I find that this declaration of impasse was premature. On that date, the Union's request for information about the administrative tasks necessary to complete dues deductions that formed the basis for the cost information provided by Respondent was still outstanding. Respondent failed to inform the Union that it was not the administrative costs but simply Respondent's opposition to performing dues deduction that was the basis for its position until a year later. Without this information, the Union's ability to make proposals on this issue was hindered. Furthermore, as the November emails between the parties reflect a significant amount of other information having a similar negative effect on the progress of bargaining. Such circumstances do not support a finding that a valid impasse could have existed.

As December approached, the parties had made some pro-

gress in negotiating healthcare benefits. The Union's August 25 proposal agreed to Respondent's Option 6 healthcare proposal. From there forward, the Union expressed its willingness to agree to Option 6 with continued negotiation on costs sharing as part of an overall contract. Respondent voiced its intent on meeting the healthcare benefit provider's deadline regardless of the status of contract negotiations. The Union responded that did not preclude the possibility of reaching a separate agreement on healthcare benefits, but it did not agree that Respondent could implement the changes without reaching a MOU on healthcare, an overall contract, or an overall negotiations impasse. To support its claim that negotiations were at impasse, Respondent points to the Union's proposals in which it agreed to some but never agreed to all three of Respondent's bargaining goals. Respondent contends that the Union knew that its failure to agree to its three main demands was a poisonous pill that would not advance negotiations. While negotiations certainly would have moved faster if the Union agreed with Respondent's three demands, that does not equate to no forward progress. Proposals where a party gives on an important issue and seeks clarification on whether the other party will adjust its demands on other issues, like the Union did by packaging its agreement with Option 6 healthcare benefits without agreeing to eliminating the arbitration clause or dues deduction, is an expected tactic in the give and take of bargaining. During this time, the Union continued to seek information to bargain about dues deduction and offered to consider alternatives or even the exclusion of an arbitration clause depending upon reaching agreement on other proposals. Such stances do not indicate an impasse in bargaining.

More importantly, Doty's emails to Horigan in December reflect that the Respondent knew the parties were not at a valid impasse. Doty expressed his concern about whether negotiations can be completed in time to implement new healthcare benefits on January 1, 2021. Doty offered to settle the healthcare benefits separately because he viewed it as unlikely that they would be able to complete overall contract negotiations by the deadline imposed by the benefit provider. Despite Doty's inconsistent claims about impasse, the parties continued to meet and bargain well into 2021.

Accordingly, I find that Respondent failed to establish the actual existence of a good faith bargaining impasse or that the impasse on the issue of arbitration clause or dues deduction had led to a breakdown in the overall negotiations preventing progress on any aspect of the negotiations until the impasse relating to those critical issues was resolved.

3. Did exigent circumstances exist?

Respondent further contends that even if it was not privileged to implement the healthcare benefits due to an impasse in bargaining, then the insurance deadline imposed by the benefits provider resulted in exigent circumstances that allowed it to implement the healthcare benefits. The Board recognizes an exception to the duty to give prior notice and opportunity to bargain or in this case to bargain to overall impasse where the employer can establish a "compelling business justification," for the action taken. *Winn-Dixie Stores, Inc.*, 243 NLRB 972, 974 fn. 9 (1979), or where "economic exigencies compelled prompt action." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The Board recognizes as "compelling economic considerations" only those "extraordinary events" which are "an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Angelica Healthcare Services,* 284 NLRB at 852–853; *Hankins Lumber Co.,* 316 NLRB 837, 838 (1995). The employer carries a heavy burden of demonstrating that this particular action had to be implemented promptly, that the exigency was caused by external events beyond its control, or that it was not reasonably foreseen. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995); *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998); *Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992).

Here, the renewal of healthcare benefits arose in 2019 and was an ongoing issue throughout 2020, and therefore, is not only a foreseeable but an expected event. The Board has found that the increase in healthcare benefit costs and associated deadlines for electing new healthcare benefit plans to evade such costs does not constitute exigent circumstances absent some showing that the increased costs would place the employer in straitened financial circumstances. See *Connecticut Institute for the Blind, Inc., d/b/a Oak Hill*, 360 NLRB 359, fn. 1 (2014) (Board affirming administrative law judge finding of no exigent circumstances arising from increased healthcare costs during negotiations that would allow unilateral implementation absent overall impasse); *Maple Grove Care Center*, 330 NLRB 775, 779 (2000) (the Board found increased premiums in health coverage not an economic exigency, in which time was of the essence and which demands prompt action, and concluded that it is highly unlikely that respondent would have been placed in straitened financial circumstances had it paid the entire premium increase until overall impasse had been reached). In the instant case, Respondent presented evidence of increased healthcare cost, but the record contains no evidence that the increased costs placed Respondent in straitened financial circumstances.

Accordingly, I find that Respondent failed to establish that exigent circumstances existed allowing for its unilateral implementation of changes to the unit employees' healthcare benefits in the absence of an overall impasse in contract negotiations.

4. Conclusion

Based upon the forgoing, I find that on about January 1, 2021, Respondent unilaterally implemented changes to the unit employees' healthcare benefits in violation of Section 8(a)(5) and (1).

E. Duty under Section 8(d)(3) of the Act

On June 10, 2019, Respondent notified the Union of its intent to bargain for a successor to the agreement scheduled to expire on September 30. (Jt. Exh. 1, p. 5; Jt. Exh. 27(a).) Respondent stipulated that it did not give notice to the State of West Virginia's Division of Labor that it sought termination and modification of the collective-bargaining agreement as is required by Section 8(d)(3) of the Act. As discussed above, in January of 2021, Respondent made a modification by changing the healthcare benefits available to unit employees. (Jt. Exh. 57, par. 27(b).)

Respondent presented evidence that the West Virginia Division of Labor office receives a handful of notices of bargaining disputes per month but does not budget for or have a practice of engaging in mediation. (Tr. 151, 152.) In presenting this evidence, Respondent makes a no harm, no foul argument that since the West Virginia Division of Labor office does not make a practice of engaging in mediation, its failure to give notice does not constitute a violation of the Act. Respondent relies upon the Ninth Circuit's refusal to enforce the Board's finding of a Section 8(d)(3) violation in *Brotherhood of Locomotive Firemen and Enginemen v. NLRB*, 302 F.2d 198 (9th Cir. 1962).

I find that argument carries no weight. Despite the Ninth Circuit's holding in *Brotherhood of Locomotive Firemen and Enginemen*, the Board has consistently held that the "statute provides a clear mandate that we are obligated to respect and enforce. These notice requirements are part of the overall statutory scheme intended to encourage the peaceful resolution of labor disputes. While the statute may in some instances yield severe consequences, it is the Congress that made that determination, and it is our obligation to obey this legislative demand." "Section 8(d) contains no exceptions and provides no mitigating circumstances justifying a failure to comply." *Boghosian Raisin Packing Co.*, 342 NLRB 383, 385 (2004).

Accordingly, I find that Respondent violated Section 8(d)(3) of the Act by failing to give notice to the State of West Virginia that it sought termination and modification of the collective-bargaining agreement as is required by Section 8(d)(3) of the Act.

CONCLUSIONS OF LAW

1. Techocap LLC (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since at least March 2018, the Union has been the exclusive collective-bargaining representative of the following unit of employees at Respondent's Glen Dale, West Virginia facility, which unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All hourly rated production and maintenance employees, including warehousemen; excluding employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

4. Since about August 1, 2020, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union as the collective-bargaining representative of the units' employees.

5. Since about August 1, 2020, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing in a timely manner to furnish the Union with the information requested by Stephen Shane Carlin his July 16, 2020 email to Darrick Doty.

6. Since about November 18, 2020, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing in a timely manner to furnish the Union with the information requested by Katherine Horigan by email on November 11, 2020, about the administrative tasks that Respondent performed to deduct dues from unit employees pay and remit it to the Union.

7. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment for the unit employees by implementing a new healthcare benefits plan on about January 1, 2021.

8. Respondent violated Section 8(d)(3) of the Act by failing to give notice to the State of West Virginia that it sought termination and modification of the collective-bargaining agreement as is required by that Section and subsequently unilaterally modified the unit employees' healthcare benefits in violation of Section 8(a)(5) and (1) of the Act.

9. The aforementioned unfair labor practices by the Respondent affected commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union in a timely manner with requested relevant information, to the extent it has not already done so, Respondent shall furnish to the Union in a timely manner the requested information, as listed above. Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment of unit employees, Respondent shall notify and, on request, bargain with the Union to a subsequent agreement to the collective-bargaining agreement that expired on September 30, 2019, or bargain to a valid overall impasse before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees. Having found that the Respondent violated Section 8(a)(5) and (1) by changing unit employees healthcare benefits starting on January 1, 2021, Respondent shall restore the status quo ante. Having found that the Respondent violated Section 8(d)(3) by failing to give notice to the State of West Virginia that it sought termination and modification of the collective-bargaining agreement as is required by that Section of the Act and subsequently changing unit employees' healthcare benefits starting on January 1, 2021, Respondent shall restore the status quo ante.

The Respondent shall make whole its employees for any loss of earnings, expenses, and other benefits suffered as a result of the unlawful changes to the healthcare benefits. Backpay owed, as a result of changes to the healthcare benefit plan, shall be computed as prescribed 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).

Additionally, Respondent shall compensate affected unit

employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). In addition to the backpay-allocation report, I find that Respondent must be ordered to file with the Regional Director for Region 6 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award. *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021).

Moreover, Respondent shall bargain in good faith with the Union as the exclusive collective-bargaining representative of the units' employees to a successor agreement or a valid impasse before implementing any changes in their wages, hours, or other terms and conditions of employment.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The National Labor Relations Board orders that the Respondent, Tecnocap LLC, Glen Dale, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish, or unreasonably delaying in furnishing, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (Union) with requested information that is relevant and necessary to the Union's role as collective-bargaining representative.

(b) Unilaterally changing the terms and conditions of employment of its unit employees by implementing bargaining proposals at a time when it has not reached a valid overall impasse in negotiations with the Union for a new collective-bargaining agreement.

(c) Failing and refusing to bargain in good faith with the Union by unilaterally implementing changes in the terms of the unit employees' healthcare benefit plan on January 1, 2021, without complying with the requirements set forth in Section 8(d)(3) of the Act.

(d) 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.

(e) failing and refusing to bargain collectively with the Union as the bargaining representative for the unit employees.

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

(a) On request, bargain in good faith with the Union for a successor to the collective-bargaining agreement that expired on September 30, 2019, as the exclusive collective-bargaining representative of the employees in the following appropriate unit, and if an understanding is reached, embody the understanding in a signed agreement:

> All hourly rated production and maintenance employees, including warehousemen; excluding employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

(b) To the extent not already done, furnish to the Union in a timely manner the information requested in Stephen Shane Carlin's July 16, 2020 email to Darrick Doty and the information requested in Katherine Horigan's November 11, 2020 email to Darrick Doty, as discussed herein.

(c) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees, specifically changes to their healthcare benefit plan, that were unilaterally implemented on about January 1, 2021. Nothing in this Order is to be construed as requiring the Respondent to rescind any changes that benefited the unit employees unless the Union requests it to do so.

(d) Make whole all unit employees for losses suffered as a result of Respondent's unlawful changes in the terms of the healthcare benefit plan that occurred on January 1, 2021, in the manner set forth in the remedy section of the decision.

(e) Compensate each backpay recipient for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each recipient.

(f) File with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(g) 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, personnel records and reports, all records reflecting healthcare premiums withheld from unit employees' pay, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its Glen Dale, West Virginia facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on

[11] If no exceptions are filed as provided by Sec. 102.48 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.

[12] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment

forms provided by the Regional Director for Region 6, 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. 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 Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since August 1, 2020.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 6 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.

(j) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 30, 2022

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 fail and refuse to bargain in good faith with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT unilaterally change the terms and conditions of employment of our unit employees by implementing bargaining proposals at a time when we have not reached a valid overall impasse in negotiations with the Union for a new collective-bargaining agreement.

WE WILL NOT fail to abide by the notice requirements set forth in Section 8(d)(3) of the National Labor Relations Act.

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

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All hourly rated production and maintenance employees, including warehousemen; excluding employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees, specifically changes to their healthcare benefit plans, that were unilaterally implemented on about January 1, 2020, but WE WILL NOT rescind any changes that benefited our unit employees unless the Union asks us to do so.

WE WILL make our unit employees whole, with interest, for any loss of earnings, healthcare expenses, and other benefits suffered as a result of the changes in their terms and conditions of employment that were unilaterally implemented on about January 1, 2020.

WE WILL compensate each backpay recipient for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 6, 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 recipient.

WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

TECNOCAP, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06-CA-265111 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, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

---

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."