In Raytheon Network Centric Systems, 365 NLRB No. 161 (December 15, 2017), the National Labor Relations Board (NLRB) jumped back into the quagmire of past practice, dynamic status quo, and impasse to create firmer ground for employers. Since first decided in 2010 and throughout the appeals process, unions used the Board’s Du Pont case, most recently reissued in 2016, E.I. Du Pont de Nemours, 364 NLRB No. 113 (Du Pont III), to leverage companies into difficult post-expiration disputes over “changes” to the terms and conditions of employment. Last week, the Board returned to a common sense approach to past practice during contract negotiations.

Unions utilized Du Pont in conjunction with the NLRB’s general prohibition against single-issue impasse to put employers in untenable bargaining situations. Once a contract expired, the Board in Du Pont held, a company could not follow an established past practice if there was any discretion in the company’s decision. As a result, employers were held hostage in bargaining while difficult choices needed to be made on strict timelines.

Du Pont created a Hobson’s choice for employers, most specifically regarding health care benefits. Under Du Pont, unions were empowered to drag negotiations on past contract expiration without striking and create leverage as open enrollment periods approached. The choice for employers: carve out small groups of unionized employees from broader company-wide health care plans at great cost and expense while bargaining continued; agree to whatever union demands were still on the table; or move to declare impasse on all remaining issues. This is exactly what happened to Raytheon.

Raytheon and the History of “Pass Through” Language

Raytheon and the United Steelworkers (USW) had a long bargaining history, and the 35 bargaining unit employees in Fort Wayne had been on the company’s health plan since 2001. Collective bargaining agreements (CBA) between the parties included “pass through” language that allowed the company to modify health care benefits for the bargaining unit so long as those changes were made for the other 65,000 employees on Raytheon’s health care plans around the country.

The parties began negotiating a successor contract in early 2012 and it expired in April without an agreement. The union wanted to delete the pass through language and bargain over any health care changes each year, for the life of the new contract. Raytheon insisted on the pass through language. Although Raytheon reached the point where it could have declared impasse, it decided against that option given the difficulty and risks associated with declaring impasse during the Obama-era NLRB.
The parties continued to negotiate after the expiration of the CBA when open enrollment for 2013 health care options arrived. The company did exactly what it had done for the past 12 years and sent out open enrollment notices to all employees, including bargaining unit employees. The notices explained the minor modifications to the company’s health care offerings (changes to premiums, deductibles, co-pays, coverage options, etc) and explained the timeline for selecting benefits for 2013.

The union demanded the company bargain over these minor changes to the plan options. The company refused and implemented the changes effective January 1, 2013. The union insisted that until the parties reached agreement, the “status quo” was to carve out 35 bargaining unit employees from the 65,000 Raytheon employees enrolled in the company’s health care plan, with benefits and health care options frozen in time with 2012 options at 2012 prices.

The USW’s bargaining position frustrated the company and for good reason. The 35 Fort Wayne employees constituted an older group, with more health issues generally. These particular employees benefited greatly from the volume discount Raytheon had procured for its 65,000 employees. Standing alone, the bargaining unit employees’ per capita cost on health care was significantly higher. During negotiations, the USW did not propose moving these employees to another plan because it was not cost effective. The USW did not propose a health care solution, other than yearly renegotiation of Raytheon’s plan for the 35 affected employees. The company refused and the USW filed a charge alleging violations of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act.

The NLRB issued a complaint, and the parties stipulated to the facts in the case. After an administrative law judge decided against Raytheon in November 2013, the case lingered before the Board for four years. In fact, the process dragged on for so long that the company did the exact same thing at the end of 2013 as the parties still did not have a new contract. The USW filed another charge and the NLRB deferred the second charge pending the outcome of this case.

Four Years But Worth the Wait

The Board’s decision in Raytheon returns the law to harmony with the Supreme Court decision in National Labor Relations Board v. Katz, 369 U.S. 736 (1962). Katz establishes that a unilateral change in a mandatory subject (i.e., wages, hours, and other terms and conditions of employment) violates Section 8(a)(5). The issue in most cases since Katz has been what constitutes a “change” that triggers the obligation to bargain.

Prior to DuPont, the Board and courts repeatedly had held employers could lawfully take actions established as past practice without bargaining because doing so did not constitute a “change” in the terms and conditions of employment. In this case, Raytheon always made minor modifications to the health care plan. Each year the company or its provider tweaked coverages, expanded services, and modified plan options, and each year the employees selected from the available options. That was the parties’ practice, established over a dozen years. DuPont made it impossible to have a past practice in this regard unless the employer exercised no discretion of any kind (e.g., the Board had upheld changes where, for instance, the expired CBA provided for specific annual increases in co-pays or deductibles and the increase post-expiration was the same).
The Board overruled DuPont as inconsistent with the long line of cases following Katz and as inconsistent with the principles behind the Act. The Board held Raytheon’s modifications to employee health care benefits in 2013 were a continuation of past practice involving similar plan modifications made at the same time every year from 2001 to 2012, i.e., the company did exactly what it had always done.

The Board determined Raytheon’s actions did not constitute a "change" in the terms and conditions of employment because they were similar in kind and degree with an established past practice of comparable unilateral actions. That the actions involved management discretion was irrelevant. Therefore, the Board found the company did not violate the Act by failing to give its union advance notice and the opportunity to bargain before making the 2013 changes.

**Practical Impact**

The Board’s decision provides employers more flexibility to act during any hiatus between collective bargaining agreements, so long as the employer can point to a past practice of unilateral modifications similar in kind and degree with the contemplated action. The decision also limits unions’ ability to hold employers hostage on potential unilateral actions through dilatory bargaining. The ability to implement does not, however, eliminate the employer’s obligation to continue bargaining over the contemplated modification, even though the union cannot prevent implementation.