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FirstEnergy Generation Corp. and International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO. Case 06–CA–036631

August 6, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On September 17, 2010, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent, FirstEnergy Generation Corp., filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. The Charging Party, International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO, filed limited exceptions with supporting argument, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The 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, as modified below, and to adopt the recommended Order as modified and set forth in full below.¹

For the reasons set forth in his decision, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes to the retirement healthcare benefits of current employees. In adopting the judge’s conclusion that the Respondent failed to establish a past practice of making unilateral changes such as the one at issue here, we rely on his finding that the Union objected to the last major change in future retiree benefits viz. the 2004 elimination of retiree healthcare benefits for new employees. We also rely on the judge’s reasoning that, even assuming the Union acquiesced in the Respondent’s annual minor programmatic changes, acquiescence alone does not establish a surrender of the right to bargain over future changes. See *Caterpillar, Inc.*, 355 NLRB 521, 523

¹ We shall modify the judge’s Order and substitute a new notice to conform to the Board’s standard remedial language. We shall also modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), we modify the judge’s remedy by requiring that monetary awards shall be paid with interest compounded on a daily basis.

(2010), enf. mem. ____ F.3d ____, 2011 WL 2555757 (D.C. Cir. May 31, 2011). Finally, we rely on the judge’s finding that the retirement benefit change at issue in this case is significantly different from those minor programmatic changes. See *id.* (even assuming the employer had a past practice of making minor changes to its prescription drug plan, the employer’s significant change to that plan was a “material departure from that practice”).²

ORDER

The National Labor Relations Board orders that the Respondent, FirstEnergy Generation Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO and giving it an opportunity to bargain.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

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

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I & T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act.

(b) Rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented on July 1, 2009.

² We therefore find it unnecessary to rely on the judge’s statements to the effect that an employer, to prove a past practice defense, bears the burden of proving not only a practice of prior unilateral changes but also union acquiescence in those changes.

In affirming the judge’s conclusion, Member Hayes finds that the Respondent did not meet its burden of proof to establish that it made changes in the past to future retiree healthcare benefits with such regularity and frequency that the “practice” would be expected to continue or reoccur on a regular and consistent basis. *Church Square Supermarket*, 356 NLRB No. 170, slip op. at 4 (2011). He finds it unnecessary to rely on the judge’s finding that the retirement benefit change here is significantly different from past changes.

(c) Make all former employees who retired on or after July 1, 2009, or who subsequently retire, whole for any loss of earnings and other benefits suffered as a result of the changes that were unilaterally implemented on July 1, 2009, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) 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 compensation due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Shippingport, Pennsylvania facility copies of the attached notice marked "Appendix."³ 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 notices are 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 1, 2009.

(f) 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 6, 2012

Brian E. Hayes, Member

³ 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."

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) 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 change your terms and conditions of employment without first notifying International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO and giving it an opportunity to bargain.

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, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I & T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on July 1, 2009.

WE WILL make all former employees who retired on or after July 1, 2009, or who subsequently retire, whole for

any loss of earnings and other benefits resulting from the changes that were unilaterally implemented on July 1, 2009, plus interest.

FIRSTENERGY GENERATION CORP.

Janice A. Sauchin, Esq., for the General Counsel.
James A. Prozzi, Esq. (Jackson Lewis, LLP), of Pittsburgh, Pennsylvania, for the Respondent.
Marianne Oliver, Esq. (Gilardi, Oliver & Lomupo, P.A.), of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, Administrative Law Judge. This case involves an employer's change to its retiree benefits program during negotiations for a new labor agreement with its employees' union. Specifically, the employer announced that its contribution to the costs charged to a retiree participating in the employer-sponsored health care program would be limited to three years of retirement. Previously, the employer subsidy had been available for as long as a retiree was in the employer's program.

The government alleges that the employer failed to provide its employees' union adequate notice and an opportunity to bargain over this change in the retirement benefit before unilaterally implementing it, at a time that the employer and the union were in bargaining for a new collective-bargaining agreement, and not at an overall bargaining impasse. The government alleges that the employer's actions were a violation of its obligation under the National Labor Relations Act (Act) to bargain over mandatory subjects of bargaining. The employer contends that the change in retiree benefits affected only current retirees and hence, was a permissive subject of bargaining, and not one the Act requires the employer to bargain over or prohibits it from unilaterally implementing. Alternatively, the employer contends, assuming *arguendo* that the change in retiree benefits was a mandatory subject of bargaining, that it was not required in this case to bargain about the change based on a longstanding practice of unilaterally changing retiree benefits and/or because the union waived the right to bargain over the change.

As discussed herein, I find that as to active union-represented employees, the change in retiree benefits constituted a mandatory subject of bargaining as to which the employer failed to meet its statutory bargaining obligation. There was neither an established practice by the employer, nor waiver by the union, that excused the employer from bargaining over this matter.

STATEMENT OF THE CASE

On August 31, 2009, the International Brotherhood of Electrical Workers, Local Union 272 (Union or Local 272) filed a charge with Region 6 of the National Labor Relations Board (Board) alleging violations of the Act by FirstEnergy Generation Corp. (FirstEnergy or Employer). The case was docketed as Case 6-CA-36631. The charge was amended by the Union on September 11, 2009.

On May 20, 2010, the Board's General Counsel, by the Regional Director of Region 6, after investigation of the Union's charge, issued a complaint alleging that FirstEnergy had violated the Act. FirstEnergy filed an answer to the complaint denying any violation of the Act.

A trial in this case was conducted before me on July 27, 2010, in Pittsburgh, Pennsylvania. The parties filed briefs in support of their positions on August 31, 2010. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

The complaints alleges, FirstEnergy admits, and I find, that at all material times FirstEnergy has operated electric generation plants in several states, including one in Shippingport, Pennsylvania. The complaint alleges, FirstEnergy admits, and I find, that in the 12-month period ending July 31, 2009, in conducting its business operations FirstEnergy derived gross revenues in excess of \$500,000. The complaint further alleges, FirstEnergy admits, and I find, that in the 12-month period ending July 31, 2009, in conducting its operations FirstEnergy received at its Shippingport, Pennsylvania facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. The complaint further alleges, FirstEnergy admits, and I find, that at all material times, FirstEnergy has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board properly has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

BACKGROUND

FirstEnergy is headquartered in Akron, Ohio, and operates electricity generation plants in various states, including the Bruce Mansfield plant located in Shippingport, Pennsylvania. Local 272 has represented the production and maintenance employees at the Bruce Mansfield plant for many years. As of the date of this hearing, there were approximately 380 employees in the Union-represented bargaining unit.

Local 272 and FirstEnergy have been parties to a series of collective-bargaining agreements, the most recent of which is effective by its terms from December 5, 2009 to February 15, 2013 (2009 Agreement). The previous collective-bargaining agreement was effective January 28, 2005, and expired on February 16, 2008 (2005 Agreement). During the 21-1/2 month hiatus between the expiration of the 2005 Agreement and the commencement of the 2009 Agreement, there was no interim agreement in effect, but the parties remained in negotiations and eventually reached the 2009 Agreement.

Under the terms of the 2009 Agreement, FirstEnergy maintains for unit employees (and spouses and dependents) an Employer-sponsored group health care plan. The costs of coverage are paid in part by FirstEnergy, and in part by the employees. The levels of coverage are set forth in Appendix B to the Agreement, and the percentage of costs to be paid by employees is set forth in Section 3 of Article XVIII of the Agreement.

The 2005 Agreement contained a similar commitment by FirstEnergy to maintain a plan and share costs.

The Employer-sponsored plan is known as the FirstEnergy Healthcare Plan. It has employee participants from facilities throughout the FirstEnergy corporation, including nonrepresented employees and employees from bargaining units other than the bargaining unit at Bruce Mansfield.

Since mid-2006, during the term of the 2005 Agreement, and continuing to date, during the term of the 2009 Agreement, the Union has elected to “withdraw” from the FirstEnergy-sponsored healthcare plan and to provide separate health care coverage for the bargaining unit employees. This right to withdraw was provided for in the 2005 Agreement and that right was continued in the 2009 Agreement. Under this arrangement, FirstEnergy contributes and forwards payment to the Union-selected health care provider an amount per employee equal to the contribution FirstEnergy would otherwise make if the employees participated in the Employer-sponsored plan. The net cost to FirstEnergy is the same.

“In-the-box” Retirees

The 2009 Agreement provides that employees retiring on or after February 16, 2008, through the term of the 2009 Agreement (set to expire February 15, 2013), will be entitled, for the life of the 2009 Agreement, to health care coverage from the Employer in accordance with the terms and conditions of the plan in effect for the active unit employees.

A similar provision existed in the 2005 Agreement, permitting employees retiring during the term of the 2005 Agreement to continue to participate in the health care plan under the terms and conditions available to active unit employees for the life of the 2005 Agreement.

Consistent with Local 272’s withdrawal from the FirstEnergy Healthcare Plan, discussed above, the 2009 Agreement provides that employees retiring from February 16, 2008 through the expiration of the 2009 Agreement, continue to be eligible to receive health care coverage, for the life of the 2009 Agreement, under the terms of the plan chosen by the Union to cover active employees. A similar provision in the 2005 Agreement permitted retirees retiring under the 2005 Agreement to receive the Union-selected plan for the duration of the 2005 Agreement.

Pursuant to the 2009 Agreement, the amount of the FirstEnergy contribution or subsidy paid toward the health care of a retiree retiring under the Agreement, during the life of the Agreement, is calculated based on the retiree’s age and service, according to the charts set forth in the agreement at Article XVIII, Section 3. The 2005 Agreement contained a similar provision calculating contributions for employees retiring under that agreement, for the duration of the Agreement, based on the charts in Article XVIII, Section 3 of the 2005 Agreement.

These retirees who are continuing to participate in the active employees’ plan until the expiration of the agreement under which they retired are called, in the parlance of the parties, “in-the-box” retirees.

“Out-of-the-box” Retirees

In-the-box retirees receiving health care coverage under the terms of the agreement under which they retired, come “out of

the box” at the expiration of the agreement under which they retired. “Out-of-the-box” retirees are eligible to receive their health care under the FirstEnergy Healthcare Plan that is available to nonbargaining unit employees of the Employer, certain other bargaining unit employees, and eligible retirees. This plan includes former bargaining unit employees who were in the box prior to February 16, 2008, and, upon expiration of the 2005 Agreement, came out-of-the-box. Under current Employer policies, eligible out-of-the-box retirees are able to participate in the employer’s health care program “[u]ntil Medicare age onto death.”

Out-of-the-box retirees receiving health care under the Employer-sponsored plan receive an Employer subsidy toward payment of their health care costs, but the amount is not dictated, as it is for in-the-box retirees, by the age/service charts in Article XVIII, Section 3.

Prior to July 2009, the Employer’s subsidy to out-of-the-box retirees participating in this health care plan continued for as long as the retiree was covered by the health care plan.

Announcement of Retiree Health Care Subsidy Cap

As referenced, the 2005 Agreement expired on February 15, 2008. The parties did not enter into a successor agreement, the 2009 Agreement, until December 5, 2009.

On June 2, 2009, during the hiatus between contracts, while the parties were still bargaining for a successor agreement, FirstEnergy issued a letter addressed to retirees and surviving spouses. The letter announced changes to the Employer-sponsored retiree health care coverage, to be effective July 1, 2009. Of relevance to the instant dispute, the announcement included news that the Employer’s contribution toward retiree health care costs would cease after three years of retirement. The letter stated in pertinent part:

While access to the Company’s retiree health care plans will remain, Company-subsidized monthly payments toward your coverage will be limited to three years beginning July 1, 2009 and each year management will determine, as it now does, the level of subsidy that the Company can support. Beginning July 1, 2012, you will continue to have access to our retiree health care plans but without any further Company contributions toward your monthly cost. The amount of that monthly cost will be determined each year by management. Of course, if you are able to secure attractive coverage at a cost lower than the plan provided by the Company you are free to pursue that path instead. For current eligible employees, a similar three-year limitation on Company subsidized contributions to retiree health care is anticipated when they retiree.

This same announcement was contained in a June 2, 2009 “special issue” “Update” published and distributed by FirstEnergy. The Update was left on lunch tables at the Bruce Mansfield facility and, presumably, distributed at all of the Employer’s facilities. Local 272 learned of the subsidy change through the Update being left on the tables at the facility.¹

¹ The Update announced numerous changes in pay and benefits corporatewide, many of which did not apply directly to the Local 272

A further June 11, 2009 Update, devoted to the “Company’s June 2 announcements of changes to operations, compensation and benefits,” provided further information, in question and answer format, regarding the health care subsidy cap:

Health Care

Q. When does the three-year limit for retiree health care contributions take effect? What happens if I retire today—versus December 2009?

A. The three years of subsidized health care start July 1, 2009 for current retirees. When they retire, current employees will be provided three years of subsidized health care beginning with their retirement date, subject to limitations and conditions stated in the plan.

Local 272’s president, Herman Marshman, responded to FirstEnergy’s announcement on benefits by letter dated June 3, 2009, to James E. Deimling, FirstEnergy’s manager of labor relations, and at that time, chief spokesman for the Employer in negotiations with the Union.²

Marshman wrote: “This letter is an official request to negotiate the changes in FirstEnergy’s contribution to healthcare for future retirees under the VEBA Post-Retirement Plan.”³

The subsidy cap was implemented July 1, 2009, for out-of-the-box retirees receiving their healthcare under the FirstEnergy Healthcare Plan. Although the documentation on the issue of the subsidy cap is not entirely clear, the parties in this matter appear to agree—in particular, FirstEnergy both concedes and contends on brief (R. Br. at 10)—that the subsidy cap does not apply to Local 272 retirees while they are in-the-box. As discussed above, pursuant to the 2009 Agreement, FirstEnergy makes retiree health care contributions for each unit employee who retired after February 16, 2008, and who is receiving retiree health care under the Union-chosen health care plan. These contributions do not count toward the three-year cap. The three-year cap applies when an out-of-the-box retiree receives healthcare from the FirstEnergy-sponsored healthcare program. For unit employees retiring after February 16, 2008, that will not be the case until the expiration of the 2009 Agreement on February 15, 2013.

Bargaining Issues and Discussion of the Retiree Health Care Subsidy Cap

Retiree benefits were subjects of bargaining during the negotiations for a new agreement. In February 2008, for instance, the Union proposed revisions for future retirees related the cost of a retiree adding a spouse to coverage, expanding eligibility of future retirees for health care, and a proposal limiting the Employer from changing pension benefits prior to 2011. The

Union also proposed, in February 2008, that the Employer’s retiree health care plan be amended to guarantee coverage for current and future retirees for the remainder of their lives. These proposals were not accepted by the Employer, which told the Union it had “no interest” in agreeing to such changes. Similarly, the Union proposed guarantees that for the duration of the new contract, retirees would receive the same level of employer contribution to health care as that received by active employees (effectively eliminating the charts at Article XVIII section 3). FirstEnergy did not accept this proposal either. FirstEnergy also proposed numerous changes in negotiations to retiree benefits, and was more successful in having those changes agreed to in the 2009 Agreement.

The Union repeatedly brought up its proposals for retirees during bargaining. According to James Cole, who was chief spokesman for the Employer’s negotiating team for much of the negotiations:

Pretty much every time [retiree issues] came up, pretty much, there would be a generic reference to retirees, and I would also say are we talking current retirees or are we talking future retirees, and then if it was about current retirees, I always said, well, that’s a permissive topic, and we’re not going to negotiate over it. With respect to future retirees, meaning our current employees, I always said I’m willing to accept your proposal; and, you know, whenever they did which for sure they did on February 6th, I would sound out what their full proposal was to make sure I understood it and then respond eventually.

On June 3, 2009, one day after its announcement about the retiree health care subsidy cap, FirstEnergy made an “offer of contract settlement” to the Union. The parties met for bargaining on July 15, 2009. Notes taken by FirstEnergy employee and union bargainer Dennis Bloom at the July 15 session were introduced into evidence.⁴

At the July 15 meeting, FirstEnergy’s spokesperson Deimling, referring to the June 3 contract offer, explained that “after 50 or 60 sessions . . . everything we want is in the offer,” and “[we] want to push us forward to get [] an agreement.” Union President Marshman replied that he “sent several letters to Co. about changes the Co. has announced and it indicated these need to be negotiated. . . . I wish today could be so simple as to discuss the agreement—but I have a duty—to give acknowledgement to the changes [the] Co. is making [including] changes to the post retirement VEBA plan.” Deimling responded that the June 2 announcement, regarding severance and the VEBA, we will “sit down + discuss—but not in this forum—not part of the agreement.” Marshman added that the “Co. has indicated in its updates [that the] changes would affect current + future retirees—I have a duty to negotiate this—[] our position is as important as the stip you sent me—I can’t be negligent with this []—it

workforce at Bruce Mansfield, where Local 272 and FirstEnergy were still in collective bargaining negotiations.

² For reasons that elude me, Deimling’s agency status was denied in the Respondent’s answer to the complaint. Based on his testimony, he was clearly an agent of the Respondent under Sec. 2(13) of the Act, at a minimum, from the end of February through August 2009, when he was chief spokesperson for the FirstEnergy bargaining committee.

³ Marshman’s reference to a VEBA is to the Voluntary Employee Beneficiary Association trust funds established by FirstEnergy to fund portions of its employees’ retiree medical costs.

⁴ These notes were introduced into evidence without objection. I rely on these contemporaneous notes of bargaining intended to record discussion and events at the bargaining table as evidence of what was stated at the bargaining table. *Allis-Chalmers Mfg.*, 179 NLRB 1, 2 (1969); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 483 (5th Cir. 1963).

affects terms of agreement. . . . [You] need to agree to negotiate these changes they will have effect on our membership.”

At the hearing, Deimling explained that at the July 15 meeting, “the Company was meeting with the Union for the purpose at least from my perspective was to talk about the last offer that we had provided to the Union, which I believe was June 3rd.” According to Deimling, Marshman “brought some other issues to the table,” including “the retiree issue.” Deimling, who described this issue as “ancillary,” then “indicated to Mr. Marshman that we were there to talk—the Company was there to talk about the June 3rd offer, and it kind of—you know, I’m not sure exactly what his objectives were.” Deimling told Marshman that

as far as current retirees, I mean, to me that was a permissive subject that we had no interest in talking about that, but he had indicated that—well, based on this June 2nd change then we have to—we need to talk about future retirees, and I indicated to him that since January of 2008 going forward there were numerous discussions between he and the Company relative to that particular subject.

Deimling was referring specifically to the Union’s proposals on retiree health care, previously rejected by the Employer. With regard to the June 2 announcement that Marshman asked to discuss, Deimling testified that he “told Mr. Marshman that the announcement was relevant to current retirees. That’s what I told Mr. Marshman, it was permissive, and we had no interest in discussing that particular matter.” As to future retirees, Deimling’s position was that language in the Employer’s contract proposal “talked about what would occur to employees that retired during the term of the agreement.” As to the change announced June 2, “[w]e did not get into a long discussion at that—during that meeting relative to the change, no, we did not.”

Subsequently, the Employer sent the Union a July 24, 2009 letter declaring a bargaining impasse. The letter detailed the history of negotiations that had yet to result in a successor agreement to the expired 2005 Agreement. As to changes in retiree benefits, the Employer’s July 24 letter stated:

The Union also sought, at the July 15th bargaining session, to negotiate over the “unilateral changes” to FirstEnergy’s retiree health plans announced in a June 2nd Employee Update. Those changes, however, affected only current retirees and the Company explained that issue was permissive and the Company was not interested in bargaining over those changes. To the extent the Union’s request to bargain over these “changes” was for future retirees, a mandatory topic, the Company continues to have no interest and the Company’s position has been consistently and exhaustively explained in numerous bargaining sessions since January 2008. The Company has rejected any effort to establish long term or permanent participation in FirstEnergy’s retiree health care plans for future retirees, without the ability to amend at the Company’s exclusive discretion. This position has not changed.

This letter notwithstanding, the record as a whole, and Cole’s testimony specifically, make clear that the “consistent” and

“exhaustive” explanations offered by the Employer in bargaining since January 2008, regarding retiree health care issues, pertained to the Union’s proposals to lock in or vest retiree health care. There is no evidence that, at any time before or after July 1, 2009, the change in the employer subsidy of retiree health care, first announced June 2, 2009, was ever bargained with the Union, despite the Union’s entreaties to do so.⁵

As part of its cost-cutting efforts announced June 2, 2009, FirstEnergy introduced an enhanced retirement incentive program to encourage retirement. Employees choosing to retire under this program were required to make an irrevocable decision to do so and their retirement would be between September 1, 2009, and August 31, 2010, on a date chosen by FirstEnergy. A number of union employees were eligible for this window, and some retired under it. This program included two years of health care coverage at the level provided to active employees, and thereafter these retirees would be eligible to participate in the FirstEnergy health care program (i.e., as out-of-the-box retirees). The retirement enhancement program made clear that the three-year subsidy cap would apply to employees retiring under this program.

⁵ According to Cole:

To me, this [reference in the July 24 letter to consistent and exhaustive explanations of the Employer’s position] means on July 15th you tried to bring up something over future retirees. We’ve talked about this several times since January ‘08. We’ve consistently said we don’t have any interest. That’s why it says, consistently and exhaustively. We’re taking the same position, and so we continue to have the same position. We’re not interested in that proposal. That’s how I read it.

Upon further questioning from the administrative law judge, Cole explained that the Union’s proposal to vest retiree health care was the matter that had been “consistently and exhaustively” discussed and rejected by the Employer, *not* the subsidy cap announcement:

THE ADMINISTRATIVE LAW JUDGE: On June [2nd] as I understand it, there was an announcement that this would be the changes at the end of the subsidy after a certain amount of time. There was a change in retiree healthcare that would end the Employer subsidy after a certain period of time?

THE WITNESS: Three years I think.

THE ADMINISTRATIVE LAW JUDGE: That would limit it?

THE WITNESS: Right.

THE ADMINISTRATIVE LAW JUDGE: And that was implemented July 1st I think is.

THE WITNESS: I would have to see the announcement.

THE ADMINISTRATIVE LAW JUDGE: Let me ask you—so [counsel for the General Counsel] Ms. Sauchin was asking about this letter. Was that subject that was announced June [2], had that been consistently and exhaustively explained in numerous bargaining sessions?

THE WITNESS: The topic of future retiree healthcare benefits, yes.

THE ADMINISTRATIVE LAW JUDGE: No. The topic of the ending of the subsidy or limiting of the subsidy?

THE WITNESS: No, no. What had been discussed is they had a proposal to basically vest retiree healthcare benefits.

THE ADMINISTRATIVE LAW JUDGE: The Union’s proposal?

THE WITNESS: Yeah, that’s what I meant.

THE ADMINISTRATIVE LAW JUDGE: And that was exhaustively discussed?

THE WITNESS: Yes.

Analysis

Section 8(a)(5) of the Act makes it “an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees.”

Section 8(d) of the Act explains 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, or the negotiation of an agreement or any question arising thereunder.”

Since at least the seminal case of *NLRB v. Katz*, 369 U.S. 736 (1962), Board precedent has been settled that the general rule is that during negotiations for a collective-bargaining agreement an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. “[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.” *Katz*, 369 U.S. at 743; *United Cerebral Palsy of New York City*, 347 NLRB 603, 606 (2006); see also, *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991) (“The Board has taken the position that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations. The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment”).⁶

Subject to some exceptions not relevant here,

when, as here, 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.

Bottom Line Enterprises, 302 NLRB 373, 374 (1991) (footnote omitted), enf. mem. 15 F.3d 1087 (9th Cir. 1994). Accord *RBE Electronics*, 320 NLRB 80, 81 (1995); *Intermountain Rural Electronics, Inc.*, 305 NLRB 783, 786 (1991), enf. 984 F.2d 1562 (10th Cir. 1993).

Moreover, the announcement directly to employees that a change in a mandatory subject is being implemented—instead of proposing it to the employee’s bargaining representative—suggests a fait accompli and is inconsistent with the duty to bargain. *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994). See also *Burrows Paper Corp.*, 332 NLRB 82, 83 (2000) (“after . . . announcement of the wage increase to employees, we

find that the Union could reasonably conclude that the matter at this point was a fait accompli, i.e., that the Respondent had made up its mind and that it would be futile to object to the pay raises”); *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982) (“most important factor” dictating finding that employer’s announcement of change was “fait accompli” was that it was made without “special notice” in advance to the union, the union’s officers “having become aware of this merely because they themselves were employees”), enf. 772 F.2d 1120 (3d Cir. 1983).

Finally, it is relevant that the statutory duty to bargain is not fulfilled by an offer to discuss a mandatory subject of bargaining *after* a collective-bargaining agreement has already been executed and the Union has lost its leverage provided by the right to strike. *E.I. DuPont de Nemours & Co.*, 304 NLRB 792, n.1 (1991) (“What we find unlawful in the Respondent’s conduct was its adamant insistence throughout the entire course of negotiations that its site service operator and technical assistant proposals were not part of the overall contract negotiations, and, therefore, had to be bargained about totally separately not only from each other but from all the other collective-bargaining agreement proposals. We find this evinced fragmented bargaining in contravention of the Respondents duty to bargain in good faith”). See also, *NLRB v. Patent Trader*, 415 F.2d 190, 198 (2d Cir. 1969), *modified on other grounds*, 426 F.2d 791 (2d Cir. 1970) (when a party “removes from the area of bargaining . . . [the] most fundamental terms and conditions of employment (wages, hours of work, overtime, severance pay, reporting pay, holidays, vacations, sick leave, welfare and pensions, etc.),” it has “reduced the flexibility of collective bargaining, [and] narrowed the range of possible compromises with the result of rigidly and unreasonably fragmenting the negotiations”).

The statutory duty to bargain, and the prohibition on unilateral changes, extends only to mandatory and not permissive subjects of bargaining. The distinction emanates from Section 8(d) of the Act, 29 U.S.C. § 158(d), which defines the scope of the duty to bargain collectively as encompassing “wages, hours, and other terms and conditions of employment.” In *NLRB v. Wooster Div. Of Borg-Warner Corp.*, 356 U.S. 342, 348–349 (1958), the Supreme Court established that mandatory subjects of bargaining are those designated in Section 8(d). Nonmandatory or permissive subjects of bargaining (I use those two words interchangeably, herein) are those not involving wages, hours, or other terms and conditions of employment under Section 8(d). As the Supreme Court explained in *Borg-Warner*, the distinction “does not mean that bargaining is to be confined to the statutory subjects.” 356 U.S. at 349. Parties are free to forcefully raise and advance, bargain over, and reach agreements regarding permissive subjects of bargaining. They often do. However, there is no statutory duty to bargain about nonmandatory subjects of bargaining, and a party may not insist to impasse or condition negotiations or overall agreement on the other party’s acceptance of a nonmandatory subject. See *Borg-Warner Corp.*, supra at 349. It is not an unfair labor practice for an employer to unilaterally implement a permissive subject of bargaining.

⁶ “Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.” *Katz*, supra at 747. “The vice involved in [a unilateral change] 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) (Board’s brackets) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court’s emphasis)), enf. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

In this case, the General Counsel contends that the Employer unlawfully implemented a unilateral change in a mandatory subject of bargaining, in violation of its statutory duty to bargain, when it implemented the three-year cap on subsidization of retiree health care costs.

There is no doubt—and FirstEnergy does not dispute it—that on June 2, 2009, the Employer announced the subsidy cap directly to employees (and retirees)—not as a proposal to the Union—but as a *fait accompli* that it was committed to implementing on July 1, 2009. There is also no dispute about the fact that the Union immediately demanded bargaining, but that its demands to bargain over this issue were dismissed by First Energy. There is no claim that the parties were at impasse on July 1, the date of implementation, and, in any event, the concept of impasse is inconsistent with new proposals, yet to be discussed. At best, while refusing to bargain about the subsidy cap, FirstEnergy offered to bargain the issue at a later date, after resolution of the collective bargaining for a new labor agreement. This too, is at odds with the duty to bargain. See, *E.I. DuPont de Nemours & Co.*, supra at fn. 1. Assuming, for the moment that First Energy had a duty to bargain over the subsidy, FirstEnergy violated Section 8(a)(5) of the Act by implementing the subsidy cap and refusing to bargain about it as part of negotiations.⁷

First Energy's defense in this case is not that it gave adequate notice and bargained in good faith over the subsidy cap. As referenced, FirstEnergy concedes it did not. Rather, FirstEnergy's defense is based on the contention that it did not have a duty to bargain with the Union over the subsidy cap, at least not at the time when the Union demanded it.

The Employer first contends that the change in subsidy was a permissive subject of bargaining and, thus, not subject to the duty to bargain and its attendant prohibitions on unilateral implementation.

In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Supreme Court held that retirees are not “employees” under the Act, and that a unilateral change to the benefits of current retirees is a permissive subject of bargaining, and therefore, not a violation of the Act.

At the same time, the Court recognized that “[t]o be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.” 404 U.S. at 180.

This dichotomy: retiree benefits for current retirees is a permissive subject of bargaining, but retiree benefits for current employees (i.e., for future retirees) is a mandatory subject of bargaining—has been consistently and uniformly reflected in Board precedent since *Pittsburgh Plate Glass*. See, e.g., *Titmus Optical Co.*, 205 NLRB 974, 981 (1973) (“Changes in retirement benefits that affect current employees are a mandatory subject of collective bargaining”); *Midwest Power Systems, Inc.*, 323 NLRB 404, 406 (1997) (“The Supreme Court has clearly stated that the future retirement benefits of current active employees are a mandatory subject of collective bargaining under the Act. Unilateral modification of such benefits consti-

tutes an unfair labor practice”), enf. denied on other grounds, 159 F.3d 636 (D.C. Cir. 1998); *Georgia Power Co.*, 325 NLRB 420 (1998) enf. mem. 176 F.3d 494 (11th Cir. 1999), cert. denied, 528 U.S. 1061 (1999); *Mississippi Power Co.*, 332 NLRB 530 (2000) ((future retirees are “employees” under the Act and the employer has a duty to bargain over changes to their retirement plan), enf. in relevant part, 284 F.3d 605 (5th Cir. 2002).

It follows then that when an employer, such as the one here, contemplates a change to its retiree benefits program, that change is a permissive subject as it applies existing retirees, and the employer is under no duty pursuant to the Act to notify or make itself available to bargain with the employees’ union about the change for current retirees.⁸ However, at the same time, with regard to current union-represented employees, the contemplated change in retiree benefits is “part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.” *Pittsburgh Plate Glass*, supra. As the Board has explained, “current bargaining unit employees [] have an obvious direct interest in their future retirement benefits as an integral part of their compensation package.” *Midwest Power Systems*, 323 NLRB at 407. As to the union-represented current employees, FirstEnergy had a statutory duty to bargain over the change in the current employees’ future retiree benefits.⁹

Notably, the Union in this case evinced awareness of the distinction. Marshman’s June 3 response to the Employer’s announcement requested “to negotiate the changes in FirstEnergy’s contribution to healthcare for future retirees under the

⁸ It is possible that an employer may be fettered in making changes affecting current retirees by contractual obligations or statutory obligations spelled out by other statutes, but that is a matter beyond the scope of the Act, and not at issue here.

⁹ The reason that the Employer’s subsidy of retiree health care is a mandatory subject of bargaining—i.e., a subject in which current employees “have an obvious direct interest . . . as an integral part of their compensation package” (*Midwest Power Systems*, supra)—was ably explained by Bloom in testimony at the hearing:

Q. Did the Union receive any complaints from bargaining unit employees after the June update was published?

A. Yes.

Q. Do you have any idea how many?

A. Quite a few. Like I said, all of those who were considering retiring in the next, you know, four or five or six years, it affected their decision.

Q. Would the July 1 change affect your own personal decision regarding retirement?

A. Yes, it would.

Q. And explain how that would affect your decision.

A. Being 57 years old, the [enhanced retirement package] was offered to us at 58. If they would offer it again, I would have to take it into serious consideration due to the fact that they’re only giving me a limited number of years of [subsidized] health-care. I would be left to fend for myself when the three years runs out after the expiration of the contract.

That is the nub of it. A current employee’s terms and conditions of employment include what the Employer is offering to provide him in retirement. Employees have an important and “obvious direct interest” in the terms of their retirement. It is a mandatory subject of bargaining and the Union has a statutory right to bargain about it.

⁷ In addition, an employer who violates Sec. 8(a)(5) derivatively violates Sec. 8(a)(1). *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

VEBA.” (Emphasis added.) At the July 15 meeting, according to Deimling, Marshman told him that “based on this June 2nd change then we have to—we need to talk about future retirees.” Pursuant to Supreme Court and Board precedent, the Employer had a duty to bargain over the retiree program available to current employees. It is a mandatory subject of bargaining.

In defense, FirstEnergy asserts that the change in subsidy is a permissive subject of bargaining, even as to current employees (i.e., future retirees), because “the change announced in June 2009 only affected current retirees.” R. Br. at 9, 10. FirstEnergy’s points out that current employees who retire after June 2009, who will remain in-the-box until the current agreement’s expiration in 2013, will not lose their subsidy until 2016, three years after beginning participation in the FirstEnergy group health care plan. FirstEnergy submits that while a subsidy cap for future retirees is “anticipated when current active employees retire, that issue will be the subject of negotiations when the 2009–2013 agreement expires in 2013.” R. Br. at 11.

Of course, the contention that retiree benefits affect only retired former employees is, at bottom, a tautology. Retiree benefits, in every case, apply to and are received by only retirees. They are, after all, retiree benefits, available to retirees, not current employees. But as the Supreme Court, and all Board precedent, and common notions of compensation recognize, “[t]o be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.” 404 U.S. at 180. The Board has pointedly rejected the argument that benefits are a permissive subject because employees do not receive them until they are retired nonemployees.¹⁰

With that said, FirstEnergy’s point is somewhat more subtly advanced—albeit not more convincing. FirstEnergy contends, in effect, that the change in retiree benefits implemented for current out-of-the-box retirees in July 2009, has not yet been *implemented* for union-represented active employees. First Energy points out that as a result of the terms reached in the

2009 Agreement, the cap cannot be implemented for these employees, or for recent in-the-box retirees, until the expiration of the 2009 Agreement, in 2013. And while it is “anticipated” that employees retiring during the 2009 Agreement will be subject to the cap in early 2013 (when employees retiring on or after February 16, 2008, go out of the box), “that issue will be the subject of negotiations when the 2009 [Agreement] expires in early 2013.” R. Br. 11. As Deimling announced at the July 15, 2009 bargaining sessions, FirstEnergy will bargain over the subsidy cap closer to the time in 2013 when the unit employees can be monetarily affected by the cap.

I do not accept this argument. The subsidy cap *has*, in fact, been implemented. It is in effect as part of the retirement program for individuals receiving retirement benefits under the FirstEnergy Healthcare Plan. It is into that program—and no other Employer-related plan—that current employees who retire during the 2009 Agreement are slated to go when they go out of the box at the expiration of the 2009 Agreement. Even given the deferral of the subsidy cap until early 2013 for unit employee retiring after February 15, 2008, the change in the retiree subsidy in the FirstEnergy health care plan is a matter in which current employees have an interest now. As of July 1, 2009—the date of implementation—their current terms and conditions include the “anticipation” that if they retire during the remainder of the 2009 Agreement they will, within 1 month to 3-1/2 years (depending on their retirement date) be eligible to be out-of-the-box participants in the Employer’s health care plan. These future retirees can anticipate that after three years in the FirstEnergy Healthcare Plan, the remaining 20, 30, or 40 years of retirement will be without an employer subsidy. Thus, the cap imposed July 1, 2009, on out-of-the-box retirees is a matter in which “current bargaining unit employees [] have an obvious direct interest” as these “future retirement benefits” constitute “an integral part of their compensation package.” *Midwest Power Systems*, 323 NLRB at 407.¹¹

It is true, as the Employer stresses, that bargaining between now and 2013 might result in the elimination of the subsidy cap in time for current unit employees to avoid feeling its effect. But that, in a nutshell, is the point of the General Counsel’s case. When FirstEnergy suggests that future bargaining may result in current employees never being affected by the cap, it is really saying that, absent agreement in subsequent bargaining to rescind the subsidy cap that applies to this retirement plan, the cap will come in to effect in 2013 for unit employees retiring any time after February 15, 2008. That is the essence of a unilateral change, which in most every case *could* be bargained back to the status quo ante.

However, FirstEnergy has a statutory duty to bargain over this retiree benefit *before* implementing it, not after implement-

¹⁰ In *Midwest Power Systems, Inc.*, 323 NLRB 404, 406 (1997) the Board explained:

In sum, the Respondent asserts that active employees are not actually affected by the benefit changes until retirement, at which time they are no longer “employees” with respect to whom there is a statutory obligation to bargain. . . .

Applying the distinction drawn in *Pittsburgh Plate Glass Co.* to the instant case, we agree with the General Counsel that the Respondent’s announcement and implementation of changes in the future retiree medical benefits of active unit employees violated Section 8(a)(5) and (1) of the Act. As noted above, the Act does not restrict the Respondent from changing the benefits of already retired employees. However, the changes prospectively announced by the Respondent affected current active employees who would retire on or after the announced implementation dates. The Supreme Court has clearly stated that the future retirement benefits of current active employees are a mandatory subject of collective bargaining under the Act. Unilateral modification of such benefits constitutes an unfair labor practice. See *Titmus Optical Co.*, 205 NLRB 974, 981 (1981) (not an unfair labor practice to tell already retired employees that employer is discontinuing payment of life insurance premiums for them; but telling current employees that employer will no longer pay insurance premiums for them when they retire is unlawful unilateral change).

¹¹ There is nothing to be made of the tentativeness with which the June 2 Update stated that it was “anticipated” that current employees would be subject to the cap in retirement. In the June 11, 2009 Update, FirstEnergy clarified the matter, directly stating that “[w]hen they retire, current employees will be provided three years of subsidized health care beginning with their retirement date.” And, as counsel for the General Counsel points out, the present implementation of the subsidy cap may be seen in its incorporation into the retirement incentive package offered to bargaining unit employees in August 2009.

ing it, leaving the Union to bargain back to the status quo ante in order to avoid future adverse effects on unit employees. FirstEnergy is not privileged to declare the mandatory subject of a subsidy cap not part of collective-bargaining negotiations and refuse Union demands to bargain about it, based on assurances that it will bargain at a future date. See, *E.I. Dupont de Nemours & Co.*, 304 NLRB 792, 792 fn.1 (1991).

By implementing the subsidy cap and refusing to bargain, FirstEnergy violated Section 8(a)(1) and (5) of the Act.

FirstEnergy also advances two affirmative defenses to the General Counsel's case.

First, the Employer contends that its introduction of the cap on the retiree health care subsidy continued a past practice of such unilateral changes and thus, did not change the status quo of terms and conditions. In support of this contention, FirstEnergy relies on Board precedent holding that a "unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo—not a violation of Section 8(a)(5)." *The Courier Journal*, 342 NLRB 1093, 1094 (2004). FirstEnergy points out that evidence adduced at the hearing demonstrated that in most years there were changes announced, as part of the annual open enrollment, to both the employee health and retiree health care plans. Changes in recent years to the FirstEnergy program (listed on R. Exh. 5) include carrier changes, benefit changes and other items included each year in the open enrollment package sent to eligible retirees.

The burden of proof to demonstrate a past practice sufficient to eliminate the duty to bargain a unilateral change rests on the Respondent. *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. 1 (2010); *Eugene Iovine, Inc.*, 328 NLRB 294, 294 fn. 2 (1999). The Respondent "must show that the practice occurred 'with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis.'"

The Employer's defense must be rejected in this case. In the first place, FirstEnergy has failed to demonstrate that the Union acquiesced in a practice of allowing FirstEnergy to make any changes it liked in retiree health care. The record is silent as to the Union's reaction to most of the changes—typically minor changes in benefits, carriers, or program details—typically announced each year as part of the annual open enrollment process. As noted, *supra*, it is a respondent's burden to prove this affirmative defense. Its burden is not met by adducing evidence of prior unilateral changes and leaving it to the General Counsel or the Union to disprove union acquiescence in the change. While there is record evidence that FirstEnergy "regularly made numerous unilateral changes in the benefits applicable to future retirees," there is not, contrary to FirstEnergy's claim, evidence "that the Union never opposed those changes." R. Br. at 12. It may, in fact, be true, as to the litany of minor annual programmatic changes detailed in Respondent's Exhibit 5, but there is no evidence with which FirstEnergy can rely upon to meet its burden. Indeed, as to the major change in retiree health care implemented by FirstEnergy—the 2004 elimination of retiree health care benefits for newly hired employees—the undisputed and credited testimony of union bargaining committee member Bloom, is that "[w]e disputed this at the bargaining." Moreover, the Union's demands in bargain-

ing on retiree health care for future retirees—such as lifetime vesting—demonstrate a desire by the Union, albeit unsuccessful, to bargain over healthcare for future retirees, even for the period of time that they will be "out-of-the-box" and covered by FirstEnergy's Healthcare Plan.

Second, in order to establish a practice that is a continuation of the status quo it is necessary to show more than a series of waivers by the union over similar subjects. It is well established that "union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past." *Exxon Research Co.*, 317 NLRB 675, 686 (1995), *enf. denied* on other grounds, 89 F.3d 228 (5th Cir. 1996); *Ciba-Geigy Pharmaceuticals*, 264 NLRB at 1017, citing *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969); *Roll & Hold Warehouse*, 325 NLRB 41, 42 (1997) ("The Respondent's contention that the Union had waived bargaining rights by acceding to unilateral changes in various other working conditions over the years is in conflict with long-established precedent that a mere failure to invoke bargaining rights over particular changes in the past does not represent a waiver of such rights over other changes in the future").

In this case, even if it is assumed that the Union routinely accepted, without seeking to bargain, the changes FirstEnergy previously made to its retiree health care program, the disparate nature of the changes—wholly unrelated to the capping of the subsidy—precludes establishment of practice necessary to show that the unprecedented unilateral change in the duration of the subsidy constituted a mere continuation of the status quo. None of the prior changes—typically changes in carriers or medical options under the plan—were remotely similar to the elimination of the employer subsidy that is at stake here. This means that the introduction of the subsidy cap cannot be considered part of the status quo, and part of a past practice of unilateral changes, as to which there is no duty to bargain.

In *Caterpillar, Inc.*, *supra*, a recent case remarkably similar to the instant one, the Board rejected just such an argument. In *Caterpillar, Inc.*, the Board found that an employer's "generic first" policy—under which employees covered by the employer's group health care plan had to pay full retail price if they chose a brand name prescription when a generic was available—was a mandatory subject over which the employer had to provide the union with the opportunity to bargain. As in this case, the employer contended that it had a longstanding practice of unilaterally implementing changes to its health care plan, and that implementation of the generic first policy was a continuation of this practice. The Board found, first, that the employer failed to meet its burden of showing the regularity and frequency of unbargained changes. The Board also held:

In addition, even assuming regularity and frequency, there was no *practice*. Other than the fact that they each altered the Respondent's prescription-drug plan, there is no thread of similarity running through and linking the several types of change at issue here. . . .

Moreover, 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. . . .

[M]aking a series of disparate changes without bargaining does not establish a “past practice” excusing bargaining over future changes. Rather, it shows merely that, on several past occasions, the Union waived its right to bargain. It is well settled, however, that a “union’s acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.”

Caterpillar, Inc., 355 NLRB No. 91, slip op. 2–3 (emphasis in original) (footnote omitted) (quoting *Owens-Corning Fiberglas*, 282 NLRB 609 (1987)).

The Board’s holding in *Caterpillar, Inc.*, supra, is dispositive of FirstEnergy’s claim that its unprecedented decision to eliminate an employer contribution to the cost of retiree health care after three years represents a continuation of the status quo, about which it did not need to bargain.

Finally, FirstEnergy claims that “the Union waved its right to bargain [over the change in the retiree health care subsidy cap] because the matter was explored in bargaining.” R. Br. at 9. According to FirstEnergy: “the issue of the future retiree benefits of currently active bargaining unit employees was fully explored in the protracted bargaining in 2008 and 2009.” R. Br. at 13. FirstEnergy cites (R. Br. at 13) the fact that the Union made a series of proposal on retiree health care in February 2008, and contends (id.) that

at all relevant times after these proposals were made, up to and including the meeting on July 15, 2009, the Company rejected such proposals. Moreover as stated by the Company’s spokesperson at the hearing, the Company’s position was that its proposal for “future retirees” was “captured in our health-care proposal.” Thus, . . . the changes in the instant matter were the subject of collective bargaining from the earliest meetings. For this reason, the Company submits that the Administrative Law Judge should conclude, if necessary, that the Union clearly and unmistakably waived its right to bargain over the change announced on June 2, 2009, since the Company did negot[iate] future retiree benefits in 2008 and 2009 (original emphasis).

This argument misses the point of the General Counsel’s case. The government does not allege that FirstEnergy, *generally*, failed to bargain over the subject of retiree health care for future retirees. Rather, the allegation is that FirstEnergy failed to bargain, specifically, by unilaterally implementing and refusing to bargain over the subsidy cap for future retirees. As to this specific, and significant change, as I have found, FirstEnergy, indeed, implemented and failed to bargain. The change was implemented notwithstanding and in the face of the Union’s express, nearly immediate, and repeated demands to bargain. And at the July 15, 2009 meeting, when the Union raised the subject, Deimling admits he “told Mr. Marshman, it was permissive, and we had no interest in discussing that particular matter.” The “exhaustive” discussions rejecting the Union’s proposals on retiree health care that FirstEnergy claims to have

engaged in throughout bargaining in 2008 and the first half of 2009, do not, in any sense, privilege its failure to bargain about this important unilateral change in retiree health care, announced for the first time on June 2, 2009, and implemented July 1, 2009. The earlier lawful bargaining does not excuse the failure to take the Union up on its demand to bargain over the subsidy cap. The Union’s express and timely demands to bargain preclude any finding of waiver. Indeed, its demands constitute the opposite of waiver.¹²

CONCLUSIONS OF LAW

1. The Respondent FirstEnergy Generation Corp. (FirstEnergy) is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party International Brotherhood of Electrical Workers, AFL–CIO, Local Union No. 272 (Local 272) is a labor organization within the meaning of Section 2(5) of the Act.

3. Local 272 is the recognized collective-bargaining representative of a bargaining unit composed of the production and maintenance employees employed by FirstEnergy at its Bruce Mansfield plant in Shippingport, Pennsylvania.

4. On or about July 1, 2009, FirstEnergy violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a three year cap on employer-paid contribution to health care applicable to current employees when they become eligible to participate as retirees in the FirstEnergy Healthcare Plan, without adequate notice to the Union or providing the Union an opportunity to bargain, and without reaching an overall impasse in ongoing collective-bargaining negotiations for a new labor agreement.

5. The unfair labor practice committed by FirstEnergy affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent shall rescind, for the bargaining unit employees, and any former bargaining unit employee who retired on or after July 1, 2009, the change in its retiree healthcare program implemented July 1, 2009, limiting the retiree care subsidy provided for employees to three years. The Respondent shall, upon demand by Local 272, bargain in good faith with Local 272 regarding a cap on the employer subsidy to

¹² The Respondent’s waiver contention is limited to the contention that the parties “fully explored” the subject of retiree benefits in bargaining. I note that FirstEnergy does not advance the contention, anticipated and disputed in both the General Counsel and Union’s brief, that the subsequent collective-bargaining agreement reached between the parties in December 2009 (the 2009 Agreement), incorporated by reference FirstEnergy benefits plans, which in turn, contained language waiving the Union’s bargaining rights on the subsidy cap. As this theory of waiver was not articulated by the Respondent in its answer, at the hearing (see counsel’s opening statement at Tr. 64–65), or suggested in its brief, I do not address this issue.

retiree health care, as it applies to current employees and to former employees who retired on or after July 1, 2009.

From the record evidence, it is clear that, to date, bargaining unit employees who retired on or after July 1, 2009, or who will retire, have yet to be financially affected by the cap. However, in time, if the remedy ordered in this matter is not adhered to, such adverse effects will occur. In that case, the Respondent shall make whole its employees who have retired, or do retire, on or after July 1, 2009, for any loss of benefits suffered as the result of the Respondent's unlawful change to the employer subsidy of retiree healthcare under the employer-sponsored plan.¹³

All payments for lost benefits are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁴

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision. In the event that, during the pendency of these proceedings, 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 1, 2009.

The Respondent shall, 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent FirstEnergy Generation Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Local 272 as the representative of its employees in an appropriate bargaining unit by unilaterally implementing changes in the retiree benefits program available to bargaining unit employees upon their eligibility for the Respondent's retiree healthcare program, without providing Local 272 notice and an opportunity to bargain, and, during bargaining for a new collective-bargaining agreement, without bargaining to an overall impasse.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Rescind the unilateral change to the retirement healthcare subsidy, as it relates to unit employees and former unit employees who retired on or after July 1, 2009. Upon demand, bargain in good faith with Local 272 over any change in the retiree subsidy for such employees or former employees, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make all former employees who retired on or after July 1, 2009, or who subsequently retire, whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of benefits suffered as a result of the Respondent's unilateral change to the retiree health care subsidy implemented July 1, 2009.

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

(d) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms pro-

¹³ This will include making such former employees whole for: expenses incurred to maintain coverage under the FirstEnergy healthcare plan that would have been paid by the Respondent but for its unlawful change; expenses beyond what would have been incurred under the FirstEnergy plan, absent the unlawful change, incurred to maintain health care coverage and/or pay for medical expenses in an alternate plan for health care; and as to such former employees who did not participate in a plan because of the Respondent's unlawful changes, reimbursement for any medical bills that they have paid directly to health care providers that would have been covered had they participated in the FirstEnergy plan without the unilateral change (minus any expenses saved by such former employees by not paying contribution costs to participate in the FirstEnergy plan that would have been required absent the unlawful unilateral change).

¹⁴ Counsel for the General Counsel offers (GC Br. at 19-28) an extensive argument that the Board should drop its practice of assessing simple interest on monetary remedies in favor of compound interest computed on a quarterly basis. The Board has repeatedly considered this proposition in recent cases and repeatedly declared that "we are not prepared at this time to deviate from our current practice of assessing simple interest." *Hatcher Press Inc.*, 355 NLRB No. 175, slip op at 3, fn. 3 (2010); *Delaware Valley Designers & Manufacturers, Inc.*, 355 NLRB No. 52, slip op. at 3, fn. 4 (2010). Given these, and many other similar recent such pronouncements, I am not inclined at this juncture to depart from the Board's traditional interest formula with regard to computation of backpay in this matter.

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁶ 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 for the [] Circuit."

vided 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the 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 9, 2009.

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

Dated, Washington, D.C. September 17, 2010

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.

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 unilaterally implement changes to our employees' retiree healthcare program without providing the Union notice and an opportunity to bargain, and, if we are bargaining for a new labor agreement with the Union, without bargaining to an overall impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

WE WILL rescind the three year cap on the employer-paid subsidy for retirees covered by the FirstEnergy healthcare program implemented July 1, 2009, insofar as it applies to employees or former employees who retired on or after July 1, 2009.

WE WILL, if requested by the Union, bargain in good faith with Local 272 over any change in the retiree subsidy for employees, or former employees who have retired on or after July 1, 2009, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make whole, with interest, any employee retiring on or after July 1, 2009, who loses benefits as a result of our unlawful implementation of changes to the retiree care subsidy implemented July 1, 2009.

FIRSTENERGY GENERATION CORP.