Caterpillar, Inc. *and* International Association of Machinists and Aerospace Workers, Local Lodge No. 851, AFL–CIO. Case 13–CA–43506

August 17, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

The single issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by announcing and implementing a "generic first" prescription drug program without providing the Union notice and an opportunity to bargain.[1] The judge found no violation and dismissed the complaint.

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 brief and has decided, for the reasons set forth below, to reverse the judge's decision and find that the Respondent's unilateral announcement and implementation of the "generic first" program violated Section 8(a)(5) and (1) of the Act.

I. BACKGROUND

The International Association of Machinists and Aerospace Workers, Local Lodge No. 851, AFL–CIO (the Union) has been the bargaining representative for a unit of the Respondent's employees at its Joliet, Illinois plant since 1951. The parties' current collective-bargaining agreement runs from May 2, 2005, to May 1, 2012. On April 28, 2005, the parties executed two Insurance Plan Agreements with appended Group Insurance Plans, under which unit employees are provided, among other things, prescription drug benefits.[2]

Under the Group Insurance Plans, employees were free to choose either brand-name prescription drugs or their generic equivalents. Employees choosing generic prescription drugs were responsible for a copayment of $5. Employees choosing brand-name prescription drugs were responsible for a copayment of $20 or $35 for preferred and nonpreferred drugs, respectively. These copay amounts were contractually specified in the Group Insurance Plans themselves.

By letter dated May 5, 2006,[3] the Respondent furnished the following notice to employees enrolled in its prescription drug plan:

> According to our data, there is still a small group of members who are choosing brand names when they have less costly, high-quality generic equivalents.
>
> For that reason, beginning September 1, 2006, Caterpillar will implement a generic step therapy program. When a direct generic is available for a given drug, members may still choose the brand but will pay full retail price for the brand drug, unless a physician specifies the brand drug is required. In the event that a brand drug does not have a direct generic equivalent . . . the brand can be filled at the regular Caterpillar co-pay amount. . . .

The Respondent did not give the Union notice and an opportunity to bargain prior to sending this announcement to employees.

Dave Stevens, the Respondent's senior labor relations consultant, testified that, in his view, the Respondent had no duty to bargain concerning the "generic first" program because it "was not a substantive change in the plan itself. It was simply an administrative change in how the prescription drugs were administered." Stevens likened the change to past drug-benefit changes that he also characterized as administrative. In 1998, for example, the Respondent began requiring preauthorization for certain prescriptions. In 1999 and after, pursuant to Food and Drug Administration (FDA) guidelines, it instituted quantity limits on prescriptions for certain drugs. And, on several occasions after 1998, the Respondent put in place "step therapies" for certain families of drugs, under which an individual would first try an over-the-counter medication and then proceed to related generic and name-brand drugs only if the previous step proved ineffective. The 1999 Group Insurance Plan was silent as to preauthorization requirements, drug quantity limits, and step therapies; the 2005 Group Insurance Plans were likewise silent as to step therapies, but they expressly gave the Respondent the right to impose preauthorization requirements and quantity limits.

Notwithstanding the Respondent's characterization, in its May 5 notice to employees, of "generic first" as a

[1] On February 2, 2007, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Board denied the Respondent's motion to untimely file cross-exceptions, a supporting brief, and an answering brief.

[2] One Insurance Plan Agreement and appended Group Insurance Plan applies to employees hired before May 2, 2005; the other, to employees hired on or after that date. The two sets of documents are identical in all respects material to this case. These two agreements superseded the parties' 1999 Insurance Plan Agreement/Group Insurance Plan.

[3] All dates refer to 2006, unless otherwise specified.

"step therapy program," Stevens acknowledged that "generic first" is not a step therapy. Stevens explained that "generic first" applied "across the board . . . wherever there was a generic equivalent for a brand name," whereas a step therapy was "a limited focus program that applied to a family of drugs . . . not every drug."

On May 10, the Union grieved the unilateral implementation of "generic first." The Respondent denied the grievance. On June 20 and September 28, the Union requested bargaining. The Respondent refused to bargain.

II. JUDGE'S DECISION AND GENERAL COUNSEL'S EXCEPTIONS

The judge found that the Respondent did not violate Section 8(a)(5) when it unilaterally implemented "generic first." Initially, he relied on the rationale that Section 8(a)(5) is not violated "where an employer's action does not change existing conditions—that is, where it does not alter the status quo." Applying this principle, the judge found the implementation of "generic first" lawful as a continuation of "an established past practice." But having found *no* alteration of the status quo, the judge went on to find no "substantive" change, citing in support two cases—*Bath Iron Works Corp.*[4] and *Optica Lee Borinquen, Inc.*[5]—that the Respondent relied on to argue that "generic first," albeit a change, was merely an "administrative" change and hence not material, substantial, and significant.[6]

Excepting, the General Counsel takes issue with both of the judge's rationales, arguing that "generic first" did change the status quo and that it did so materially, substantially, and significantly.

III. ANALYSIS

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,[7] provided that the change is material, substantial, and significant[8] and that no claim of privilege applies.[9] If, of course, the alleged "change" actually maintains the status quo, then Section 8(a)(5) is not violated.[10] Healthcare benefits are mandatory subjects of collective bargaining.[11] Thus, if the Respondent's unilateral implementation of "generic first" changed employees' healthcare benefits, and did so materially, substantially, and significantly, then absent any defense that the change was privileged, the Respondent violated Section 8(a)(5).

It is not clear from the judge's analysis whether he found no duty to bargain because "generic first" continued a past practice and, thus, did not change the status quo, or because it did change the status quo, but not materially, substantially, and significantly. However the judge's analysis is characterized, we conclude that he erred, for the reasons that follow.

A.

To the extent the judge found that "generic first" merely continued a past practice and, thus, did not change the status quo, we reject that finding as having no evidentiary support.

The burden of proof to demonstrate past practice rests on the Respondent, who 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."[12] The record here falls short of such a showing.

The Respondent failed to establish the specific circumstances surrounding the prior changes in the prescription drug program. The Respondent presented no evidence of the dates on which the prior changes occurred, or the number or the frequency of the changes. The record merely reflects that on unspecified dates in and after 1998, the Respondent made unbargained changes in prescription-drug benefits by instituting preauthorization requirements, drug-quantity limits, and step therapies. By failing to specify when the prior changes occurred, the number of such changes or their frequency, the Respondent necessarily failed to meet its burden of showing regularity and frequency.

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

[4] 302 NLRB 898, 901 (1991).

[5] 307 NLRB 705, 716 (1992), enfd. mem. 991 F.2d 786 (1st Cir. 1993).

[6] See, e.g., *Crittenton Hospital*, 342 NLRB 686 (2004) (finding employer's unilateral change lawful because the change was not material, substantial, and significant).

The Respondent also argued that even if the change was more than merely administrative, it was still not material, substantial, and significant because its impact on unit employees was de minimis. The judge rejected this contention, and also implicitly rejected the Respondent's contention that the change was privileged because the Union waived bargaining. No timely exceptions were filed by the Respondent, and therefore those contentions are not before us.

[7] *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[8] E.g., *Crittenton Hospital*, supra.

[9] *Pan American Grain Co.*, 351 NLRB 1412, 1414 fn. 9 (2007) (holding that the burden of demonstrating that a unilateral change was privileged rests on the employer), enfd. 558 F.3d 22 (1st Cir. 2009).

[10] E.g., *Post-Tribune Co.*, 337 NLRB 1279, 1280–1281 (2002) (finding no change where increase in employees' health insurance costs in absolute dollars-and-cents terms preserved unchanged the percentage of health insurance costs allocated to employees).

[11] *United Hospital Medical Center*, 317 NLRB 1279, 1281 (1995).

[12] *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).

no thread of similarity running through and linking the several types of change at issue here. The three types of past change—preauthorization requirements, drug-quantity limits, step therapies—are each dissimilar; and the Respondent does not contend that "generic first" falls into any one of these categories of past practice. And it does not: "generic first" is not a preauthorization requirement; it has nothing to do with drug-quantity limits; and Labor Relations Consultant Stevens expressly acknowledged that it is not a step therapy.

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. The past changes were limited in scope, involving only certain drugs or families of drugs. "Generic first," by contrast, involved *all* brand-name drugs that have generic equivalents.[13] Moreover, and significantly, unlike "generic first," the past changes did not alter express terms of the Group Insurance Plans. All such changes concerned matters the Group Insurance Plans either did not address or, after April 28, 2005, expressly left to the Respondent's sole discretion. By contrast, the copay amounts for brand-name drugs were specified in the Group Insurance Plans.

Finally, we reject the judge's finding that the unilateral implementation of "generic first" was lawful because it continued a past practice of making "administrative" changes. As defined by the Respondent, an "administrative" change is procedural, as opposed to a substantive modification in plan benefits. But there is no principle that exempts a "procedural" change from the duty to bargain, provided that the change is material, substantial, and significant (as "generic first" was, for reasons explained below).

Further, making 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."[14] Moreover, as stated above, however characterized, "administrative" changes that do not alter express contract terms are fundamentally unlike an "administrative" change that does.

In sum, the record does not permit a finding that "generic first" continued an established past practice and did not alter the status quo.

B.

To the extent the judge found that the unilateral implementation of "generic first" was lawful because it was not a material, substantial, and significant change, we disagree with that analysis as well.

The Board has found unilateral changes to be material, substantial, and significant where, among other things, those changes impair employee choice or discretion related to employee benefits[15] or change the costs to employees of such benefits.[16] Both of these grounds apply in this case. Prior to the implementation of "generic first," employees had the discretion to choose between generic drugs ($5 copayment) or brand-name drugs ($20 or $35 copayment) as they saw fit. The only consequence of choosing a brand-name drug was a higher copayment. Under the new program, employees no longer have discretion to choose brand-name over generic drugs. If an employee chooses a brand-name drug without physician approval, the employee must pay the full retail price. The elimination of employee discretion in this area and the increase in the cost of brand-name drugs when not specified by a physician constitute material, substantial, and significant changes. *Palm Court Nursing Home*, supra; *Flambeau Airmold*, supra.[17]

Bath Iron Works, supra, and *Optica Lee Borinquen*, supra, cited by the judge, are distinguishable. Applying the *Spielberg/Olin*[18] deferral standard, the Board in *Bath Iron Works* upheld as not clearly repugnant to the pur-

[13] The Respondent did not present evidence regarding how many drugs or families of drugs were involved in the past changes. At the hearing, Stevens was asked how many drugs were involved in the step therapy program, and he testified that he "would not hazard a guess" but that it was "more than one." He acknowledged, however, that "generic first" applied "across the board . . . wherever there was a generic equivalent for a brand name."

[14] *Owens-Corning Fiberglas*, 282 NLRB 609 (1987).

[15] *United Rentals*, 349 NLRB 853, 863 (2007) (finding the employer's unilateral discontinuation of its long-settled practice of allowing employees to take unpaid days off without using sick leave or vacation time unlawful because "the freedom to [do so] cannot be labeled as insignificant"); *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001) (finding the employer's unilateral changes unlawful because those changes "impaired the employees' discretion and ability to use their sick leave benefit as they saw fit"), modified on other grounds 337 NLRB 1025 (2002).

[16] See, e.g., *Palm Court Nursing Home N.H., L.L.C.*, 341 NLRB 813, 819–820 (2004) (finding the employer's unilateral implementation of changes in health benefits unlawful in part because these changes increased employee copayments for prescription drugs).

[17] The fact that this change impacts only those few employees who choose brand-name over generic drugs does not make it insubstantial. See, e.g., *Ivy Steel & Wire*, 346 NLRB 404, 419 (2007) ("The fact that the unilateral change . . . may have affected only one unit employee, and not other members of the bargaining unit, does [not] render the change inconsequential or insubstantial."); *Carpenters Local 1031*, 321 NLRB 30, 32 (1996).

[18] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Olin Corp.*, 268 NLRB 573 (1984).

poses and policies of the Act an arbitral award finding that an employer permissibly instituted drug testing where the testing was "logically encompassed" in "established rules" that "set forth the [employer's] authority" to do so. 302 NLRB at 901. Here, by contrast, "generic first" was not "logically encompassed" in the established copay rules. Rather, the rules themselves were changed.

In *Optica Lee Borinquen*, the Board considered the bargainability of several changes and found no violation where they "amounted merely to language adjustments which either codif[ied] previously announced procedures, eliminate[d] ambiguity, or articulate[d] procedures undeclared, but implicit in an existing body of rules or restrictions." 307 NLRB at 716. Significantly, however, a violation of Section 8(a)(5) was found for the unilateral change most similar to the "generic first" program: a reduction of the employee discount on purchases of sunglasses and contact lenses. Id. at 716–717. Like that change, the one at issue here increased costs for employees who chose to purchase certain products.

For these reasons, we reverse the judge's decision and find that the Respondent's unilateral announcement and implementation of the "generic first" program violated Section 8(a)(5).

REMEDY

Having found that the Respondent has violated Section 8(a)(5) of the Act by failing to notify and bargain with the Union concerning the announcement and implementation of its "generic first" program, we shall order the Respondent to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. Specifically, we shall order the Respondent to rescind its "generic first" program and to bargain with the Union before implementing further changes in unit employees' wages, hours, or terms and conditions of employment. We shall also order the Respondent to make whole employees adversely affected by unilateral implementation of the "generic first" program, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Caterpillar, Inc., Joliet, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally announcing and implementing the "generic first" program.

(b) Making material, substantial, and significant changes to the prescription drug program of unit employees without first notifying the Union and affording it an opportunity to bargain concerning such changes and their effects.

(c) 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 necessary to effectuate the policies of the Act.

(a) Rescind the "generic first" program implemented on September 1, 2006.

(b) 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 of the Company's Joliet Plant, excluding salaried office clerical employees, plant protection employees, professional and supervisory employees as defined in the Act.

(c) Make whole all employees adversely affected by the unlawful implementation of the "generic first" program, with interest as set forth in the remedy section of 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 reimbursement to the unit employees due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Joliet, Illinois, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 13, 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 cur-

[19] 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."

rent employees and former employees employed by the Respondent at any time since May 5, 2006.

(f) 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 the Respondent has taken to comply.

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

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, 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 unilaterally implement the "generic first" prescription drug program for employees in the bargaining unit set forth below.

WE WILL NOT unilaterally make material, substantial, and significant changes in unit employees' prescription drug benefits without first notifying International Association of Machinists and Aerospace Workers, Local Lodge No. 851, AFL–CIO (the Union) and affording it an opportunity to bargain concerning such changes and their effects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above, which are guaranteed them by Section 7 of the Act.

WE WILL rescind the "generic first" program implemented on September 1, 2006.

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 of the Company's Joliet Plant, excluding salaried office clerical employees, plant protection employees, professional and supervisory employees as defined in the Act.

WE WILL make whole, with interest, all employees adversely affected by our unlawful implementation of the "generic first" program.

CATERPILLAR, INC.

Denise Jackson-Riley, Esq., for the General Counsel.
Joseph J. Torres, Esq. and *Kevin M. Cloutier, Esq.,* of Chicago, Illinois, for the Respondent-Employer.
Cristina Nedrow, of Naperville, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on November 30, 2006,[1] in Chicago, Illinois, pursuant to a complaint and notice of hearing in the subject case (the complaint) issued on October 13, by the Regional Director for Region 13 of the National Labor Relations Board (the Board). The underlying charge was filed on July 19, by International Association of Machinists and Aerospace Workers, Local Lodge No. 851, AFL–CIO (the Charging Party or the Union), alleging that Caterpillar, Inc. (the Respondent or the Employer) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent, about May 5, announced that the prescription drug plan of employees in the bargaining unit would be changed beginning on September 1, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the Respondent, I make the following

[1] All dates are in 2006, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the business of manufacturing construction and mining equipment, diesel and natural gas engines, and industrial gas turbines in Joliet, Illinois, where in the past 12 months it purchased and received at its facility goods valued in excess of $50,000 from points directly outside the State of Illinois. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union has represented the Respondent's employees for collective-bargaining purposes since its certification by the Board on May 18, 1951. That recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from May 2, 2005, to May 1, 2012 (Jt. Exh. 7).[2]

Coextensive with the parties' collective-bargaining agreement, they negotiated and agreed to a successor Insurance Plan Agreement (Jt. Exh. 2) which succeeded their 1999 Plan (Jt. Exh. 3). Subject to the Insurance Plan Agreement, the parties' agreed to continue to maintain the Group Insurance Plan which is the exclusive plan for insurance and other benefits for death, sickness, accident, hospitalization, surgical, or other medical services for eligible employees of Respondent.

Included in the 2005 Group Insurance Plan are specific procedures for review of disputed claims.[3] Also contained therein is the right of the Respondent to administer the Group Insurance Plan (Jt. Exh. 2, sec. 9.3).

B. The 8(a)(1) and (5) Allegation

The General Counsel alleges in paragraph 5 of the complaint that the Respondent, about May 5, announced that the prescription drug plan of employees in the bargaining unit would be changed beginning September 1, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

[2] Art. 4.1, step 3 (Grievance Procedure) states in pertinent part: Disputes whose basic issue is the interpretation, application or alleged violation of the terms of the Group Insurance Plan Agreement between the parties shall not be subject to the grievance procedure. Such disputes shall be processed in accordance with the review procedure for disputed claims in the appropriate Group Insurance Plan Agreement.

[3] Sec. 8 states in pertinent part: To afford employees a means by which they can seek review and possible reconsideration of a disputed disability, medical, dental, vision, catastrophic medical expense, or a hearing aid claim or a life insurance, or accidental death or dismemberment benefit claim which is denied the following procedure will apply. Thereafter, there are four steps that must be followed when submitting a disputed claim (Jt. Exh. 2, p. 2).

1. Facts

By letter dated April 24, Respondent's physician, Dr. Richard Luetkemeyer, furnished local physicians that service employee/members prescription drug needs, information about the use of drug claim data. In pertinent part, Dr. Luetkemeyer noted that 95 percent of individuals covered under the prescription drug plan choose a generic drug when one is available and pointed out that there is a small group of employees who are choosing the brand drug even though the prescribing physician has stated substitution with the generic equivalent is acceptable.

Accordingly, the Respondent determined that effective September 1, it would implement a "generic first" program. When a direct generic is available for a given drug, the employee/member may still choose the brand, but will pay full retail price for the brand drug, unless the brand drug is specified by the treating physician. The Respondent will no longer pay any portion of the cost of a brand drug with a direct generic equivalent, unless the prescribing physician has ordered "no substitution" for the brand drug (Jt. Exh. 6).

By letter dated May 5, Respondent notified all prescription drug plan employee/members of the above changes to be effective September 1 (Jt. Exh. 4).[4]

By letter dated May 8, Respondent sent a similar letter to specific employee/members who recently chose at least one brand drug when there are less costly, high-quality alternative drugs available and notified them that beginning September 1, a generic step therapy program will be implemented (Jt. Exh. 5).

On May 10, the Union filed a step 3 grievance under the parties' collective-bargaining agreement alleging that an improper change was made to their prescription drug plan and requested that the drug benefits be applied as provided in the benefit book (Jt. Exh. 8). The Respondent, on or about May 30, denied the grievance relying on article 4, dection 4.1, step 3, of the grievance procedure that such disputes must be processed in accordance with the review procedure for disputed claims in the group insurance plan.

On or about June 20, prior to a meeting with the labor relations manager, the Union orally requested to negotiate over the May 5 announced change in the prescription drug plan.

On July 19, the subject unfair labor practice was filed.

By letter dated September 26, the Union referenced the May 5 change to the prescription drug plan and cited the denial of its grievance that protested the change. Accordingly, the Union requested the Respondent to engage in negotiations over the change (Jt. Exh. 9).

[4] In pertinent part the letter stated: For this reason, beginning September 1, 2006, Caterpillar will implement a generic step therapy program. When a direct generic is available for a given drug, members may still choose the brand but will pay full retail price for the brand drug, unless a physician specifies the brand drug is required. In the event that a brand drug does not have a direct generic equivalent, step therapy does not apply and the brand can be filled at the regular Caterpillar copay amount. We are not requiring members to choose a generic if there is no direct generic equivalent to the medication they are currently using. The letter closed by stating that generic step therapy should have little or no impact on you and your family, however, we want you to be aware of the new program.

2. Discussion and analysis

The General Counsel and the Union argue that when the Respondent made changes to the prescription drug plan it did so without notice and without affording the Union an opportunity to bargain with respect to this conduct.

The Respondent presents several arguments in support of its position that its conduct in changing the prescription drug plan did not violate the Act. First, the Respondent states that its actions were taken in accordance with the terms of the applicable Insurance Plan Agreement and Group Insurance Plan which were negotiated by the parties. Second, the Respondent contends that the underlying dispute must be submitted to the applicable dispute resolution procedure that is set forth in the Group Insurance Plan. Third, the Respondent argues that any change that occurred was an administrative rather then a substantive change and therefore did not trigger a notice or bargaining obligation with the Union. In this regard, the Respondent asserts that the program merely changed a procedural aspect of "how" prescription drugs were administered; it did not alter language in the Group Insurance Plan or otherwise substantively modify actual benefits. Finally, the Respondent opines that even if there was a substantive change in the prescription drug plan any impact on bargaining unit employees was not greater than de minimis.

In considering the first two arguments presented by the Respondent, I note that section 8 of the Group Insurance Plan excludes the prescription drug plan as one of the procedures for the review of disputed claims (Jt. Exh. 2, p. 2). Likewise, the procedure specifically states that it is to afford employees a forum to seek review and reconsideration of a claim that has been denied. There is no reference to the Union as an independent party with a right to file a claim or fully participate in the review procedure. While a local union insurance representative is mentioned in steps 1–4 of section 8, that individual is only permitted to represent the employee's interest in a previously denied claim and no provision is made for the Union to independently file a grievance or a refusal to negotiate allegation in this forum.

For all of these reasons, I reject Respondent's first two arguments that the procedures set forth in the Group Insurance Plan should be followed, and the subject complaint allegations should be dismissed. I also reject the Respondent's arguments in its posthearing brief that the present dispute is solely one of contract interpretation warranting that the subject change in the prescription drug plan be dismissed. Based on the above discussion, and particularly noting that the prescription drug plan is excluded from the dispute resolution procedure in the Group Insurance Plan, I do not find that there are equally plausible contract interpretation questions to be resolved. *Westinghouse Electric Corp.,* 313 NLRB 452 (1993).

With respect to the Respondent's third defense, they first contend that the Group Insurance Plans provisions reserve to it the exclusive right to administer the Plan. The Respondent does not disagree with its obligation to notify the Union if a substantive change is made to the Insurance Plan Agreement. For example, if the Plan's section for preventive benefits did not include diagnostic tests and the Respondent wanted to add these to the Plan, such a substantive change would trigger a notification and a bargaining obligation with the Union. On the other hand, the Respondent has a consistent established past practice of not notifying the Union when it makes administrative changes to the existing Insurance Plan Agreement. For example, the Respondent has an established practice of requiring certain drugs to be preauthorized in order to control costs and to determine whether other drugs could treat the problem just as effectively. The Union challenged the preauthorization criteria arguing that this was a substantive change to the Insurance Plan Agreement. Ultimately, the matter was referred to arbitration under the parties' 1999 collective-bargaining agreement. The arbitrator held that the Respondent's design of the preauthorization criteria was reasonable and appropriate, finding that it was within the Company's right to administer the plan as a means of controlling costs (R. Exh.1).

On another occasion, the Respondent changed the Insurance Plan Agreement as it concerned the quantity of medication that could be prescribed by a physician. This procedure started with the prescribing of Viagra and has continued more recently with cholesterol type drugs. Since this was an administrative change to the Insurance Plan Agreement, notification was not provided to the Union.

Lastly, the Respondent implemented a step therapy program wherein the employee/members of the Plan are required to start with an over-the-counter medication before progressing to a generic prescription drug and then to a brand drug if the generic drug did not prove effective. Because this was an administrative change to the plan, the Union was not notified and no negotiations occurred between the parties.

The Board has held that an employer violates Section 8(a)(1) and (5) 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. 736, 743 (1962). On the other hand, where 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)(1) and (5) of the Act. See *House of the Good Samaritan,* 268 NLRB 236, 237 (1983). An established past practice can become part of the status quo. Indeed, the Board has previously found no violation of Section 8(a)(1) and (5) of the Act where the employer simply followed a well-established past practice. See, e.g., *Luther Manor Nursing Home,* 270 NLRB 949, 959 (1984), affd. 772 F.2d 421 (8th Cir. 1985) (no violation of Sec. 8(a)(1) and (5) where the employer, in accordance with past practice, paid one third of an insurance premium itself and required employees to pay the remaining two thirds). In a subsequent case, *Post-Tribune Co.,* 337 NLRB 1279 (2002), the Board applied this criteria in finding no violation of the Act.

The Respondent argues that it has an established past practice of making administrative changes to its prescription drug plan without notifying or bargaining with the Union. Indeed, the record evidence shows that such a practice does exist and in the subject case the employee/member is not adversely impacted if they select the equivalent generic medication to the brand drug. Likewise if the employee/member is required to take the brand drug, and this is noted on the prescription form by the treating physician, no change takes place as the em-

ployee/member may receive the brand drug and is reimbursed by the Respondent for the appropriate copayment. It is only in the situation when the physician approves the use of a generic drug or does not specify that a brand drug must be provided and the employee/member chooses the brand drug that he or she would be required to incur the co-payment.

Under these circumstances, I am in agreement with the Employer that no substantive change occurred on May 5, when the Respondent informed employees that the prescription drug plan would be changed effective September 1. In this regard, the employee/member is permitted to receive a brand drug with total reimbursement by the Respondent as long as the physician certifies the necessity for its use.

For all of these reasons, and particularly noting that no substantive change occurred requiring notice and bargaining with the Union, I recommend that the complaint be dismissed in its entirety. *Bath Iron Works Corp.,* 302 NLRB 898, 901 (1991); *Optica Lee Borinquen, Inc.,* 307 NLRB 705, 716 (1992).

Based on my above finding that no substantive change occurred to require a bargaining obligation, the Respondent's argument that even if a change took place the impact on employees was not greater than de minimis is moot. However, if others disagree with my conclusion, I would find contrary to the Respondent that the change in the prescription drug plan on September 1, had a foreseeable impact on employees greater than de minimis. In this regard, the record testimony indicates that as of the date of the hearing no claims filed by employees had progressed through the pipeline to produce information whether employees had incurred additional costs if they selected brand drugs without the authorization of there physician. In my opinion, it is reasonable to conclude that of the 5 percent of employees that do not routinely select generic drugs a percentage of them, due in part to the introduction of the new change or the fact that certain employees have always selected brand drugs, continued to do so after September 1. Therefore, it stands to reason that those employees who previously were reimbursed by the Respondent for the copayment will not receive that payment under the change that is now in effect and will be required to pay the full price for the prescription.

Based on the above, I find that if a change did occur on September 1, the impact on bargaining unit employees was greater than de minimis.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(a)(1) and (5) of the Act when it made administrative changes to the parties prescription drug plan.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 2, 2007

[5] 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.