Wendt Corporation *and* Shopmen's Local Union No. 576. Cases 03–CA–212225, 03–CA–220998, and 03–CA–223594

August 26, 2023

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX, AND PROUTY

On July 29, 2020, the National Labor Relations Board issued its Decision and Order in this proceeding finding that the Respondent committed multiple violations of Sections 8(a)(1), (3), and (5) of the Act during the parties' initial year of first-contract bargaining.[1] The Respondent petitioned for review, and the Board filed a cross-application for enforcement. On March 1, 2022, the United States Court of Appeals for the District of Columbia Circuit enforced the Board's Order, with the exception of one finding by the Board: that the Respondent violated Section 8(a)(5) and (1) of the Act by temporarily laying off 10 unit employees in February 2018. The court remanded the case to the Board for further consideration of whether the temporary layoff was privileged by the Respondent's asserted past practice.[2]

By letter dated May 27, 2022, the Board invited the parties to file statements of position with respect to the issues raised by the court's opinion. The Respondent, the Union, and the General Counsel each filed a statement of position. On August 8, 2022, the Board granted the Respondent's request for leave to file a response to the General Counsel's statement of position. On August 22, 2022, the Respondent filed a response to the General Counsel's position statement.

The Board has reviewed the entire record in light of the court's decision, which is the law of the case. We find, for the reasons set forth below, that the Respondent has failed to establish under *Raytheon Network Centric Systems*[3] that it had a longstanding past practice of layoffs which occurred with sufficient regularity and frequency to privilege it to unilaterally implement the February 2018 layoffs. We thus reaffirm the Board's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by temporarily laying off 10 unit employees in February 2018.

However, we overrule *Raytheon* insofar as it held that an employer may lawfully make a unilateral change in terms and conditions of employment informed by discretion, so long as the change is similar in kind and degree to the changes made in connection with the employer's past practice of such changes. This holding cannot be reconciled with long-established past-practice jurisprudence under the Supreme Court's controlling decision in *NLRB v. Katz*, 369 U.S. 736 (1962). In any case, as we also explain, we believe that the pre-*Raytheon* law better serves the policies of the Act.

Finally, we reaffirm a longstanding principle of Board law advanced by the General Counsel but not addressed by the Board in its original decision here, namely that an employer may not defend a unilateral change in terms and condition of employment that would otherwise violate Section 8(a)(5) by citing a past practice of such changes *before* its employees were represented by a union and thus before the employer had a statutory duty to bargain with the union.

I. BACKGROUND

On June 23, 2017, the Board certified the Union as the representative of a unit of the Respondent's production and maintenance employees. The February 2018 layoffs occurred during a year-long course of severe and pervasive unlawful conduct committed by the Respondent while the parties were engaged in negotiations for their first collective-bargaining agreement.[4] The Respondent has argued throughout this proceeding that it was privileged under *Raytheon* to unilaterally implement the layoffs pursuant to its asserted past practice of instituting layoffs during downturns in its business (most recently in 2015), all of which occurred before the Union was certified.

The Board, in a unanimous opinion, rejected the Respondent's past-practice defense. Applying *Raytheon*,[5] the Board found that the Respondent had failed to prove that it had a longstanding regular and consistent past practice of layoffs that were similar in kind and degree to its February 2018 temporary layoffs. 369 NLRB No. 135, slip op. at 5–6.

The Board examined the evidence adduced by the Respondent of its past layoffs occurring in 2001, 2009, and

[1] 369 NLRB No. 135.

[2] 26 F.4th 1002, 1014 (D.C. Cir. 2022). We note that the court modified the Board's Order to exclude reference to two dismissed allegations.

[3] 365 NLRB No. 161 (2017).

[4] See *Wendt Corp.*, 371 NLRB No. 159 (2022).

[5] See 369 NLRB No. 135, slip op. at 5 fn. 19 (quoting *Raytheon*, 365 NLRB No. 161, slip op. at 16) ("[A]n employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past"); and slip op. at 19 fn. 89 ("[U]nder [*NLRB v.*] *Katz*, an employer modification that is consistent with any regular and consistent past pattern of change is not a change in working conditions at all.") (quotation marks omitted).

2015. The Board discounted the 2015 layoffs, which were permanent, finding that they were "different in kind and degree than the temporary layoffs in 2018 and were not an appropriate comparator." Id., slip op. at 6 fn. 20. With respect to the 2001 and 2009 layoffs, which were temporary, the Board found that the "use of temporary layoffs twice in 17 years falls well short of establishing a regular and consistent practice sufficient to privilege unilateral action." Id., slip op. at 5. The Board further found that the 2018 layoff was different in kind from the 2009 layoff because, even though both involved temporary layoffs, "only shop (i.e. unit) employees were laid off in 2018, while the 2009 layoff involved both nonunit office and unit shop employees in equal numbers." Id. The Board concluded that the Respondent failed to meet its burden of proving an established regular and consistent past practice of layoffs such that employees could have reasonably expected the practice to reoccur in 2018. Id., slip op at 5–6.

On review, the court observed that the Respondent also contended that it had laid off employees in 2002 and 2003 and that the Board's decision failed to address those layoffs as part of the Respondent's asserted past practice. See 26 F.4th 1002 at 1013–1014. The court held:

> If the Board had considered all five of the past layoffs that Wendt says comprise its past practice, then the Board may have had grounds to conclude that Wendt lacked a past practice of layoffs that occurred with sufficient regularity and frequency to privilege Wendt to act unilaterally. But the Board considered only a subset of the layoffs Wendt identified without adequately explaining the materiality of its distinctions between those considered and those excluded.

The court further posed to the Board the Respondent's argument that the Board had "strayed from its past precedent" under *Raytheon* and *Mike-Sell's Potato Chip Co.*[6] by "focus[ing] on the number of layoffs Wendt has implemented, rather than Wendt's practice of laying off employees during economic slowdowns."[7] The court accordingly determined that the Board had not adequately addressed the Respondent's past practice arguments and remanded the case to the Board for further consideration. The court specifically directed the Board "to complete its explanation of [the] distinctions" it had made between the Respondent's past layoffs or to consider each of the five layoffs identified by the Respondent as materially similar in assessing whether Wendt's claimed past practice "'occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis.'"[8]

II. THE POSITION OF THE PARTIES

The General Counsel urges the Board to overrule *Raytheon.* The General Counsel argues that the test in *Raytheon* allowing an employer to make unilateral discretionary changes to terms and conditions of employment so long as they do not materially vary in kind or degree from the employer's past practice is directly contrary to *Katz*, which prohibited past practices to privilege employer unilateral conduct where the conduct involved significant employer discretion. The General Counsel urges the Board to *reinstate E.I. Du Pont de Nemours*, 364 NLRB 1648 (2016)—which was overruled by *Raytheon*—holding that discretionary unilateral changes made pursuant to a past practice developed under an expired management-rights clause are unlawful. The General Counsel contends that the *Du Pont* test effectuates statutory policy by fostering the collective-bargaining process. The General Counsel additionally requests that the Board overrule *Mike-Sell's Potato Chip Co.*, supra, arguing that it is contrary to the established requirement permitting employer unilateral action based on past practice only when the employer has shown the practice is regular and consistent.

The General Counsel alternatively urges the Board to conclude that under *Raytheon*, past practice cannot justify unilateral action during bargaining for a first contract with a newly certified union. The General Counsel maintains that in the first contract context the nascent bargaining relationship and employee support for the union can too easily be undermined by employer unilateral action, and further argues that a newly certified union can have had no role in the development and formation of workplace past practice. Finally, the General Counsel urges the Board to find that, under *Raytheon*, the Respondent has not established a past practice of layoffs legitimating unilateral action because its 2002, 2003, and 2015 layoffs are different in kind from its February 2018 layoff and did not occur with sufficient regularity and frequency to permit unilateral action.

The Union argues that the Respondent has not shown a past practice justifying unilateral action, because its past layoffs were different in kind and degree from the 10-person, temporary layoff in 2018 involving only unit employees. The Union points out that previous layoffs, by contrast, included permanent layoffs, layoffs of only a small number of employees, and layoffs of both unit and nonunit employees. The Union additionally joins the General Counsel in requesting that the Board overrule *Raytheon.*

The Respondent argues that it presented evidence establishing a past practice of implementing layoffs in 2001,

[6] 368 NLRB No. 145 (2019).

[7] 26 F.4th at 1013.

[8] Id. at 1014 (quoting *Mike-Sell's,* supra, 368 NLRB No. 145, slip op. at 3).

2002, 2003, 2009, and 2015. It argues that these layoffs were based on prevailing economic, sales, and industry conditions at those times, which dictated whether those layoffs would be temporary or permanent, would involve only shop employees, and would involve few or many employees. The Respondent contends that its exercise of discretion to temporarily lay off only shop employees in 2018 was consistent with this past practice.[9] The Respondent asserts that the Board engaged in a strained effort to distinguish the Respondent's past layoffs from the temporary layoff of only shop employees in February 2018, failed to discuss the layoffs in 2002 and 2003, and thus erroneously found that no past practice existed. The Respondent asserts that it satisfied the *Raytheon* test because the "evidence clearly demonstrated that Wendt had a long-established past practice of layoffs" and that the decisions pertaining to the 2018 layoffs "were made consistently with how those decisions were made in the past" based on prevailing economic conditions. In sum, the Respondent asserts that with its February 2018 layoffs it "did precisely what it had always done when faced with a lack of work."

The Respondent further argues that the Board's finding that it did not show that it had a regular and frequent past practice of layoffs is inconsistent with the holding in *Mike-Sell's* that the practice need not occur at regular intervals.[10] The Respondent reiterates the argument it made to the court that in determining regularity, the Board's focus on the number of layoffs—rather than whether the Respondent had acted consistently with its past conduct when confronted by lack of work—was contrary to *Raytheon* and *Mike-Sell's*.

The Respondent additionally argues that the General Counsel's request that the Board overrule *Raytheon* and *Mike-Sell's* is improper. First, it asserts that the request is beyond the scope of the remand from the District of Columbia Circuit, which has already determined that *Raytheon* and *Mike-Sell's* govern this case. Second, the Respondent argues that the General Counsel's request violates its due process rights because the Respondent relied on *Raytheon* in determining its bargaining obligation under the Act and deciding to proceed with the February 2018 layoffs. The Respondent thus contends that retroactive application to this case of the *Du Pont* standard which *Raytheon* overruled is inequitable.

The Respondent further asserts that *Raytheon* and *Mike-Sell's* are not inconsistent with *Katz*, but rather that they simply reestablished that under *Katz* the duty to bargain is only triggered when there has been a change to an established past practice. The Respondent contends, citing *Raytheon*,[11] that the Supreme Court's statement in *Katz* that the merit increases at issue in that case "involved a large measure of discretion" was simply a factual observation, and that the Court did not announce a rule that any past practice involving the exercise of discretion activated a duty to bargain. The Respondent additionally maintains that *Raytheon* and *Mike-Sell's* further the goals of the NLRA by preserving the status quo, subject to a union's right to request bargaining to change an established past practice, and thus promote the Board's duty to foster stable labor relations while encouraging collective bargaining.

III. ANALYTICAL FRAMEWORK FOR EVALUATING THE PAST PRACTICE AFFIRMATIVE DEFENSE

A. NLRB v. Katz

The touchstone for evaluating unilateral action during bargaining and the availability of past practice as an employer defense to a Section 8(a)(5) allegation, was set forth some six decades ago in the Supreme Court's seminal case, *NLRB v. Katz*, 369 U.S. 736 (1962). There, the Court rejected the view that a violation of Section 8(a)(5) required a finding of the employer's subjective bad faith at the bargaining table and that the employer's unilateral change in terms and conditions of employment could not be a per se violation. The Court explained that a unilateral change is "a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal" to bargain. Id. at 743. Accordingly, the Court declared that a unilateral change made during contract negotiations "must of necessity obstruct bargaining, contrary to the congressional policy" and "will rarely be justified by any reason of substance." Id. at 747.

The *Katz* Court found that the employer had made unlawful unilateral changes involving wage increases, a sick-leave plan, and merit wage increases. With respect to the merit wage increases, the Court addressed the employer's argument that its past practice of acting unilaterally permitted it to again make a unilateral change. Rejecting that argument, the Court explained:

> This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of § 8 (a)(5), unless the fact that the [merit] . . . raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews—in effect, were a mere continuation of the status quo—differentiates them from the wage increases and the changes in the sick-leave plan. We do not think it does. Whatever might be the case as to so-called 'merit

[9] The Respondent also argues that its employee handbook put employees on notice that layoffs might occur and were within the Respondent's discretion to implement.

[10] Citing 368 NLRB No. 145, slip op. at 3.

[11] 365 NLRB No. 161, slip op. at 16.

> raises' *which are in fact simply automatic increases to which the employer has already committed himself*, the raises here in question were in no sense automatic, but were *informed by a large measure of discretion*. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.

Id. at 746–747 (emphasis added). The Court thus rejected the employer's past-practice defense because the unilateral merit increases were *not* automatic increases to which the employer had already committed itself. Under *Katz*' plain terms, changes in terms and conditions of employment that are "informed by a large measure of discretion" cannot be unilaterally implemented even if they might be characterized as consistent with past practice. Id. at 746.[12] Legions of Board and court cases have applied the Supreme Court's instructions in *Katz* and rejected an employer's unilateral change defense during bargaining where the changes are not part of a longstanding practice, and second, where the changes are informed by a large measure of discretion, with the result being that it cannot be said that "in effect," the alleged changes "were a mere continuation of the status quo." 369 U.S. at 746.

The Board has consistently held that, under *Katz*, a past practice can be "long-standing" only if it has been regular and frequent. "An employer's practices . . . which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment . . . A past practice must occur with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007) (citations omitted).[13] The duration of the practice is critical to determining whether it was "so commonplace as to be a basic part of the job itself." *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 842–843 (2004) (internal quotation marks and citation omitted). See, e.g., *A-V Corp.*, 209 NLRB 451, 452 (1974) (finding merit in past-practice defense where the evidence showed a "consistent practice over a considerable number of years").[14]

The courts of appeals have similarly interpreted *Katz*. For example, the Ninth Circuit has applied the *Katz* regularity requirement to reject a past-practice defense where layoffs were, inter alia, "unpredictably episodic." *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d 705, 711 (9th Cir. 1986), enfg. 274 NLRB 1268 (1985). The Sixth Circuit in *Adair Standish Corp. v. NLRB* likewise held unlawful under Section 8(a)(5) layoffs that were "unpredictably episodic." 912 F.2d 854, 864 (6th Cir. 1990) (rejecting past-practice defense under *Katz* because the employer's "argument presumes that the company's lay-off practice was systematic, as opposed to sporadic"), enfg. 292 NLRB 890 (1989). The Eleventh Circuit rejected a past-practice defense under *Katz* because the employer's practice was "irregular" and it "had not committed itself to any fixed practice." *City Cab Co. of Orlando v. NLRB*, 787 F.2d 1475, 1478-1480 (11th Cir. 1986), cert. denied 479 U.S. 828 (1986).

The Board and the courts have further repeatedly applied *Katz* to hold that employers may act unilaterally pursuant to an established practice only if the changes do not involve the exercise of significant managerial discretion. As the District of Columbia Circuit held in *NLRB v. Blevins Popcorn Co.,* 659 F.2d 1173, 1189 (D.C. Cir. 1981):

> In *Katz* the Supreme Court held that an employer cannot unilaterally change conditions of employment during the course of negotiations with a union; if the company decides to alter a preexisting practice, it must give the union an opportunity to bargain over the change. The Court applied this principle to distinguish between automatic wage increases to which the employer has already

[12] In *Katz*, which involved an employer's unilateral changes during bargaining with a newly certified union for a first contract, the Board, too, had rejected the employer's past-practice defense, adopting the finding of the trial examiner (administrative law judge). *Benne Katz, Alfred Finkel, and Murray Katz, d/b/a Williamsburg Steel Products Co.*, 126 NLRB 288, 289 (1960). The trial examiner noted that it was "no defense that [the employer] was allegedly merely following an established practice of quarterly reviewing the merit of its employees for 'it is now beyond dispute that an employer is under a duty to bargain with the representative of its employees with respect to individual merit increases.'" Id. at 294 fn. 4 (quoting *General Controls Co*., 88 NLRB 1341, 1342 (1950)). At the time that the asserted past practice was developed—prior to the union's certification—the employer had no statutory duty to bargain with the union over changes in terms and conditions of employment.

The Supreme Court subsequently made clear that the *Katz* doctrine prohibiting employers from making unilateral changes in terms and conditions of employment "has been extended as well to cases in which an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991) (citing, e.g., *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544, fn. 6 (1988)).

[13] Accord: *Santa-Barbara News Press*, 358 NLRB 1415, 1416 (2012), reaffd. 362 NLRB 252 (2015), enfd. 2017 WL 1314946 (D.C. Cir. Mar. 3, 2017); *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010), enfd. mem. 2011 WL 2444757 (D.C. Cir. May 31, 2011); *Eugene Iovine, Inc*., 353 NLRB 400, 400 (2008), enfd. 371 Fed. Appx. 167 (2d Cir. 2010), reaffd. 356 NLRB 1056 (2011); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004).

[14] See *Eugene Iovine, Inc.*, 353 NLRB at 400 (past practice not established where there was no evidence of layoffs for 4 straight years since union's certification).

> committed itself and wage increases that are "in no sense automatic, but (are) informed by a large measure of discretion." 369 U.S. at 746. The employer would be required to grant the automatic wage increase unless it notified the union that it wished to make a change in the existing conditions of employment and gave the union an opportunity to bargain over the change. However, the employer could not unilaterally grant a non-automatic, discretionary wage increase since "(t)here simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice . . . ." Id. Thus the union could "insist that the company negotiate as to the procedures and criteria for determining such increases. Id. at 746–747."

Succinctly stated, "the Act does not permit a unilateral change 'informed by a large measure of discretion.'" See *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012) (quoting *NLRB* v. Katz, 369 U.S. at 746).[15] As the Ninth Circuit stated in *Aaron Brothers Co. v. NLRB*, 661 F.2d 750, 753 (9th Cir. 1981):

> In determining whether a benefit change fits within the *Katz* exception, the Supreme Court has counseled lower courts to examine the degree to which an employer has discretion to award a benefit or determine its size. See *Katz*, 369 U.S. at 746-47. The greater the discretion, the Court has reasoned, the greater the danger unilateral action will destabilize industrial relations by undermining a union's institutional credibility.

Other courts of appeals have uniformly applied the *Katz* principle limiting the permissible scope of discretionary unilateral conduct.[16]

The Board has likewise applied *Katz* in numerous cases to hold that discretionary changes are precisely the types of actions that require an employer to bargain with the union and cannot privilege unilateral action pursuant to past practice. For example, in *Eugene Iovine*, *Inc.*, the Board found that the employer's recurring unilateral reductions of employees' work hours were discretionary and therefore required bargaining with the newly certified union. The employer's past-practice defense failed because the unilateral action lacked a "'reasonable certainty' as to the timing and criteria for a reduction in employee hours" and "the employer's discretion to decide whether to reduce employee hours 'appear[ed] to be unlimited.'" 328 NLRB 294, 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001).[17] Conversely, the Board has approved employer unilateral action when employer discretion was limited. For example, in *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002), the employer "had a consistent, established past practice of allocating health insurance premiums on an 80/20-percent and 60/40-percent basis" and thus did not violate Section 8(a)(5) by unilaterally allocating premium increases at the same fixed ratio during bargaining.[18]

In sum, *Katz* has been interpreted to permit unilateral conduct only when the employer has shown the conduct is consistent with a longstanding past practice and is not informed by a large measure of discretion. See *Eugene Iovine*, *Inc.*, supra, 328 NLRB 294. *Katz* described such unilateral conduct as automatic in nature rather than discretionary. See 369 U.S. at 746–747. As stated in *Aaron Bros. Co. v. NLRB*, the key to the analysis is whether the unilateral "change was fixed by an established formula containing variables beyond the employer's immediate

[15] Accord: *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162–1163 (D.C. Cir. 2002).

[16] See, e.g., *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1381 (8th Cir. 1993) (rejecting past-practice defense under *Katz* because employer exercised substantial discretion in determining the timing and amount of wage increases), enfg. 307 NLRB 94 (1992); *NLRB v. Allis-Chalmers* Corp., 601 F.2d 870, 875–876 (5th Cir. 1979) (unilateral wage changes were unlawful; employer failed to meet its "heavy burden" of showing that its unilateral actions were "purely automatic and pursuant to definite guidelines," noting that the wage increases were not automatic but involved "considerable discretion"); *NLRB v. John Zink Co.*, 551 F.2d 799, 801–802 (10th Cir. 1977) ("In *Katz* the Court distinguished between automatic and discretionary wage increases and held that discretionary increases during contract negotiations violated the employer's duty to bargain in good faith" and finding the pay raises unlawful because they "resulted from the exercise of managerial discretion"); *NLRB v. Ralph Printing & Lithographing Co*., 433 F.2d 1058, 1062 (8th Cir. 1970) (unilateral discretionary pay increases are not allowed under *Katz*); *City Cab Co. of Orlando v. NLRB*, 787 F.2d 1475, 1478–1480 (11th Cir. 1986) (rejecting employer's defense that its changes "were merely the continuation of established practices which operated merely to maintain the status quo," finding the employer had "exercised an impermissible degree of discretion").

[17] Accord: *Garrett Flexible Products, Inc*., 276 NLRB 704 (1985) (employer unlawfully increased health insurance premiums paid by unit employees where employer had exercised substantial discretion in allocating the increases between itself and employees); *Maple Grove Health Care Center, 330 NLRB 775, 780 (2000) (same); Adair Standish Corp*., 292 NLRB 890, 890 fn. 1 (despite past practice of instituting economic layoffs, employer, because of newly certified union, could no longer continue unilaterally to exercise its discretion with respect to layoffs), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990); *Oneita Knitting Mills, Inc*., 205 NLRB 500, 500 fn. 1, 502–503 (1973) (unilateral wage increase during bargaining impermissible "to the extent that discretion has existed in determining the amounts or timing of the increases"); *State Farm Mutual Auto Insurance Co*., 195 NLRB 871, 889–890 (1973) (unilateral wage increase impermissible because based on significant degree of discretion).

[18] The District of Columbia Circuit has cited *Post-Tribune Co*. with approval as an example of limited discretion under *Katz* permitting unilateral action. See *Du Pont v. NLRB*, 682 F.3d at 68. Accord: *A-V Corp*., 209 NLRB 451, 452 (1974)(employer showed a consistent past practice of allocating increased insurance costs to its employees on a pro rata basis).

influence . . . [and] resulted from nondiscretionary standards and guidelines." 661 F.2d at 753–754.

B. The Board's Raytheon decision

Claiming to be acting consistently with these principles, a Board majority in *Raytheon* found that the employer's unilateral changes to its health benefits plans were privileged by its past practice developed under an expired management-rights clause and thus did not violate Section 8(a)(5) of the Act. However, *Raytheon* interpreted the *Katz* past-practice doctrine to privilege unilateral conduct even if that conduct involved substantial employer discretion.

Raytheon considered the holding in *Katz* that the past-practice defense does not attach to conduct that is "informed by a large measure of discretion,"[19] and dismissed it as a mere "factual observation" that the Court simply "mentioned." 365 NLRB No. 161, slip op. at 16. The *Raytheon* majority found that Board and court caselaw in fact permits unilateral changes that "involved substantial employer discretion," id. at 8, 16, and held that the "relevant factual question is whether the employer's action is similar in kind and degree to what the employer did in the past." Id., at 13. According to the *Raytheon* majority, "the Board has interpreted *Katz* to hold that an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion."[20] Id. at 16. *Raytheon* thus declared that "[r]ather than turning on the existence or non-existence of discretion, the Board and the courts have repeatedly held that actions constitute a change, and require notice and the opportunity for bargaining, only when the actions are a 'departure from the norm,' or 'materially var[y] in kind or degree from what had been customary in the past'." See id., slip op. at 19 fn. 89 (quoting *Westinghouse*, 150 NLRB at 1576, and *Shell Oil*, 149 NLRB at 288). The Board accordingly held in *Raytheon*:

> [R]egardless of the circumstances under which a past practice developed—i.e., whether or not the past practice developed under a collective-bargaining agreement containing a management-rights clause authorizing unilateral employer action—an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past.

Id., slip op. at 16. In sum, *Raytheon* rejected the proposition that *Katz* forbade unilateral actions informed by a large measure of discretion. 365 NLRB No. 161, slip op. at 12-13.[21] *Raytheon* accordingly overruled *E.I. Du Pont de Nemours*, 364 NLRB 1648, which held that discretionary unilateral changes made pursuant to a past practice developed under an expired management-rights clause are unlawful. See *Raytheon*, supra, slip op. at 1.[22]

IV. DISCUSSION

A. The Respondent Has Failed to Establish a Regular and Frequent Past Practice of Layoffs

In determining whether the Respondent has shown that it has a regular and frequent past practice of layoffs under *Raytheon*, we consider, as directed by the court, all five of the past layoffs that the Respondent says comprise its past practice: 2001, 2002, 2003, 2009, and 2015.[23] The Respondent asserts that these five layoffs constitute "a long-established past practice and clear pattern of layoffs" over a 17-year span that legitimated its unilateral implementation of layoffs in 2018. There is no dispute that the burden of establishing the past practice affirmative defense rests

[19] 369 U.S. at 746.

[20] In support, *Raytheon* primarily relied on *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965), and *Shell Oil*, 149 NLRB 283 (1964), where the Board found that employers' unilateral subcontracting did not violate Sec. 8(a)(5) of the Act. See *Raytheon*, supra, slip op. at 7-8, 16.

[21] Member Kaplan joined the majority decision in *Raytheon* and filed a concurring opinion "express[ing] support for an alternative rationale" for dismissing the complaint in that case. *Raytheon*, supra, slip op. at 20–21.

Members Pearce and McFerran dissented in *Raytheon*, deeming "the majority simply wrong when claiming that the sole relevant question in *Katz* is whether an employer's alleged unlawful unilateral changes are 'similar in kind and degree to what the employer did in the past.'" Id., slip op. 29. They maintained that the majority's interpretation "misse[d] the whole point" of *Katz*' past practice holding: "that managerial discretion is determinative in deciding whether a past practice of unilateral changes may lawfully continue during contract negotiations." Id., slip op. 29.

[22] The instant case does not involve a past practice developed under a management-rights clause, unlike *Raytheon* and *Du Pont*.

[23] We recount in full the evidence adduced by the Respondent concerning its layoffs implemented in 2002 and 2003, which were not specifically addressed in our prior decision. The Respondent's Vice-President of Finance Joseph Bertozzi testified as to the layoffs in 2002 and 2003:

> I don't remember any specific layoff event, if you will, like 2009 and 2015—those were specific, sizeable events. But these are—yeah, no. I don't -- I don't remember any -- I don't remember any particulars on why. We had the normal ebbs and flows of work in our shop, so at a time [sic] that's what we would have done. We would have laid off employees. [Tr. 1631–32.]

When questioned by the administrative law judge whether the layoffs in 2002 and 2003 "might have been individual employees laid off, not a group-wide [layoff]", Bertozzi answered "correct." The Respondent admitted into evidence its exhibit 27 showing that the Respondent laid off one employee in 2003 for "lack of work" and two employees in 2002 for that same reason. Bertozzi testified that the individuals laid off in 2002 and 2003 were shop employees.

with the party asserting the defense. See, e.g., *The Atlantic Group*, *Inc.,* 371 NLRB No. 119, slip op. at 2 (2022); *Bemis Company, Inc.*, 370 NLRB No. 7, slip op. at 32 (2020). A substantial showing is necessary to satisfy the burden because, as *Katz* made clear, unilateral action "will rarely be justified by any reason of substance." 369 U.S. at 747. The employer thus bears a heavy burden of proof,[24] and the past-practice defense is to be narrowly construed.[25]

The evidence shows that following the Respondent's implementation of layoffs in three consecutive years—2001, 2002 and 2003—at the very beginning of the 17-year past practice period, the Respondent had no layoffs for the subsequent full 5-year period comprising 2004, 2005, 2006, 2007, and 2008. That 5-year period was followed by a single, isolated layoff event in 2009. Next, the Respondent again did not have any layoffs for another full 5-year period, comprising 2010, 2011, 2012, 2013, and 2014. This second 5-year period without any layoffs by the Respondent was followed by a single layoff event in 2015. The Respondent did not have any layoffs in 2016 or 2017. The layoffs at issue followed in 2018.

We find that the above evidence patently fails to show a practice that is regular or frequent such that "'employees could reasonably expect the practice to reoccur on a consistent basis.'" *Wendt Corp. v. NLRB,* 26 F.4th at 1014 (quoting *Mike-Sell's Potato Chip Co.*, supra, slip op. at 3). The record shows that during the asserted past-practice period, there were more than twice as many years in which the Respondent did not have any layoffs—12 years—than years in which the Respondent in fact implemented layoffs, which was merely 5 years. Further, there were two, separate, full 5-year periods during which the Respondent effected no layoffs whatsoever. In contrast, there were no equivalent or even near-equivalent periods when the Respondent implemented layoffs in each year, let alone two separate periods of five consecutive years' duration. During the 11-year sweep from 2004 through 2014, the Respondent effected a layoff in only one of those years: 2009.

This evidence clearly shows that *not* having layoffs was by far the dominant regular pattern by the Respondent during its asserted past-practice period. Indeed, the conclusion is inescapable that the Respondent has failed to establish that it implemented layoffs with any regularity whatsoever. Thus, following three straight years in which the Respondent had layoffs from 2001–2003, the Respondent plainly had no regular practice of layoffs because, over the entire subsequent 14-year period, it implemented layoffs only twice. We can discern no regularity of any kind in the Respondent's past use of layoffs which, when they did occur, were at highly irregular and inconsistent intervals.[26]

Further, the evidence adduced by the Respondent fails to show that it implemented layoffs with sufficient frequency that employees would reasonably expect layoffs to reoccur on a consistent basis. Indeed, if, as the Respondent contends with respect to the 2002 and 2003 layoffs, there is a normal ebb and flow to its work that results in layoffs, then one would expect far more layoffs to have occurred during the 17-year period at issue. Yet, the Respondent implemented layoffs in less than a third of the years of its asserted past-practice period; 5 out of 17 years. These infrequent and occasional layoffs were bracketed by long intervals without layoffs. The evidence accordingly establishes that the Respondent's past use of layoffs was highly episodic rather than frequent and regular. See *Tri-Tech Services*, 340 NLRB 894, 895 (2003) (3 prior layoffs in 14 years did not establish a consistent practice that privileged employer to act unilaterally with respect to layoffs).

The paradigmatic showing of regularity and frequency sufficient to establish the past-practice defense is an annually recurring event over a significant period of years. For example, in *E. I. DuPont De Nemours, Louisville Works*, 367 NLRB No. 12, slip op at 2 (2018), the regularity requirement was satisfied where the employer had a "long-standing past practice of annual changes" in its health care plan by making those changes every year consecutively from 1996 to 2002.[27] In *Raytheon* itself, the employer satisfied its burden of establishing a regular past practice by showing that it had taken the same action for 11 straight years. 365 NLRB No. 161, slip op. at 17–18. There can be no dispute in such cases that employees could reasonably expect the practice to reoccur on a consistent basis as a term and condition of their employment.

To be sure, *Raytheon* does not require that an event be annually recurring in order to satisfy the regularity and frequency requirements. However, the further the evidence adduced by an employer strays from showing an annualized or similarly recurring event, the more unlikely it is that the employer has met its burden of showing a regular and frequent past practice. While the regularity and frequency components of the past-practice defense are not subject to precise mathematical formulation, we have no difficulty concluding that the evidence here of 5 sporadic layoffs spread episodically throughout 17 years strays so

[24] See *Eugene Iovine*, 328 NLRB at 294–295 fn. 24; *NLRB v. Allis Chalmers Corp.,* 601 F.2d at 875-876.

[25] See *Adair Standish Corp. v. NLRB*, 912 F.2d at 864.

[26] See, e.g., *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d at 711 (past practice defense rejected where layoffs were unpredictably episodic).

[27] See *E. I. DuPont De Nemours v. NLRB*, 682 F.3d at 66–67.

sharply away from establishing regularity and frequency as to plainly fall outside the range of permissible unilateral conduct. The Respondent's evidence does not establish a regular and frequent practice of layoffs punctuated by occasional exceptions, but rather portrays extended periods predominated by no layoffs and interrupted only by infrequent layoffs at highly irregular periods, despite the normal ebb and flow of its business.[28] We accordingly find that the Respondent has failed to carry its burden of demonstrating under *Raytheon* that it had a consistent, regular long-term practice of layoffs that would reasonably inform employees that layoffs are a term and condition of their employment.[29] Thus, we have considered, as directed by the court, whether the Respondent's past-practice defense fails under *Raytheon* and *Mike-Sell's,* and we conclude that it does.

B. Raytheon Did Not Eliminate the Established Regularity and Frequency Requirement

In addition to directing the Board to consider, as we have done above, all of the evidence presented by the Respondent in support of its past-practice defense, the court also specifically posed the Respondent's argument that the Board's evaluation of its past-practice evidence had strayed from *Raytheon*'s kind and degree test because it had "inexplicably focused on the number of layoffs the Respondent had implemented" during the past practice period. 26 F.4th at 1013–1014. The Respondent argued to the court, and reiterates before the Board, that under *Raytheon* the past practice analysis is not numerical, but instead focuses solely on whether its 2018 layoffs materially varied in kind and degree from its past practice of laying off employees during economic slowdowns. Id. The Respondent essentially argues that *Raytheon* discarded the established regularity requirement and replaced it with the kind and degree test.

We disagree. While the *Raytheon* decision dispensed with *Katz'* holding that unilateral action cannot be justified by past practice if it was informed by a large measure of discretion and substituted its new kind and degree test, *Raytheon* also squarely recognized that under longstanding precedent, for past changes to constitute a "practice," the changes must have been "regular and consistent." *Raytheon* thus held that "under *Katz*, an 'employer modification' that is consistent with 'any *regular and consistent* past pattern of change' is 'not a "change" in working conditions at all.'" *Raytheon*, 365 NLRB No. 161, slip op. at 19 fn. 89 (emphasis supplied). As *Raytheon* explained:

> [T]he case law (including the Katz decision itself) makes clear that . . . the status quo against which the employer's 'change' is considered must take account of any regular and consistent past pattern of change. An employer modification consistent with such a pattern is not a 'change' in working conditions at all. [Raytheon, supra, slip op. at 5 & fn. 23. Emphasis in original.]

Although this test is not susceptible to mathematical specificity, it cannot reasonably be disputed that determining whether a practice has been "regular and consistent" requires at least a basic numerical analysis; it is impossible to find that something is regular and consistent without examining how many times it has occurred, and at what intervals. *Raytheon* accordingly did not disturb the abundance of established court and Board precedent, which we have detailed above, applying the requirement of *Katz* that a past practice be determined longstanding by arithmetically evaluating the evidence presented to determine regularity and frequency. See, e.g., *Caterpillar, Inc.*, 355 NLRB at 522 ("[B]y failing to specify . . . the number of such changes or their frequency, the Respondent necessarily failed to meet its burden of showing regularity and frequency"); *Mission Foods*, 350 NLRB 336, 337 (2007) (finding an established past practice requires analysis of the "number of years the [practice] has been in place . . . and its regularity"); *Rural/Metro Medical Services*, 327 NLRB 49, 51 (1998) (same).

Further, following *Raytheon*, the Board continued to hold that for past changes to constitute a practice, the changes must have been regular and consistent. In *Mike-Sell'*s, the Board confirmed that the "party asserting the existence of a past practice bears the burden of proving that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis." *Mike-Sell's*, 368 NLRB No. 145, slip op. at 3.[30]

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[28] We note that the evidence presented by the Respondent does not even measure up to that found sufficient by a Board majority in *Mike-Sell's,* a decision that tests (and in our view, exceeds) the outer limits of the regularity and frequency requirement. See infra fn. 30. In *Mike-Sell*'s, the employer unilaterally sold sales routes in 7 out of 17 or 18 years. See 368 NLRB No. 145, slip op. at 3.

[29] The Respondent's reliance on a provision in its employee handbook concerning layoffs does not and cannot substitute for the requisite showing of an actual regular and frequent practice of layoffs.

[30] We find meritless the Respondent's argument that, under *Mike-Sells,* whether there is an established past practice is not dependent on whether the practice occurred in a regular and recurrent pattern. As explained above, *Mike-Sell's* specifically upheld the regularity requirement, 368 NLRB No. 145, slip op. at 3, and held that the past practice must have occurred in a recurrent manner. Id. at 4 ("To establish the existence of a past practice, it is enough to show that frequent, recurrent, and similar actions have been taken . . . . ") (emphasis omitted). The observation in *Mike-Sell's* that past practice need not occur at precisely set intervals did not eliminate or alter the regularity requirement. Id. at 3.

Accordingly, we find that neither *Raytheon* nor *Mike-Sell's* displaced the established regularity, consistency, and frequency requirements of the past-practice defense and its attendant numerical evaluation of the asserted past practice. We reaffirm its centrality to the analysis of a whether a past-practice defense to unilateral action under *Katz* has been established. These requirements are vital to ensuring that employees will recognize that a pattern of changes is in fact a practice that is part of their terms and conditions of employment.[31]

C. The Respondent's Past-Practice Defense Fails Raytheon's Kind and Degree Test

The court further found that the Board's analysis under *Raytheon*'s kind and degree test of material distinctions between the Respondent's layoffs was incomplete. The court directed the Board to either complete its explanation of the distinctions or to consider each of the five layoffs identified by the Respondent as materially similar in kind and degree when examining their regularity and frequency. In response, we assume arguendo that the five layoffs are similar in kind and degree. Applying that assumption, we find that the Respondent failed to establish a past-practice defense under *Raytheon* because, even assuming all five layoffs are similar in kind and degree, the Respondent has not adduced sufficient evidence satisfying the regularity and frequency requirements of the past-practice defense, as explained above.[32]

D. Raytheon's Kind and Degree Test is Incompatible with Katz

Our analysis does not end here, however. Unlike the established regularity and frequency requirements which *Raytheon* did not disturb, *Raytheon's* kind and degree test is incompatible with the express language and long-standing construction of *Katz* because it eliminates the requirement that past practice cannot privilege unilateral action if it is informed by a large measure of discretion.

Raytheon's articulation of the kind and degree test to replace the discretion analysis wholly failed to acknowledge, adhere to, and apply binding Supreme Court precedent under *Katz* that discretionary conduct cannot be unilaterally implemented under the past-practice defense. The court's remand placed before the Board the proper scope of the kind and degree test under *Raytheon*, with respect to both the continued vitality of the regularity requirement, and the drawing of distinctions among asserted past-practice conduct. As stated above, we find that the latter inquiry under *Raytheon*'s kind and degree test improperly ignores *Katz*' explicit direction that the Act does not permit a unilateral change "informed by a large measure of discretion" because "[t]here simply is no way in such [a] case . . . to know whether or not there has been a substantial departure from past practice." 369 U.S. at 746. The Board is bound to apply controlling Supreme Court precedent under *Katz* when evaluating an employer's past-practice defense, and *Raytheon* failed to do so. Because the court's remand raised to the Board the application of the proper parameters of *Raytheon*, we find it appropriate here to overrule *Raytheon*'s kind and degree test because it is inconsistent with *Katz*.[33]

Raytheon's disregard of *Katz* is patent. The unambiguous language of *Katz* holds that the Act does not permit a unilateral change "informed by a large measure of discretion." 369 U.S. at 746. This directly contradicts *Raytheon*'s holding that *Katz* permits unilateral conduct involving substantial employer discretion. The *Raytheon* majority improperly characterized the Supreme Court's holding as a mere "factual observation" that the Court simply "mentioned." 365 NLRB No. 161, slip op. at 16. We have found no caselaw support for this constricted interpretation of the express holding of *Katz*. Rather, the Board and the courts have repeatedly and consistently deemed the discretion principle of *Katz* as a holding of law and viewed the absence of substantial employer discretion

[31] While, as noted, *Mike-Sell's* reiterated the regularity requirement, we recognize that *Mike-Sell's* is an outlier from precedent finding the regularity and consistency requirements for a past practice defense satisfied. In *Mike-Sell's*, there were more years in which there were no sales by the employer (10) than years with sales (7), along with multiple periods of 2-3 consecutive years in which there were no sales. The sales that did take place occurred on a sporadic, random, and intermittent basis and would not reasonably inform employees that a change would occur on a regular basis. Then-Member McFerran dissented in *Mike-Sell's* and found that the employer there did not establish a regular and consistent practice of unilaterally selling sales routes. Id., slip op. at 9–10. We agree. Accordingly, we overrule the Board's decision in *Mike-Sell's*, because we find that the respondent's factual showing there falls outside the ambit of the caselaw we have marshalled above requiring that an employer's successful past practice defense must show that the unilateral conduct is part of a regular and consistent past practice.

Our overruling of *Mike-Sell's* arises from the court's remand to the Board the question of determining whether numerical analysis of an employer's asserted past practice is appropriate. Thus, having reaffirmed the established regularity, consistency, and frequency requirements of the past-practice defense and its attendant numerical analysis, we find that *Mike-Sell's* was wrongly decided under that precedent.

[32] See 26 F.4th at 1014 ("If the Board had considered all five of the past layoffs that Wendt says comprise its past practice, then the Board may have had grounds to conclude that Wendt lacked a past practice of layoffs that occurred with sufficient regularity and frequency to privilege Wendt to act unilaterally.").

[33] We note that the issue of overruling *Raytheon* and *Mike-Sell's* was squarely addressed by the parties in the General Counsel's position statement and the Respondent's response brief filed with the Board following the court's remand.

as a prerequisite for upholding a past-practice defense, as we have detailed above.[34]

Raytheon failed to reckon with this profusion of precedent. Instead, *Raytheon* primarily relied on two Board cases to support its construction of *Katz* and view that past practice can privilege unilateral conduct even if it is informed by a large measure of discretion: *Shell Oil,* 149 NLRB 298, and *Westinghouse*, 150 NLRB 1574.[35] But neither case provides persuasive support for that proposition, and even if they did, they could not overcome the contrary controlling Supreme Court holding in *Katz*.

In *Shell Oil*, the Board found that the employer's subcontracting of work during bargaining for a successor contract was a lawful continuation of a past practice because it did not "materially var[y] in kind or degree from what had been customary in the past." 149 NLRB at 288. This is the foundation for the holding in *Raytheon* that unilateral conduct during bargaining is lawful so long as it does "do[es] not materially vary in kind or degree from what has been customary in the past." *Raytheon*, slip op. at 16. *Raytheon* held that so long as the "kind and degree" standard was met, the Board could find unilateral conduct lawful under past practice even if the conduct involved substantial discretion.[36] *Shell Oil* did not, however, discuss, mention, or even cite *Katz*. There is accordingly no basis for finding that the Board in *Shell Oil* interpreted *Katz* in any fashion, much less somehow displaced the Supreme Court's holding in *Katz*.

Nor does the Board's decision in *Westinghouse*, supra, constitute persuasive authority for the *Raytheon* majority's holding that past practice can privilege a unilateral change even if it was informed by a large measure of discretion. In *Westinghouse*, the Board held that the employer lawfully unilaterally implemented thousands of subcontracts. The Board, citing *Katz*, explained several reasons that cumulatively made the unilateral subcontracting in *Westinghouse* lawful, including that (1) the subcontracting did not eliminate any unit work and had "no significant impact on unit employees' job interests," and (2) it was not a departure from the norm in the letting out of contracts and did not materially vary in kind or degree from that which had been customary in the past. Id., at 1576–1577. Unlike *Shell Oil*, *Westinghouse* did cite *Katz*, but in finding a lawful past practice, it emphasized the subcontracting in question "comported with the traditional methods by which the [employer] conducted its business operations," implicitly recognizing that the employer's discretion in subcontracting was limited. Id. at 1577. In addition, the Board noted that the job security of unit employees was not implicated by the subcontracting decisions.[37]

Accordingly, we find that *Westinghouse* and *Shell Oil* do not support the majority's decision in *Raytheon* to contradict the express language of the Supreme Court in *Katz* forbidding unilateral action largely discretionary in nature, and the overwhelming weight of Board and court precedent comporting with that holding.

Raytheon's additional reliance on the Board's decisions in the *Courier-Journal* cases[38] and *Capitol Ford*[39] likewise cannot justify *Raytheon*'s departure from the clear dictates of *Katz*. In *Courier-Journal I,* the Board majority found that unilateral changes made to employees' health care benefits during bargaining for a successor contract were lawfully in accord with a past practice of making similar unilateral changes authorized by a management-rights clause during the term of an expired contract. *Courier I* explicitly found, however, that the employer's "discretion was limited." 342 NLRB at 1094. This, of course, comports with *Katz*.[40] In *Capitol Ford*, a Board majority found that a successor employer could modify the employee bonus program in its discretion based on its predecessor's past practice under the union-predecessor collective-bargaining agreement. 343 NLRB at 1058. *Capitol Ford* did not mention or discuss *Katz*, however, and cannot legitimate *Raytheon*'s approval of entirely discretionary unilateral actions.[41] In sum, *Raytheon* cited no

[34] See Sec. III,A, above; see also, e.g., *Aaron Bros. Co. v. NLRB*, 661 F.2d at 754 (describing the *Katz* limitation on discretion as having "create[ed] a per se rule").

[35] See *Raytheon*, supra, 365 NLRB No. 161, slip op. at 7–8, 12 fn. 60, 16.

[36] See, e.g., id. slip op. at 8.

[37] As the *Raytheon* dissent observed, "in the years following *Westinghouse* and *Shell Oil*, the potential adverse impact on employees' job tenure was the determinative factor as to whether an employer's subcontracting decision was lawful. Where the subcontracting decision was consistent with a past practice and was based on limited managerial discretion that had no demonstrable adverse impact on unit employees' work, the Board found no violation." See *Raytheon*, supra, slip op. at 31 (collecting cases).

[38] 342 NLRB 1093 (2004) (*Courier I*) and 342 NLRB 1148 (2004) (*Courier II*).

[39] 343 NLRB 1058 (2004).

[40] In dicta, the majority in *Courier I* stated that "even if the discretion is not limited, the past practice, accepted by the Union, privileged the Respondent's actions" but limited that dicta to incumbent unions. 342 NLRB at 1094. The majority squarely recognized that *Katz* "holds that a newly certified union is not bound to the employer's wholly discretionary merit pay increases prior to certification." Id. *Courier II* followed the reasoning in *Courier I*. Neither case mentioned the kind and degree test.

[41] *Raytheon* also cursorily relied on several wage increase cases to support its finding that *Katz* privileges employers to act unilaterally despite "substantial employer discretion." See *Raytheon*, supra, 365 NLRB No. 161, slip op. at 8. These cases do not do so. See *Arc Bridges*, 355 NLRB 1222 (2010), enf. denied 662 F.3d 1235 (D.C. Cir. 2010) (court found the employer's past decisions regarding annual wage increases were far too discretionary to constitute a cognizable past practice; there

persuasive Board precedent to justify its departure from *Katz*. Further, we reiterate that the Board is bound by controlling Supreme Court precedent.

E. Raytheon's Kind and Degree Test Undermines the Collective-Bargaining Process

Statutory policy under the NLRA strongly supports overruling *Raytheon* and returning to faithful application of *Katz*. The Board in *Raytheon* emphasized that its embrace of the kind and degree test and its concomitant diminishment of the *Katz* principle limiting the permissible scope of discretionary unilateral conduct was justified by the Board's obligation to foster stability in labor relations. 365 NLRB No. 161, slip op. at 11 & fn. 48. In the view of the *Raytheon* majority, with regard to collective-bargaining obligations, employers should be free to "do[ ] precisely what they have done in the past." *Raytheon*, slip op. at 11. The *Raytheon* majority neglected, however, to meaningfully account for the Board's statutory mandate to "encourag[e] the practice and procedure of collective bargaining" set forth in Section 1 of the Act. Even if *Raytheon*'s kind and degree test could somehow be deemed permissible under *Katz*, we would still overrule it because we believe that the wealth of pre-*Raytheon* precedent—holding that a unilateral change is unlawful if it is informed by a large measure of discretion—better serves the Act's policies.

The harm to collective bargaining from unilateral action is well-established. As the Supreme Court has recognized since the early days of the Act's history, unilateral action "minimizes the influence of organized bargaining" and "interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). The Court continued to recognize the harmful effects of unilateral action on the bargaining process in *Katz* and in the decades thereafter. See *Katz*, 369 U.S. at 747 (a unilateral change made during contract negotiations "must of necessity obstruct bargaining, contrary to the congressional policy"); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991) ("[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations.").

The courts of appeals likewise emphasize this point. As the Eighth Circuit has observed, unilateral conduct sends a message to employees "that their union is ineffectual, impotent, and unable to effectively represent them." *NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8th Cir. 2002). This is particularly true with respect to unilateral layoffs because "[l]aying off workers works a dramatic change in their working conditions (to say the least)." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987). "The statutory scheme recognizes that allowing an employer to make unilateral changes to the terms and conditions of employment during negotiations creates an untenable power imbalance infringing the employees' § [8(a)]5 rights to bargain and their § [8(a)]1 rights to organize." *NLRB v. Nexstar Broad., Inc.*, 4 F.4th 801, 806 (9th Cir. 2021).[42]

As the Board has explained in the context of unilateral wage increases, unilateral discretionary changes leave a union "unable to explain to its represented employees how any . . . changes in wages were formulated, given the Respondent's retention of discretion over all aspects of these increases." *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1391 (1996) (citations omitted), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). Such unilateral conduct thus "disparage[s] the [union] by showing . . . its incapacity to act as the employees' representative in setting terms and conditions of employment." Id. Discretionary unilateral conduct leaves the union in a weakened bargaining position during contract negotiations, which, in turn, causes employee disaffection and destabilizes the entire bargaining process.

However, *Raytheon* made no inquiry regarding the harm to collective bargaining resulting from its approval of discretionary unilateral conduct, despite the Supreme Court's repeated admonitions. *Raytheon* instead

was no practice of fixed, non-discretionary annual wage increases because there were "no objective criteria" and it was "highly discretionary" whether increases would be awarded). In *Central Maine Morning Sentinel*, 295 NLRB 376 (1989), the Board applied *Katz* and found that the employer's annual across-the-board wage increases constituted a consistent practice that the employer was lawfully required to continue. While the employer retained discretion as to the amount of the increases, the wage increases constituted an established practice because they were based on a nondiscretionary "formula derived from uniform factors" and without "deviat[ion] from year to year." Id., at 379. The retention of discretion as to the *amount* of the merit increase was not fatal to the conclusion that the annual pay raises were a condition of employment which must be maintained as part of the status quo in light of the fixed timing and criteria for the increases. In *Mission Foods*, 350 NLRB 336 (2007), wage increases were a term and condition of employment because they were fixed as to timing and criteria and thus required bargaining with the union over the discretionary amount of the increase. *See Daily News of Los Angeles v. NLRB,* 73 F.3d 406, 416 (D.C. Cir. 1996) (under *Katz*, "[i]f an established merit increase program is fixed as to timing and criteria and discretionary only as to amount, then the employer is obligated to keep the program in place and continue to apply the same criteria").

[42] See, e.g., *NLRB v. McClatchy Newspapers*, 964 F.2d at 1162 (a unilateral change "injures the process of collective bargaining itself," and "interferes with the right of self-organization") (quoting *May Dept. Stores Co. v. NLRB*, 326 U.S. at 385); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d at 1090 (the rule against unilateral changes "is intended to prevent the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them" and unilateral layoffs "send[] a dramatic signal of the union's impotence").

maintained a singular myopic focus on stability—i.e., maintaining the status quo—which ignored that Section 8(a)(5) of the Act forbids unilateral action because it obstructs bargaining. *Raytheon's* declaration that its decision was guided by "fundamental purposes of the Act" is thus premised on an erroneous and incomplete account of NLRA statutory policy because it omitted and ignored that encouraging collective bargaining is one of the fundamental purposes of the Act. 365 NLRB No. 161, slip op. at 10.

Raytheon further disregarded that, as Section 1 of the Act makes clear, Congress has already determined that collective bargaining is itself vital to securing industrial stability and preventing disruptions of commerce. The Board's mandate to "encourag[e] the practice and procedure of collective bargaining" fosters the Congressional assessment that bargaining is conducive to industrial stability and peace. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996) ("The object of the [Act] is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes[.]"). See also *Bloom v. NLRB*, 603 F.2d 1015, 1019 (D.C. Cir. 1979) ("The fundamental intent of the National Labor Relations Act as amended is to minimize industrial strife and promote industrial stability through collective bargaining.").[43] The statutory goals of collective bargaining and labor relations stability are both vindicated by *Katz*.

Raytheon further undermines collective bargaining by including unilateral employer action on key topics like layoffs, wage increases, and health benefits as part of its redefinition of the status quo, removing more and more unilateral action from the ambit of actions the employer must bargain before implementing. Permitting such expanded discretionary unilateral conduct encourages piecemeal, fragmented bargaining, which is disfavored under the NLRA, because it reduces flexibility in negotiations and narrows the range of possible compromises that characterize the give-and-take of meaningful overall bargaining for an agreement. See *T-Mobile USA*, 365 NLRB No. 23, slip op. at 3, fn. 4 (2017), enfd. 717 Fed. Appx. 1 (D.C. Cir. 2018) ("[T]he Board's longstanding policy disfavor[s] the practice of 'piecemeal bargaining' during contract negotiations" which "allow[s] employers to cherry-pick the subjects of bargaining which gives them an unfair advantage in negotiations and destabilizes the bargaining process.").

The *Raytheon* majority nevertheless maintained that its approach would not meaningfully undermine the bargaining process because, after the employer's unilateral implementation has occurred, the employer is obligated to bargain upon request of the union about the already changed subject. 365 NLRB No. 161, slip op. at 11–12, 18–19. However, in *Mike-Sell's*, the Board subsequently explained that this language in *Raytheon* "was only meant to underscore the separate principle that an employer still has the obligation to bargain, upon the union's request and at times when Section 8(d) requires bargaining, about changing that status quo for the future." 368 NLRB No. 145, slip op. at 4.[44] This view provides cold comfort to employees and their union, who are powerless to prevent unilateral discretionary action on important mandatory subjects of bargaining and leaves unchecked employer license to act unilaterally during contract negotiations. *Raytheon*'s insistence that this provides stability and predictability to bargaining and labor relations is without reasonable foundation.

The concurrence, in defending *Raytheon,* fails to grapple with its disregard of the significance of the discretion principle articulated by the Court in *Katz*. The concurrence offers no defense for the linchpin premise of *Raytheon* dismissing the central legal holding of Katz as mere "factual observation." That holding—that a past practice cannot be based on conduct that is "informed by a large measure of discretion"[45]—is not from a "short-lived" decision in *Du Pont*, supra, as the concurrence claims, but has been the animating legal principle for past practice jurisprudence for decades. A wealth of caselaw, including from the District of Columbia Circuit, has applied that holding.[46]

[43] *Raytheon* suggested that its decision would help collective bargaining and better define the status quo. See *Raytheon*, supra, 365 NLRB No. 161, slip op. at 11. But the Supreme Court in *Katz* has already identified past practices informed by a large measure of discretion as outside the ambit of the status quo. In refusing to acknowledge that holding, the *Raytheon* majority does not advance stability; it merely expands the ambit of past unilateral action within which an employer may continue to act unilaterally, at the expense of the statutory duty to collectively bargain. Further, when a unilateral change is informed by a large measure of discretion, there is "no way" for a union to ascertain whether there has been a change to the status quo. *Katz*, 369 U.S. at 746–747.

[44] Accord *NBC Universal Media, LLC*, 371 NLRB No. 5, slip op. at 1 fn. 1 (2021) ("[T]he judge read Board precedent as holding that an employer must bargain upon request regarding a decision to take an action that maintains the status quo. That is incorrect. An employer must bargain upon request (at times when Sec. 8(d) requires bargaining) about changing the status quo *for the future*, but it has no duty to bargain about a decision to take unilateral action that is consistent with a past practice and therefore maintains the status quo.") (emphasis in original), enfd. Nos. 21–1177, 21–1184, U.S. App. LEXIS 18393 (D.C. Cir. July 1, 2022).

[45] 369 U.S. at 746.

[46] See *Du Pont v. NLRB*, 682 F.3d at 67 ("There are, however, limits to the scope of the unilateral changes an employer may lawfully make during negotiations. More specifically, the Act does not permit a unilateral change "informed by a large measure of discretion" because "[t]here simply is no way in such [a] case ... to know whether or not there

The concurrence's efforts to dismiss the significance of that precedent are unavailing. The concurrence takes issue with *Post-Tribune Co.*, 337 NLRB 1279, asserting that the Board's analysis in that case did not address whether the employer's unilateral changes, which involved allocation of health insurance premium increases according to fixed percentages, involved discretion. The D.C. Circuit, however, cited *Post-Tribune* as an example of conduct falling within "an acceptable degree of discretion" under *Katz* because the employer's unilateral change was informed by a "fixed ratio" rather than by discretion. See 682 F.3d at 68. Indeed, the Board and courts have applied the *Katz* discretion principle to unilateral changes involving the full spectrum of employment terms and conditions subject to mandatory bargaining including: wages,[47] layoffs;[48] reduction in working hours;[49] health insurance benefits;[50] and rental rates and mileage surcharges on cab drivers.[51] This precedent is in no way diminished by the concurrence's citation to cases like *Space Needle, LLC*,[52] that involved application of *Katz*' regularity requirement rather than its discretion principle.[53]

Our concurring colleague criticizes our interpretation of the *Katz* standard as an overly restrictive definition of past practice. To the contrary, in applying the *Katz* standard we are applying the explicit language of the Supreme Court in *Katz*, finding that "whatever might be the case as to . . . automatic increases," unilateral conduct is not permitted during bargaining when the action is "informed by a large measure of discretion." The concurrence's argument that today we are creating a different, more exacting standard – that any amount of discretion disqualifies a past-practice defense – is simply wrong.[54] We do not pay lip service to the *Katz* standard, as the concurrence accuses; we uphold it. The concurrence's defense of *Raytheon* cannot obscure the Board's holding there, which, in direct contravention of *Katz*, permits unilateral conduct which involves substantial employer discretion.[55] As we observed in *Tecnocap*, the companion case also issued today reaffirming our overruling of *Raytheon* and *Mike-Sell's*, "[t]he dissent's main disagreement is not with today's majority decision but with *Katz* itself." *Tecnocap*, 372 NLRB No. 372 slip op at. 136 (2023).

F. Overruling Raytheon

For all these reasons, we overrule *Raytheon* because it failed to abide by Supreme Court precedent in *Katz* forbidding unilateral conduct informed by a large measure of discretion and because the pre-*Raytheon* precedent better serves the policies of the Act.[56] In light of and applying this standard to the facts of this case, we find, as an alternative holding, that the February 2018 layoffs are unlawful because they were entirely discretionary.[57] The General Counsel urges the Board to further overrule *Raytheon*'s holding that a past practice privileging unilateral action may be established pursuant to conduct developed under an expired management-rights clause. We do not reach that issue here because the instant case does not involve a past practice developed under a management-rights clause.[58] Thus, regardless of whether the asserted

has been a substantial departure from past practice." *Katz*, 369 U.S. at 746."). See infra, fns. 46–49.

[47] See, e.g., *NLRB v. Allis-Chalmers Corp.*, supra, 601 F.2d 870.

[48] See, e.g., *Garment Workers Local 512 v. NLRB*, supra, 795 F.2d 705, 711 ("Economic layoffs would seem to be inherently discretionary . . . Thus, we doubt that the *Katz* exception can ever apply to an economic layoff"); *Adair Standish Co. v. NLRB*, supra, 912 F.2d 854, 864 (layoffs were "highly discretionary").

[49] See, e.g., *Eugene Iovine Co.*, supra, 328 NLRB 294, 294 ("employer's discretion to decide whether to reduce employee hours 'appears to be unlimited'"), enfd. 1 Fed. Appx. 8 (2d Cir. 2001).

[50] See, e.g., *Post-Tribune Co.*, supra, 337 NLRB 1279, 1280 (2002); *Dynatron/Bondo Corp.*, supra, 323 NLRB 1263, 1265 (1997), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1999).

[51] See, e.g., *City Cab of Orlando v. NLRB*, supra, 787 F.2d at 1480 ("the company exercised an impermissible degree of discretion").

[52] 362 NLRB at 38, fn. 9. In *Space Needle*, the Board affirmed "solely on procedural grounds" the administrative law judge's dismissal of a unilateral change allegation. Id. at 38 (noting that no party excepted to judge's rejection of the only theory alleged by the General Counsel). The concurrence thus places more weight on *Space Needle*'s failure to mention the discretion principle than it can bear.

[53] See concurrence, infra, slip op. at 29.

[54] Nor did the Board articulate any such standard in *Du Pont*, contrary to the assertions of *Raytheon*, which the concurrence repeats.

[55] See Sec. III, B, supra.

[56] For the same reasons, we overrule subsequent Board cases that applied *Raytheon's* kind and degree test, such as *The Atlantic Group*, 371 NLRB No. 119, and *Mike-Sell's*, 368 NLRB No. 145. We additionally overrule Board cases such as *Shell Oil*, *Westinghouse*, the *Courier-Journal* cases, and *Capitol Ford* to the extent they may be construed as privileging unilateral action informed by a large measure of discretion.

In overruling *The Atlantic Group* insofar as it applied the kind and degree test, we note that in that case, the Board found that the employer failed to establish a past practice of laying off employees because its prior layoffs occurred due to unique conditions caused by the COVID pandemic. Therefore, under either *Raytheon*'s kind and degree test or the standard we adopt today, the employer failed to establish any applicable past practice justifying the challenged unilateral layoffs.

[57] Thus, the layoffs were conducted without reference to any definite criteria or guidelines of any kind but rather were wholly in the Respondent's discretion. Indeed, the Respondent's discretion to decide whether to lay off shop employees, how many of those employees to lay off, and for how long, appears to be unlimited. See, e.g., *Eugene Iovine*, *Inc.*, supra, 328 NLRB at 294 (collecting cases). Absent any reasonable certainty whatever as to the criteria for implementing the layoffs, as *Katz* held, "there simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining" the layoffs. 369 U.S. at 746-747.

[58] We would consider this issue in a future appropriate case. Then Member-McFerran dissented in *Raytheon*, finding that conduct

past practice is developed under a management-rights clause or otherwise, we will apply the long-established discretion and regularity principles set forth in *Katz* to determine whether the employer has met its burden to show that the unilateral action was privileged by an established past practice.

The Respondent argues that overruling *Raytheon* violates its due-process rights because it relied on *Raytheon*'s kind and degree test in determining whether to proceed with its 2018 layoffs. However, as we have discussed above, *Raytheon* explicitly did not disturb the established regularity and frequency components necessary to establishing the past-practice defense. Our finding today is that the Respondent's 2018 layoffs were unlawful because the Respondent failed to show, under *Raytheon*, that it had a regular and frequent practice of laying off employees, regardless of whether the layoffs were informed by a large measure of discretion. The Board's decision today accordingly does not result in any detriment to the Respondent for its asserted reliance on *Raytheon*.[59]

The Respondent further contends, and the concurrence agrees, that the Board is foreclosed from overruling *Raytheon* in this proceeding because doing so exceeds the scope of the court's remand. To be sure, the Board is required to faithfully comply with the terms of the court's remand and its instructions contained therein. See *Sanitary Truck Drivers and Helpers Local 350, IBT v. NLRB*, 45 F.4th 38, 43–44 (D.C. Cir. 2022).[60] We have fully done so here. We have specifically answered the three issues posed to the Board in the court's opinion remanding: to account for all five layoffs identified by the Respondent; to answer the Respondent's argument whether the Board improperly relied on the number of layoffs implemented by the Respondent rather than its asserted past practice; and to choose between the two options offered by the court for evaluating whether there are material distinctions among the five layoffs. Thus, our decision "provide[s] what the court requested." *AT&T Wireless Services v. FCC*, 365 F.3d 1095, 1099 (D. C. Cir. 2004). We have accordingly complied with the District of Columbia Circuit's mandate construed in the light of its opinion in deciding this case. See *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d at 346.

Moreover, our action is also consistent with the spirit of the court's mandate and opinion. The issues posed in the court's remand raised to the Board the efficacy of the kind and degree test articulated in *Raytheon* for evaluating the past practice defense. These issues called on the Board to address the continued vitality of the numeric regularity requirement under *Raytheon*, and the proper scope of kind and degree distinctions to be drawn under *Raytheon*. The court's remand thus presented to the Board for consideration the contours of the past-practice test as articulated in *Raytheon*. Past-practice jurisprudence must in the first instance flow from *Katz* and comport with its dictates. We have found that *Raytheon* did comport with *Katz* concerning the regularity requirement, but demonstrably failed to do so with respect to the limitation on discretionary unilateral conduct mandated by *Katz*.[61] By overruling *Raytheon* in the latter respect, we have both completely addressed and also acted consistently with the court's remand of three specific questions to the Board "for further consideration of whether Wendt's temporary layoff of unit employees in February 2018 was privileged by past practice." 26 F.4th at 1014.

The concurrence vigorously disagrees with our interpretation of the court's remand. The court, however, is the authoritative interpreter of its own remand, and the court looks to the terms of its opinion to ascertain the letter and spirit of the mandate to which the Board is subject. *See AT&T Wireless Services v. FCC*, supra, 365 F.3d at 1099; *Mid-Tex Electric Coop. v. FERC*, 822 F.2d 1123, 1129-1130 (D.C. Cir. 1987); *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d at 346–347 and fn. 25. Contrary to the claim of the concurrence, our interpretation carefully heeds the court's approach. We have relied fully on the terms of the court's opinion to ascertain our obligations under the remand. We have identified and answered the three questions posed by the court, and we have explicitly addressed, and resolved in the negative, the court's directive whether, under *Raytheon* and *Mike-Sell*'s, "Wendt's claimed past practice 'occurred with such regularity and frequency'" to establish its past practice defense. 26 F.4th at 1014. There is accordingly no basis for the concurrence's repeated assertions that we have disregarded or ignored the court's express instructions.

Our concurring colleague's view of the scope of the remand does not take into consideration the court's full opinion. See *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d at 346–348 (breadth of inquiry

developed under a management-rights clause cannot privilege unilateral action following the expiration of the collective-bargaining agreement containing that clause. 365 NLRB No. 161, slip op. at 33–34.

[59] We also note that the Board granted the Respondent's request to file a brief responding to the General Counsel's request that the Board overrule *Raytheon*.

[60] See *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977) (footnotes omitted) (the "decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority," including an administrative agency, which "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case.").

[61] In addition, as we have explained, even if *Raytheon* had not run afoul of *Katz* in this respect, we would overrule the case because pre-*Raytheon* precedent better serves the policies of the Act.

under remand is based on the terms of the court's opinion fairly read). The concurrence fails to address or even mention the question raised by the court of whether the Board strayed from its precedent by focusing on the number of layoffs Wendt has implemented rather than its practice of implementing layoffs during economic slowdowns.[62] We believe the court's opinion fairly read placed before the Board the parameters of the *Raytheon* test, as we have explained, with respect to both the vitality of the numerical regularity requirement and the drawing of distinctions among asserted past-practice conduct,[63] and did not foreclose, expressly or otherwise, our inquiry resulting in our partial overruling of *Raytheon* and the overruling of *Mike-Sell's*.[64] Contrary to the concurrence, this is not a case where the agency subject to the court's remand has blatantly disregarded the terms of an unambiguous mandate. Compare *ILGWU v. Donovan*, 733 F.2d 920, 922–923 (D.C. Cir. 1984) (Secretary of Labor's attempt to "re-implement[] precisely the same rule that this court vacated as 'arbitrary and capricious'" conflicts with "interest of the judicial branch in seeing that an unambiguous mandate is not blatantly disregarded"). Our decision today fully satisfies the court's remand mandate construed in the light of its opinion.

While we have complied with the court's express instructions, as we are required to do, we are mindful that, contrary to the concurrence's assertion, the Board is also required to examine the court's entire opinion to determine its task on remand.[65] Having done so, we conclude that we must additionally address and answer the court's specific question regarding whether the Board strayed from precedent by focusing on the number of layoffs Wendt has implemented. Our overruling of *Mike-Sell*'s is directly tied to that question, as we explained supra at fn. 30, and therefore is within the permissible scope of the remand.

The D.C. Circuit requires an administrative agency to review both express instructions, and the court's entire opinion, to determine its obligations under the court's remand. Thus, we cannot agree with the concurrence that it is only the former that matters when, as here, a thorough reading of the court's full opinion reveals an additional question that must be answered to fulfill our obligations on remand. Moreover, in determining our remand obligation, we reiterate that we have applied the D.C. Circuit's standard: that we cannot "do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case." The concurrence repeatedly discounts our reliance on this standard; we believe our careful adherence to it is proper.[66]

We submit that by carefully adhering to the D.C. Circuit's standard, we have not exceeded the scope of the remand. Our concurring colleague prefers a narrower interpretation of the court's remand than we articulate today. We believe, however, that the importance to effectuating national labor policy of reconsidering *Raytheon* and *Mike-Sell*'s warrants our broader interpretation, where our interpretation contravenes neither the "letter" nor the "spirit" of the D.C. Circuit's opinion.[67]

Indeed, "[i]t is a guiding principle of administrative law, long recognized by th[e Supreme] Court, that 'an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.'" *NLRB v. Food Store Employees Union*, 417 U.S. 1, 9 (1974) (citations omitted).[68] Our decision today follows this approved administrative approach. We have

[62] See 26 F.4th at 1013–1014 (noting Wendt's argument that "the Board strayed from its past precedent," citing *Raytheon* and *Mike-Sell's*, and stating, "We do not believe the Board adequately addressed Wendt's past practice argument.")

[63] See Sec. IV, D, supra.

[64] See *Mid-Tex Electric Coop. v. FERC*, 822 F.2d at 1130 (court determined that FERC made reasonable inference of permissible agency conduct pursuant to the court's remand).

[65] See *Mid-Tex Electric Coop. v. FERC*, supra, 822 F.2d at 1129-1130 (an administrative agency must "desist from 'do[ing] anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case'" and the court thus "turn[ed] to the opinion" in its underlying case "to ascertain the 'letter and spirit' of the mandate under which the [administrative agency] labored"), quoting inter alia, *City of Cleveland, Ohio v. Federal Power Commission*, supra, 561 F.2d at 346. See id. ("the mandate [is] construed in the light of the opinion of [the] court deciding the case.").

[66] We fully recognize that the D.C. Circuit's standard does not provide that the spirit of the court's decision supersedes express remand instructions, contrary to the concurrence's mischaracterization of our view.

[67] Contrary to the view of the concurrence, we have acted within the law of the case by considering, as directed by the court, whether the Respondent's past-practice defense fails under *Raytheon* and *Mike-Sell's* and by concluding that it does. We also find that the scope of the court's remand permits our further addressing the validity of *Raytheon* and *Mike-Sells,* and thus our decision to overrule those cases is similarly not outside the law of the case.

[68] Of course, we do not "suggest," as our colleague claims, that the Court's decision in *Food Store Employees* "stand[s] for the proposition that the Board can disregard specific remand instructions from the appellate court in order to effectuate the policies of the Act." Rather, it supports the proposition that in a remand proceeding, such as here, when correcting errors identified by the court, we are not foreclosed from enforcing the statutory policies of the Act, including overruling agency precedent at odds with Supreme Court authority interpreting the Act. See also *City of Cleveland, Ohio v. Federal Power Commission,* supra, 561 F.2 at 346 fn. 24 (same) (citing, inter alia, *NLRB v. Food Store Employees Union*, 417 U.S. at 9).

corrected the errors in our underlying decision identified by the D.C. Circuit in its opinion remanding. We have gone further, in order to effectuate a key Congressional policy committed to the Board's administrative expertise: to encourage the practice and procedure of collective bargaining.

We fully recognize that "the law of the case applies to everything decided by the higher court at an earlier stage of the case, either expressly or by implication," as the D.C. Circuit has explained. See *City of Cleveland, Ohio v. Federal Power Commission,* supra, 561 F.2d at 348. In *City of Cleveland*, the court found that its underlying decision "inexorably outlaw[ed]" the approach to a rate structure adopted by the Federal Power Commission. Id. By contrast, here, the court's underlying decision did not outlaw either the Board's revisiting of *Raytheon* and *Mike-Sell's*, or the conclusions we have reached upon doing so. See *CWA, Local 5008 v. NLRB*, 784 F.2d 847, 849 (7th Cir. 1986) ("The doctrine of law of the case does not prevent an agency from reexamining a policy that was not squarely presented for resolution . . . We did not direct the Board to use the *Kraft Foods* test because it was the only permissible test; it was simply the one the Board favored at the time . . . . Because the Board is entitled to rethink old rules – even after a remand from the court – we enforce its Order."). We do not believe that the remand in this case forecloses us from "rethink[ing] old rules."[69]

G. Retroactive Application of Overruling Raytheon

Our finding that the Respondent's layoffs were unlawful does not raise any issue of retroactivity with respect to the Respondent because, as shown, the Respondent's layoffs were unlawful even under *Raytheon*. There remains, however, the question of whether our decision overruling *Raytheon* in part should be applied to other pending cases. The principles governing retroactivity are well-established. "The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.,* 121 NLRB 995, 1006–1007 (1958)). The Board will apply a new rule to the parties in the case in which the new rule is announced and to parties in other cases pending at the time so long as retroactivity does not work a manifest injustice. See, e.g., *Cristal USA, Inc.*, 368 NLRB No. 141, slip op. at 2 (2019); *SNE Enterprises*, 344 NLRB at 673 ("In determining whether the retroactive application of a Board rule will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application."). Under *Securities & Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 203 (1947), the propriety of retroactive application is determined by a balancing of any ill effects of retroactivity against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." See *SNE Enterprises*, 344 NLRB at 673.

A balancing of these relevant factors shows that retroactive application of our decision today will not work a manifest injustice. Our decision is not a departure from a well-settled area of preexisting law, and we have not altered any established rule that has been generally recognized. Rather, we are restoring long-established law under *Katz*. Accordingly, our reaffirmance of settled law does not militate against retroactive application. Cf. *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (an agency's substitution of new law for old law that is reasonably clear typically may justify refraining from applying a rule retroactively); *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (same).

Further, retroactive application is essential to accomplishing the purposes of the Act. The harm to collective bargaining and labor relations stability flowing from unilateral conduct informed by a large measure of discretion during bargaining is well established under *Katz* and subsequent past-practice jurisprudence, as fully discussed above. Our return to faithful application of *Katz* upholds the statutory rights of employees seeking to collectively bargain through their chosen union representative, and the

[69] The concurrence asserts that "even if the issue were before us," our overruling of *Raytheon* "would be dicta." We disagree. First, as explained above, the issue is properly before us. Second, our overruling of *Raytheon* is an alternative rationale for our decision. As the Supreme Court has long made clear, alternate holdings are not *dicta*. See, e.g., *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.") (citing *Massachusetts v. United States*, 333 U.S. 611, 623 (1948); *United States v. Title Insurance & Trust Co*., 265 U.S. 472, 486 (1924)). The Board is not required to decide cases on only the narrowest possible ground available to it. Rather, "[i]t is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy," and "to accomplish the task which Congress set for it, [the Board] necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500–501 (1978). The view of the concurrence would severely constrain the Board's responsibility to formulate and administer national labor policy, contrary to the Act's statutory scheme. As the Supreme Court has long recognized, "'adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein,'" and "such cases 'generally provide a guide to action that the agency may be expected to take in future cases.'" *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294 (1974) (quoting *NLRB v. Wyman-Gordon,* 394 U.S. 759, 765–766 (1969)). In our view, *Raytheon* is inconsistent with Supreme Court precedent and undermines collective bargaining, for the reasons we have fully explained. We are within our authority to overrule it, and we have done so.

policy we announce today better sustains the collective-bargaining process that lies at the core of the NLRA. We thus view retroactive application of our decision today as critical to accomplishing the purposes of the Act. Failure to do so would "produc[e] a result which is contrary to a statutory design." *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. at 203.

We have considered the Respondent's asserted reliance on the kind and degree test in implementing its February 2018 layoffs. Even assuming that the Respondent did so rely,[70] we find that any harm to the Respondent is outweighed by the overriding statutory interest in protecting the collective-bargaining process. In any event, the Respondent's past-practice defense fails under *Raytheon* itself, because it fails the established regularity requirement, which *Raytheon* did not disturb but, rather, upheld. The potential reliance interest of other employers is not dispositive to our retroactivity decision because we have not announced a new standard today but are restoring settled law under *Katz*, and in light of the important statutory collective-bargaining goals at stake. In these circumstances, reliance interests do not tip the Board's balancing of the relevant factors against retroactive application of our decision today.

H. Reaffirmation of the Principle that a Past Practice Defense Cannot Be Based on Unilateral Changes Made Before the Employer Had a Statutory Duty to Bargain with the Union

Finally, we address an issue raised by the General Counsel, who asks us to hold that an employer can never defend a unilateral change in terms and conditions of employment by invoking a past practice that was developed *before* the union seeking bargaining represented employees—and thus before the employer had a statutory duty to bargain with that union. That is the situation presented in this case: the Respondent's past practice of layoffs dates entirely to the period before the union was certified. While we need not reach the issue here – having found the Respondent's past practice defense insufficient because it failed to show a regular and consistent past practice of layoffs and, in the alternative, because it was entirely discretionary—Board precedent clearly supports the General Counsel's position, and the General Counsel is correct that such precedent provides an alternative basis for finding the unilateral change violation in this case. We reaffirm that prior precedent.

For nearly 50 years, the Board consistently has held that an employer's preunion past practice of making unilateral changes cannot privilege the employer to *continue* to make such changes after employees have chosen a union to represent them in collective bargaining with the employer. See *Amsterdam Printing & Litho Corp.*, 223 NLRB 370, 372 (1976) (finding unilateral-change violations and observing that the "practices of [the employer] prior to the certification of the [u]nion do not relieve it of the obligation to consult with the certified [u]nion about the implementation of these practices as affecting the wages, hours, and other terms and conditions of employment of the unit employees"), enfd. mem. 559 F.2d 188 (D.C Cir 1977).[71]

Permitting the employer to act unilaterally in those circumstances is antithetical to Section 8(a)(5), which imposes on employers the duty to bargain with the representatives of their employees, and to the policies of the Act, which aims to "encourag[e] the practice and procedure of collective bargaining," in the words of Section 1.[72] Employees choose union representation precisely so that they can require the employer to engage in collective bargaining over their terms and conditions of employment. To be told, in effect, that choosing union representation changes nothing with respect to the employer's ability to act unilaterally undermines the Act's promise to employees. Of course, a past practice developed before the union represented employees cannot possibly prove that the union agreed to or acquiesced in prior unilateral changes or that it somehow waived its right to bargain over future changes, once it was entitled to demand bargaining. See, e.g., *NLRB v. Advertisers Mfg. Co.,* 823 F.2d 1086, 1090 (7th Cir. 1987) (finding unilateral layoffs unlawful and observing that "[i]t is not a good answer that the company did nothing different from what the collective bargaining

[70] The Respondent first mentioned the possibility of layoffs to the Union at a bargaining session on Sept. 24, 2017, which the parties discussed at subsequent sessions. See 369 NLRB No. 135, slip op. at 22. The *Raytheon* decision issued thereafter, on Dec. 15, 2017. On February 8, 2018, the Respondent informed the Union that the 10 employees would be laid off that day.

[71] The Board has acknowledged or applied this principle repeatedly – and, indeed, without dissent – over the past four decades. For a sampling of decisions, in chronological order, see *Gulf States Manufacturers, Inc.*, 261 NLRB 852, 863–864 (1982); *Taino Paper Co.*, 290 NLRB 975, 978 (1988); *Porta-King Building Systems*, 310 NLRB 539, 543 (1993); enfd. 14 F.3d 1258 (8th Cir. 1994); *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001); *Falcon Wheel Div., L.L.C.*, 338 NLRB 576, 576–577 (2002); *Southside Hospital*, 344 NLRB 634, 639 (2005); *UPS Supply Chain Solutions, Inc.*, 364 NLRB 25, 25 fn. 4 (2016). More than 20 years ago, the Board had already observed that it was "well settled that an employer's past practices prior to the certification of a union as the exclusive collective bargaining representative of the employees do not relieve the employer of the obligation to bargain with the certified union." *Mackie Automotive*, supra, 336 NLRB at 349. No subsequent Board decision, meanwhile, has overruled this long line of precedent.

[72] 29 U.S.C. § 151.

agreement, if there had been one, would have permitted it to do, or from what it did before there was a union").[73]

Our concurring colleague disregards these precedents, asserting, in essence, that these cases' rejection of unilateral changes based on pre-union practices rest on a principle no different from our colleague's (erroneous) view of unilateral changes based on past practices developed during a union's representation of employees. In other words, our colleague contends that an employer's ability to make unilateral changes based on "longstanding past practices" is unaffected by the employees' designation of a union as their bargaining representative. Neither logic nor law supports this view. It is not logical because before union certification, *every* action taken by the employer is a permitted unilateral change. Pre-certification, there is nothing but lawful unilateral change. The very point of the union's certification—the very point of the Act—is to interpose a legal obligation on the employer to bargain changes over terms and conditions of employment. The Act is undermined by the claim that the employer's unilateral changes made when the right to make unilateral changes was unlimited, privileges the exemption of that "practice" from bargaining once a union is certified. The law also does not support our colleague's view. While the case law we cite has, at times over the years, been overlooked, it has never been contradicted. Thus, these cases do not—as our colleague asserts—rest on some imagined principle rejecting the unilateral change on the basis that the precertification practice lacked sufficient palpability or involved too much discretion. Rather, these cases hold that once a union is voted in "it is no defense that such unilateral actions were made pursuant to an establish[ed] company policy and without antiunion motivation." *Southside Hospital*, 344 NLRB at 639. As the Board has explained, a "Respondent's defense that its actions were based on past practice is without merit in that the past practices of Respondent prior to the latest certification of the Union did not relieve Respondent of the obligation to consult with the certified Union regarding implementation of practices affecting terms and conditions of employment of unit employees."[74]

[73] Our colleague suggests there is inconsistency in our focus on rejecting the employer's use of precertification past-practice defense to a unilateral change allegation (what he terms a past practice "shield") while ignoring what he calls "the General Counsel's use of past practice as a sword to force an employer to take an action consistent with a past practice that arose before the union came on the scene," for instance, by finding a violation where an employer failed to grant an expected annual wage increase after a union is certified. Our colleague says that under our view "an employer is damned if it does and damned if it does not." Not at all. The two situations illustrate how Board doctrine, in furtherance of the Act's policy, consistently seeks to promote collective bargaining and avoid labor disputes.

By raising past practice as a defense to a unilateral change allegation, the employer is seeking an exemption from the statutory duty to bargain. This defense makes no statutory sense to the extent that the employer argues that a practice of making unilateral changes, developed when there was no union and the employer was free to and did make *every* change unilaterally, shields changes that become subject to the statutory duty to bargain once it applies. It is precisely the duty to bargain over changes that distinguishes pre-union and post-union-certification situations. It defies reason to suggest that a new union's right to bargain has been impaired because the employer regularly made unilateral changes *before* the union represented employees, *when there was no duty to bargain*.

In contrast, when the General Counsel argues that an employer has violated the statutory duty to bargain by failing to maintain a past practice that predates the union, the theory is that the practice itself was a term and condition of employment, part of the status quo that the employer may not change unilaterally, such as established annual or anniversary wage increases that employees reasonably have come to expect. See, e.g., *Omni Hotels Mgmt.*, 371 NLRB No. 53, slip op. at 3 (2022) ("Factors relevant to the determination of whether a wage increase is an established practice include the number of years the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.") (internal citation omitted). In this circumstance, sometimes referred to as the "dynamic status quo," once the evidence establishes that the practice of a wage increase or other such benefit *is* a term and condition of employment, then the duty to bargain before changing that term follows obviously from the basic bargaining obligations of the Act. In such a situation, the employer is required to maintain the nondiscretionary aspects of the practice (e.g., an annual wage increase), but must bargain with the union over its discretionary aspects (e.g., the amount of the increase). See id., slip op. at 4. The distinction between what our colleague calls the "sword" and "shield" past practices is not at issue in this case, but it should be clear that there is no inconsistency between the Board's traditional approaches to these different situations and no inconsistency between today's decision and either approach. Our colleague's contention that there is ignores that when a union is certified the Act's chief aim is to impose a duty to bargain over terms and conditions of employment, not to seek exceptions to it.

Finally, the concurrence suggests that *Katz*, which involved a newly certified union, precludes the Board from holding that a past-practice defense cannot be successful based on a past practice developed prior to the Union's representation. We disagree. In *Katz*, the Supreme Court did not consider the issue of whether a past-practice defense is *ever* available where the alleged past practice developed prior to union certification. The Court had no cause to consider that issue, as it found that the alleged past practice defenses as to each unilateral change at issue in that case failed because of the discretionary nature of those changes. As to the viability of a hypothetical nondiscretionary unilateral change based on a past practice—such as "automatic increases to which the employer had already committed itself"—the Court did not and did not need to reach a conclusion. See 369 U.S. at 746 ("Whatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion."). In other words, in no sense did *Katz* hold that the Board *must* permit an employer's past-practice defense based on a precertification past practice. Accordingly, *Katz* does not preclude the Board from finding, consistent with the Act, that for newly recognized unions, the duty to collective bargaining should predominate over adherence to any past-practice defense to the duty to bargain.

[74] *Gulf States Manufacturers, Inc.*, supra at 863–864. Accord: *Taino Paper Co.*, 290 NLRB at 978 ("The Company's past practices, prior to the Union being the representative of its employees, does not relieve it of its obligation to give notice to and bargain with the Union concerning

Ignoring this line of cases, our colleague offers five cases that he asserts demonstrate Board acceptance of pre-certification past practices. These cases do not undermine the longstanding principle of law that we reaffirm today.

Our colleague cites *House of the Good Samaritan*, 268 NLRB 236 (1983), and its description in *Du Pont*, supra, 364 NLRB at 1655 fn. 22, for the proposition that the Board found that "the employer's unilateral conduct in passing on a premium increase to employees was consistent with its past practice prior to the union's certification." However, that is not what happened in that case. Rather, in *House of the Good Samaritan*, the Board determined that the "status quo, with respect to health insurance premiums [was] reflected by the terms of the Respondent's [pre-union certification] policy manual regarding health insurance," which capped the dollar maximum amount of health insurance contributions the employer would make. Id. at 237. Rejecting the General Counsel's claim, the Board found "insufficient evidence" of a consistent practice by the employer to reflect that the employer always covered increases in premiums, and found that the "status quo" terms and conditions of employment which the employer was required to maintain was the dollar maximum in the policy manual. Accordingly, the Board rejected the General Counsel's claim that the Respondent violated the Act by passing along the cost of the increased health insurance premiums. Thus, *House of the Good Samaritan* is not a case where an employer relied on a past practice to defeat a unilateral change allegation, but rather, a case where the General Counsel failed to prove that the status quo terms and conditions included a practice of covering all premium increases. In other words, *House of Good Samaritan* is a failed "sword" case, but it manifestly does not provide an example of a precertification past practice being used by an employer to shield it from a unilateral change allegation.

Our colleague also cites *Mitchellace Inc*, 321 NLRB 191 (1996), but that case supports the majority position. In *Mitchellace*, the employer made a "non-trivial change" in shift starting and ending times and the judge explained that

> [t]he question here is whether the fact that Mitchellace routinely had effectuated that kind of change in the past, before the employees chose to be represented by the Union, made it permissible for management to unilaterally order the change even after the Union arrived at Mitchellace.

321 NLRB at 195.

The judge's answer, affirmed by the Board, was no. Recognizing that "decisions about the time of day that work starts and whether the workweek should consist of five 8-hour days or four 10-hour days are classically matters in which unions, at the behest of employees, want to be involved," the Board found that the employer's unilateral schedule change violated the employer's duty to bargain. In reaching this decision in *Mitchellace*, the Board distinguished two of the other cases that our colleague offers up as examples of the Board permitting unilateral changes based on pre-certification practices.

Thus, in *Mitchellace*, the Board recognized that *KDEN Broadcasting Co.*, 225 NLRB 25, 34–35 (1976), and *Kal-Die Casting Corp.*, 221 NLRB 1068, 1068 fn. 1 (1975), were "exceptions to the usual rule," cabining them to their limited facts of continuing to make scheduling changes for individual employees.[75]

laying off unit employees"); *Porta-King Building Systems*, 310 NLRB at 542 ("an employer's practices, prior to the certification of a union as the exclusive collective-bargaining representative of the employees, do not relieve an employer of the obligation to consult with the certified union about changes in . . . terms and conditions of employment"); *Mackie Automotive Systems*, 336 NLRB at 349 ("It is well settled that an employer's past practices prior to the certification of a union as the exclusive collective-bargaining representative of the employees do not relieve the employer of the obligation to bargain with the certified union about the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees."); *Falcon Wheel Div., LLC,* 338 NLRB at 576–577 ("an employer has a duty to bargain with a newly certified union over layoffs, even where the employer contends that the layoffs at issue are consistent with an established past practice"); *Southside Hospital*, 344 NLRB at 639 ("it is no defense that such unilateral actions" made following a union's election "were made pursuant to an establish[ed] policy and without anti-union motivation"); *UPS Supply Chain Solutions, Inc.*, 364 NLRB at 25 fn. 4 ("It is well settled that an employer's past practices prior to the certification of a union as the exclusive collective bargaining representative of the employees do not relieve the employer of the obligation to bargain with the certified union about the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees."), quoting *Mackie Automotive Systems*, 336 NLRB at 349.

[75] The Board likewise in *Mackie Automotive Systems,* 336 NLRB at 350, distinguished *KDEN Broadcasting* and *Kal-Die Casting Corp*. Thus, *KDEN Broadcasting* permitted an employer, without violating the Act, to continue make changes to individual employee schedules on the grounds that "where the past practice is so commonplace as to be a basic part of the job itself[,] a continuation of that past practice cannot be characterized as a unilateral change in working conditions." See 225 NLRB at 35. The Board viewed these changes as so frequent and integral to this employer's operation that "if an employer were prevented from operating in its normal routine fashion once a union is certified, it could bring the business to a grinding halt." Id. Similarly, in *Kal-Die Casting Corp.*, the Board found lawful unilateral changes because they concerned only "routine" production scheduling and adjustments. See 221 NLRB at 1068 fn. 1. These cases are, indeed, as *Mitchellace* found and *Mackie Automotive Systems* confirmed, exceptions to the rule—as articulated in numerous cases across decades—that the arrival of the union marks the end of the employer's right to act unilaterally. *KDEN and Kal Die* are distinguishable as unusual cases involving the most routine management adjustment to individual employee schedules.

Our colleague also cites *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), and its description in *Du Pont*, supra, 364 NLRB at 1654, for the principle that "following the union's certification, the employer could continue its past practice of paying one third of an insurance premium and requiring employees to pay the remaining two thirds that arose prior to the union's certification." However, this account elides the relevant point.

In *Luther Manor*, the employer's health insurer raised premium rates during the employer's negotiations with the newly certified union. The Board found that the employer did not make an unlawful unilateral change because it acted in accordance with its existing terms and conditions—which were that employees paid 2/3 of the premium and the employer paid 1/3 with health insurance premiums increases passed on at that fixed ratio split between the employer and employees. See 270 NLRB at 959. The maintenance of a fixed ratio status quo does not illustrate what our colleague claims: it is not a situation where an employer relies on a past practice developed precertification to provide it discretion to make unilateral changes once the union is in place and the bargaining obligation has attached. To the contrary, *Luther Manor* is just another case where the Board determined that the status quo that must be maintained is a fixed ratio rather than an absolute amount.

In short, the cases our colleague cites either do not conflict at all with the precedent demonstrating that precertification past practices cannot be relied upon as a defense to unilateral change allegations or—in two cases—provide unusual exceptions, that neither mention nor threaten the logic of the main body of precedent.

Finally, contrary to our colleague's account, *Raytheon*, which we overrule precisely because of the undue breadth it gave to the past-practice defense, did not meaningfully consider or purport to address the question of whether the past-practice defense can be mounted or makes sense in the context of a past practice based solely on unilateral actions taken before the employer was under a statutory duty to bargain. Thus, *Raytheon* did not mention, much less overrule any of the cases we reference that hold that precertification past practices cannot provide a defense to a unilateral change allegation. For these reasons, it does not advance our colleague's position to cite *Raytheon's* overbroad conception of past practice as a rejoinder to our reaffirmation of the principle that the past-practice defense cannot be grounded in changes made before the Act's duty to bargain was a consideration for the employer.

V. CONCLUSION

"The Labor Act is process-oriented. It establishes and protects the employees' right to bargain, not their right to *a* bargain." *Boilermakers Local 88 v. NLRB*, 858 F.2d 756, 763 (D.C Cir. 1988) (emphasis in original). The Supreme Court has made clear that the Board, in fulfilling its responsibility to protect the right to bargain and to set the rules for the bargaining process, "is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion . . . ." *NLRB v. Katz*, 369 U.S. at 747. We have done so today by faithfully adhering to established precedent under *Katz* that permits unilateral conduct during bargaining only when the employer has demonstrated a regular and consistent past practice that is not informed by a large measure of discretion.

ORDER[76]

The National Labor Relations Board reaffirms the Order set forth at 369 NLRB No. 135 and orders that the

[76] We have amended the remedy set forth in the judge's decision, as amended in the Board's decision reported at 369 NLRB No. 135, in accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022). Under *Thryv*, the Respondent shall also compensate the laid off employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful layoffs, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We have modified the Order set forth in the Board's decision reported at 369 NLRB No. 135, in accordance with *Thyrv*, supra, and in accordance with *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021). We have substituted a new notice to conform to the Order as modified.

We note that the court enforced the Board's unfair labor practice findings in our underlying decision and the remedies associated with them, except for the layoffs at issue in this remand and two Sec. 8(a)(1) allegations inadvertently included in the Board's Order. See 26 F.4th at 1014. Those violations include interrogating employees about their union sympathies; creating the impression of surveillance of union or other protected concerted activities; informing or implying to employees they will be laid off for supporting the Union; instructing employees to remove union insignia, instructing employees to remove prounion photographs from social media; denying employees' requests for union representation at interviews that they reasonably believe can result in discipline; discriminating against employees for supporting the Union by delaying their performance reviews and wage increases, suspending them, assigning them to undesirable work, or denying them overtime; unilaterally changing the terms and conditions of employment of its unit employees by mandating overtime, removing unit work and transferring it to supervisors, or delaying their performance reviews and wage increases; refusing to furnish the Union with information; and refusing to bargain regarding the retroactivity of pay increases conferred in 2018. We shall not repeat those court-enforced provisions of the Board's original order here, because those findings and associated remedies continue to be required by our previous order and were enforced by the court. See *Fluor Daniel, Inc.*, 350 NLRB 702, 702 fn. 5 (2007); *Bryan Adair Construction*

Respondent, Wendt Corporation, Cheektowaga, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its unit employees by laying them off.

(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 necessary to effectuate the policies of the Act.

(a) Make employees who were laid off whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful layoffs, in the manner set forth in the remedy section of the judge's decision as amended in the Board's decision reported at 369 NLRB No. 135 and as amended herein.

(b) Compensate employees who were laid off for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for these individuals.

(c) File with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the corresponding W-2 forms reflecting the backpay awards for the laid off employees.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter notify in writing those who were laid off that this has been done and that the layoff will not be used against them in any way.

(e) 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 full-time and regular part-time janitors, welders, machine operators, maintenance mechanics, fitters, assemblers, painters, machinists, leadmen and shipping and receiving clerks employed by the Respondent at its facility located at 2555 Walden Avenue, Buffalo, New York 14225, but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(f) 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.

(g) Post at its facility in Cheektowaga, New York, copies of the attached notice marked "Appendix."[77] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2017.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Co., 341 NLRB 247, 247 fn. 4 (2004); *Ryder System*, 302 NLRB 608, 610 fn. 9 (1991), enfd. 983 F.2d 705 (6th Cir. 1993).

[77] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work, and the notices may not be posted until a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, concurring in the result.

In the initial decision in this case, in which I participated, the Board determined that, under *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), the Respondent had failed to meet its burden to show that the temporary layoff it implemented in February 2018 was justified by an established past practice. In reaching that conclusion, the Board examined three prior layoffs, which occurred in 2001, 2009, and 2015. Of those three, the Board found that only the temporary layoff in 2001 was similar in kind and degree to the layoff at issue in 2018. But the Board found that, even assuming that the temporary layoffs in 2009 were also similar in kind and degree, "[t]he Respondent's use of temporary layoffs twice in 17 years falls well short of establishing a regular and consistent practice sufficient to privilege unilateral action." *Wendt Corp.*, 369 NLRB No. 135, slip op. at 5 (2020).

More than a year ago, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit" or "court") found that the Board's analysis had considered "only a subset of the layoffs Wendt identified without adequately explaining the materiality of its distinctions between those considered and those excluded." Accordingly, the court remanded this case back to the Board with clear remand instructions:

> We do not believe the Board adequately addressed Wendt's past practice argument. If the Board had considered all five of the past layoffs that Wendt says comprise its past practice, then the Board may have had grounds to conclude that Wendt lacked a past practice of layoffs that occurred with sufficient regularity and frequency to privilege Wendt to act unilaterally. But the Board considered only a subset of the layoffs Wendt identified without adequately explaining the materiality of its distinctions between those considered and those excluded. Because our review is limited to the grounds on which the Board ruled, . . . we remand for the Board to complete its examination of its distinctions or to considered each of the identified layoffs as materially similar in its assessment of whether Wendt's claimed past practices "occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis." *Mike-Sell's Potato Chip. Co.,* 368 N.L.R.B. No. 146, at *4 (Dec. 16, 2019).

Wendt Corp. v. NLRB, 26 F.4th 1002, 1014 (D.C. Cir. March 21, 2022). Thus, the court directed the Board to "complete its explanation" of its finding that the Respondent's unilateral temporary layoff in February 2018 was not consistent with its asserted past practice by addressing all the layoffs that the Respondent cited in support of its past practice defense. In addressing those layoffs, the court directed the Board to explain either the differences that would justify leaving them out of the past practice determination or the material similarities that would warrant their inclusion in the determination. Put another way, the court directed the Board to apply *Raytheon*, which required a consideration of whether a unilateral action was materially similar to past actions in order to justify a past practice defense. Finally, the court expressly cited *Mike-Sell's* as the appropriate precedent for the Board to apply in determining whether the layoffs occurred with sufficient regularity and frequency.

Remand instructions from an appellate court are not suggestions. They direct the Board to take certain actions, and the Board is not free to disregard them when they are inconvenient.[1] Nor is the Board free to ignore the scope of the court's remand by choosing not to apply the law of the case, as directed by the court, but instead proclaiming that they are overruling the law of the case and, to add insult to injury, applying the purported new law as their primary alternative holding.

In this concurrence, I will follow the direction of the court. I will explain why the Respondent has failed to establish that three of the five layoffs it identified were similar in kind and degree to the temporary layoffs in 2018, as required by *Raytheon*.[2] Then, applying, *Mike-Sell's*, I will determine whether the Respondent's prior layoffs

[1] See, e.g., *Starcon, Inc*., 344 NLRB 1022, 1024 (2005) (holding that the judge's finding of an independent refusal-to-consider violation was beyond the scope of the court's remand), enfd. 450 F.3d 276 (7th Cir. 2006); *Sagamore Shirt Co., d/b/a Spruce Pine Mfg*. Co.,166 NLRB 437, 440 fn. 3 (1967) (noting that the Board can only address the issues remanded to it by the court); see also *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977 (noting that the principles restricting review upon remand to the scope of the court's remand "indulge no exception for reviews of administrative agencies").

[2] In its decision, the court did not address the fact that the Board in *Wendt* had expressly indicated that it was not considering the 2015 layoff as a relevant comparator because that layoff was permanent, as opposed to temporary, and therefore was not "similar in kind and degree" as required by *Raytheon*. Accordingly, it is not clear whether the court

occurred with sufficient regularity and frequency to support a past practice defense. After undertaking that review, I ultimately reach the same conclusion reached by the Board in *Wendt*: the Respondent has failed to meet its burden to establish that it had an established past practice that would privilege the Respondent to act unilaterally.

My colleagues, however, have chosen to ignore the court's express remand instructions, despite the fact that the outcome of this case would not change if the court's remand instructions were followed.[3] Their presumed intent is that, by doing so, they can use this case to overrule *Raytheon* and its progeny and to reinstate part of the previous and short-lived decision in *E.I. Du Pont de Nemours*, 364 NLRB 1648 (2016) (*DuPont*). Their fundamental error in taking this approach, however, is that the issue of whether *Raytheon* and its progeny should be overruled was not before the court in the first place. No party had argued to the Board, or to the court, that *Raytheon* was wrongly decided. Nor did either party argue before the court that it should not apply *Raytheon* and *Mike-Sell's* in deciding this case. To the contrary, the Respondent affirmatively argued to the court that the Board had erred in failing to *apply those cases correctly*, and the court found merit in that argument. Because the issue of whether *Raytheon* and *Mike-Sell's* was not before the court, the court did not consider the issue. My colleagues, therefore, are taking the position that the scope of the court's remand includes consideration of an issue that was not presented to the court in the first place. I find this mind-boggling.

Simply put: the issue of whether *Raytheon* and *Mike-Sell's* were correctly decided is unquestionably beyond the scope of the court's remand and not before the Board for consideration.[4] Accordingly, my colleagues' attempt to overrule *Raytheon* and *Mike-Sell's* in this decision and apply their new standard is entirely without effect.[5]

I. AFTER COMPLETING THE EXPLANATION BEGUN IN *WENDT*, AS DIRECTED BY THE D.C. CIRCUIT, I WOULD REACH THE SAME RESULT.

In *Raytheon*, the Board held that, in order for an employer to use prior actions as establishing a past practice, those actions must be similar in kind and degree with the employer's unilateral action at issue. *Raytheon*, 365 NLRB No. 161, slip op. at 13, 16. Later, in *Mike-Sell's*, the Board applied *Raytheon* and specifically addressed what it meant for a practice to have "occurred with such regularity and frequency that employees would reasonably expect the practice to reoccur on a regular basis." 368 NLRB No. 145, slip op. at 4.

Complying with the court's remand instructions, I would find that—even assuming that the 2009 temporary layoff, like the 2001 temporary layoff, was similar in kind and degree to the 2018 temporary layoff—the other three layoffs put forward by the Respondent were not similar in kind and degree and, therefore, were properly excluded from the past practice analysis. To begin, as noted above, the *Wendt* decision did consider the "permanent layoff of 17 employees in 2015." *Wendt*, 369 NLRB No. 135, slip op. at 6 fn. 20. The Board concluded that because that layoff was "different in kind and degree than the temporary layoffs in 2018," the 2015 layoff should not be considered as an event relevant to establishing whether the Respondent had established a past practice of temporary layoffs. Id. Consistent with the remand, I will provide a fuller explanation of why the 2015 layoff was properly excluded. Temporary layoffs and permanent layoffs are significantly different in kind, particularly from the perspective of the employee, which is a fundamental part of the *Raytheon* analysis. Permanent layoffs, unlike temporary layoffs, effectuate a complete severance of the employment relationship between employees who are laid off and the Respondent.[6] Furthermore, there can be no question

viewed that explanation as inadequate or not. Therefore, I will err on the side of caution and provide additional explanation of the distinction between permanent and temporary layoffs in response to the court's remand.

[3] I am assuming that my colleagues would agree that the temporary layoffs and permanent layoffs are not "similar in kind and degree."

[4] The issue of the proper standard to apply *was* before the Board in *Raytheon*, in which I participated. The decision in *Raytheon* contains a full explanation of my position that *Raytheon* properly overruled the overly restrictive definition of past practice endorsed in *DuPont* and is not inconsistent with the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), among other issues.

[5] I note that my colleagues' analysis does not even rise to the level of *dicta*, which is analysis unnecessary to deciding an issue properly before the Board, because they are addressing an issue that is not before the Board in the first place. See, e.g., *United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007) (finding that district court lacked jurisdiction to consider an additional basis for finding ineffective assistance of counsel when that basis was beyond the scope of the court's remand instructions), cert. denied 553 U.S. 1007 (2008). However, *even if* the reconsideration of *Raytheon* were properly before the Board, my colleagues acknowledge that it would not be necessary for them to overrule *Raytheon* to decide this case. Accordingly, even if the issue were before us—which it decidedly is not--my colleagues' alleged overruling of *Raytheon* would be dicta and therefore nonbinding precedent. Finally, I note that the application of *Raytheon* to this matter does not change the results. Given all those factors, I find my colleagues' decision to try to use this case as a vehicle for overruling *Raytheon* astonishing.

I also note that I understand that my colleagues do not agree with *Raytheon* and *Mike-Sell's* and that, therefore, they would prefer not to apply those cases here. However, given the doctrine of "law of the case," following the court's express remand instructions here would not have required them to indicate any support for the holdings in those cases.

[6] In fact, "permanent layoffs" can just as easily be described as "discharges."

that, even if it had been taking place regularly for many years, an employer's annual practice of temporary layoffs based on fluctuations of work would not lead employees to reasonably expect that the employer would, in a following year, permanently lay off employees based on fluctuations of work. Because temporary layoffs are fundamentally different from permanent layoffs, both in terms of their practical effect as well as the employee expectations that are created therefrom, the *Wendt* decision properly excluded the permanent layoff in 2015 in conducting the past practice analysis.

The court also directed the Board to consider to what extent the layoffs in 2002 and 2003 were distinct from or similar to the temporary layoff in 2018. Based on the scant record evidence of the nature of those layoffs, I conclude that the Respondent failed to meet its burden to establish that the layoffs were similar in kind to the layoff in 2018. The record includes copies of the discharge forms that were issued to the two employees laid off in 2002 and the one employee laid off in 2003. Those forms do not include any suggestion that three layoffs were temporary in nature. Nor is there testimonial evidence establishing that the layoffs were temporary. When asked about the 2002 and 2003 layoffs, the Respondent's Vice President of Operations Joseph Bertozzi admitted that he did not "remember any specific layoff event, if you will, like 2009 and 2015 . . . [or] any particulars on why" the Respondent laid off employees. He then speculated that "[w]e had the normal ebbs and flows of work in our shop, so at a time that's what we would have done. We would have laid off employees." It is well established that the Respondent had the burden to establish that a past practice existed that would have privileged its 2018 temporary layoffs. See, e.g., *Palm Beach Metro Transp.*, 327 NLRB 180, 183 (2011), enfd. per curium 459 Fed.Appx. 874 (11th Cir. 2010. Because the Respondent failed to introduce sufficient evidence to establish that the layoffs in 2002 and 2003 were "similar in kind" to the temporary layoff in 2018, the Board properly excluded those layoffs from its past practice determination.[7]

Having determined that the permanent layoff in 2015 was different in kind and degree from the 2018 layoff, and having insufficient record evidence upon which to conclude that the 2002 and 2003 layoffs were similar in kind to the 2018 layoff, I am therefore left with the same conclusion that the Board reached in the underlying decision: the Respondent's "use of temporary layoffs twice in 17 years falls well short of establishing a regular and consistent practice sufficient to privilege [the 2018] unilateral action." *Wendt Corp.*, 369 NLRB No. 135, slip op. at 5.[8]

II. MY COLLEAGUES' ATTEMPTS TO JUSTIFY EXCEEDING THE SCOPE OF THE D.C. CIRCUIT'S REMAND ARE WITHOUT MERIT.

A. The "spirit" of a court's remand cannot encompass an argument not raised to the court.

My colleagues assert that their decision to overrule *Raytheon* and *Mike-Sell's*, in relevant part, does not exceed the scope of the court's remand because "the court looks to the terms of its opinion to ascertain the letter and spirit of the mandate to which the Board is subject." In the next section, I will explain how the cases cited by my colleagues do not support their apparent position that the Board is entitled to glean the scope of a court's remand from the "spirit" of the case as opposed to the court's express remand instructions. But even assuming that they are correct that the "spirit" of the decision is controlling over the express remand instructions, there is no question that the "spirit" of the court's decision did not intend that the Board reconsider, let alone overrule, *Raytheon* and *Mike-Sell's* on remand.[9] The question of whether *Raytheon* or *Mike-Sell's* was good law was not before the

[7] I do not disagree with the court that it would have been helpful for the Board to have included this analysis of the layoffs in 2002 and 2003 in its decision.

[8] I note that my finding here is not inconsistent with my dissent in *The Atlantic Group, Inc.*, 371 NLRB No. 119, slip op. at 6–7 (2022). There, I found that the employer satisfied its burden of proving that it had a past practice of laying off employees when faced with a lack of available work from its client. In that case, I relied on the facts that the employer was a contractor for a single client. Id. The evidence showed that the employer had a practice of laying off employees when its only client was unable to provide work. Id. There is no indication, as here, that the employer chose to react differently to different periods of low work. Further, I rejected the majority's argument in *The Atlantic Group* that, based on the language of the employer's employment agreements, the employees would not have expected to be laid off for lack of work. Id., slip op. at 6 fn. 2.

My colleagues have modified the Order set forth in the Board's decision reported at 369 NLRB No. 135, in accordance with *Thryv, Inc.*, 372 NLRB No. 22 (2022), and in accordance with *Paragon Systems, Inc*., 371 NLRB No. 104 (2022). Insofar as I am concurring in the result, I acknowledge and apply *Paragon Systems* as Board precedent, although I expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance Service, Inc*., 369 NLRB No. 68 (2020). Additionally, I disagree with the majority that employees should be made whole for any direct or foreseeable pecuniary harms incurred as a result of the Respondent's unlawful layoffs. Consistent with my partial dissent in *Thryv,* , I would require the Respondent to compensate employees for other pecuniary harms only insofar as the losses were directly caused by the unlawful layoffs, or indirectly caused by that act where the causal link between the loss and the unlawful layoffs is sufficiently clear.

[9] As their primary alternative holding, my colleagues find that "that the February 2018 layoffs are unlawful because they were entirely discretionary." My colleagues' holding in this regard is clearly contrary to the court's specific, narrowly tailored remand instructions as set forth above. My colleagues cannot expand the scope of the court's remand simply by labeling their overruling of *Raytheon* and *Mike-Sell's* an "alternative" holding.

court. No party questioned that *Raytheon* and *Mike-Sell's* contained the appropriate standards upon which to decide the issues presented. Rather, the dispute involved whether or not the Board had properly applied those standards in deciding the case.

As a result, it is not surprising that neither the express remand instructions, nor any other language in the decision, suggest that the court questioned the validity of *Raytheon* or *Mike-Sell's* or intended that the Board consider the validity of those cases upon remand.[10] Nor is it surprising that the express remand instructions directed the Board to apply the standard set forth in *Raytheon* upon remand: no party had even suggested to the court that *Raytheon* should not be used to determine whether the Respondent had established a past practice that justified the February 2018 layoffs.

Once again, to be clear, my colleagues are suggesting that, rather than following the court's express remand instructions, the Board should determine that the "spirit" of the court's decision included directing the Board to address an argument *never presented to the court*. In fact, because the question of the validity of *Raytheon* and *Mike-Sell's* had not been raised by either party in the proceedings before the Board, the parties would have been barred from even raising the issue before the court by Section 10(e) of the Act.[11] So my colleagues are actually suggesting that the court intended that the Board, upon remand, consider an issue that was not raised during the course of litigation of the case, that could not have properly been raised before the court, and that was not mentioned anywhere in the court's decision.[12] Not only is this an extraordinary way to interpret the "spirit" of a court remand, but if my colleagues' view was correct, any court remand would in effect give parties another "bite at the apple" to make any argument that they failed to raise in the Board proceeding below. I do not believe that court remands should be abused in this manner, nor do I believe that any reviewing court will have difficulty finding that any such arguments, or findings based thereon, are beyond the scope of the remand.

B. The cases cited by my colleagues do not support their position that a court's express remand instructions can be disregarded in favor of the "spirit" of the court's decision.

As discussed in the preceding section, I do not believe that there is any doubt that the "spirit" of the court's decision could not have encompassed an intent that the Board address an issue that was not before the court. Nevertheless, I will address the cases cited by my colleagues in support of their position that the "spirit" of a decision trumps a court's express remand instructions. To begin, my colleagues cite *AT&T Wireless Servs. v. FCC*, 365 F.3d 1095 (D.C. Cir. 2004) ("*AirCell II*"). In that case, a dispute arose regarding "an order of the Federal Communications Commission [(Commission)] granting AirCell, Inc., a waiver to operate an aircraft-based analog cellular telephone system." Id. at 1097 (citing *AT&T Wireless v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001) ("*AirCell I*"). As part of the decision granting AirCell the waiver, the Commission had rejected the finding of an expert regarding the level of harmful interference with aircrafts that would result from the waiver and instead, based on its own review, concluded that no significant level of harmful interference would occur. The court remanded the matter, "holding that the Commission had failed 'to justify adequately its choice of an interference threshold,'" that the FCC had failed to show how the raw signal data from a field test led to the finding of no significant harmful interference, and that accordingly "the court was unable to discern 'why the Commission considered one interference threshold preferable to another.'" Id. at 1098 (citing *AirCell I,* 270 F.3d at 968). On remand, the FCC explained, on technical grounds, the reasoning behind its decision to grant the waiver, including why it rejected the expert's findings of a higher chance of harmful interference.

The court, in reviewing the FCC's "remand order," found that "[t]he Commission, on remand, provided what the court requested: an explanation of 'why the Commission considered one interference threshold preferable to another.'" *AirCell II*, 365 F.3d at 1099 (quoting the

[10] Contrary to my colleagues' suggestion, I have considered the court's "entire opinion" in determining the scope of "the task" that the court assigned to us upon remand.

[11] In his answering brief in the underlying Board proceedings, former General Counsel Peter Robb asserted that *Raytheon* did not apply to this case involving a newly certified union. The General Counsel did not suggest that *Raytheon* was wrongly decided.

[12] The first time the issue of whether *Raytheon* and *Mike-Sell's* were wrongly decided was raised was in the General Counsel's position statement on remand. Under the Board's practice, however, statements of position are not intended to be vehicles for raising new arguments that are not prompted by, or responsive to, the scope of the court's remand. Indeed, the letter sent out by the Executive Secretary stated that parties may file position statements "with respect to the *issues raised by the remand*" (emphasis added). Whether or not the Board should overrule *Raytheon* and *Mike-Sell's* and whether an a past practice can arise before employees were represented by a union are not issues raised by the court's remand. Nonetheless, my colleagues observe that "the issue of overruling *Raytheon* and *Mike-Sell's* was squarely addressed by the parties in the General Counsel's position statement and the Respondent's response brief filed with the Board following the court's remand." My colleagues appear to be taking the position that a request by the General Counsel to overrule Board precedent for the first time on remand coupled with an objection to that request by the Respondent is sufficient to put the issue of whether that case should be overturned before the Board, regardless of prior positions taken during the course of litigating the case and regardless of the court's remand instructions. I disagree.

express remand instructions in *AirCell I*, 270 F.3d at 968). In other words, the court found that the Commission had, in fact, followed the court's express remand instructions.[13]

The other two cases upon which my colleagues rely are also unavailing. In *Mid-Tex Electric Coop. v. FERC*, 822 F.2d 1123, 1129–1130 (D.C. Cir. 1987), the question presented did not involve the scope of remand instructions. Rather, the question presented involved whether the *substance* of a new rule, promulgated while reconsideration of the remanded rule was pending, was *consistent with* the substantive comments made by the court in the remanded matter. As the court noted, the new rule did not exist at the time it remanded the original matter, and therefore was clearly *beyond the scope* of the remand. Similarly, *City of Cleveland v. Federal Power Comm'n*, does not support my colleagues' position that the "spirit" of a decision trumps express remand instructions because, in that case, the remanding court did not include express remand instructions in its decision. Although the court "reversed the Commission's disposition of the ratchet-clause issue," it merely remanded the case "for further proceedings consistent with this opinion." 561 F.2d at 346, citing *City of Cleveland v. Federal Power Comm'n*, 525 F.2d 845, 857 (D.C. Cir. 1975).[14] When the parties had conflicting views of the scope of the remand, the court interpreted the scope of its vague directions to conduct "further proceedings consistent with this opinion" based on a reading of the prior decision as a whole. There is nothing in that case, however, to suggest that it is necessary to undertake such a "reading of the entire decision" when a court provides specific remand instructions, as the court did here.

Finally, my colleagues seem to suggest that their decision to disregard the court's express remand instructions is not inappropriate because it pales in comparison to the actions of the Department of Labor (DOL) in *ILGWU v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984), where the DOL "blatantly disregarded" the D.C. Circuit's earlier decision by repromulgating the very same rule the court had earlier vacated. Of course, the fact that another agency's blatant disregard was arguably worse hardly serves to make my colleagues' actions here acceptable.[15]

C. My colleagues ignore the law of the case as established by the court.

My colleagues assert that because the court directed the Board to apply *Raytheon*, it is "appropriate here to overrule *Raytheon*'s kind and degree test because it is

[13] See also *AirCell II*, 365 F.3d at 1101 ("The court remanded on the interference threshold because it could not locate an explanation within the four corners of the Commission's order; on remand the Commission has supplied one.")

[14] The closest the court came appears to have been the following: "The qualifications upon the Commission's acceptance of CEI's schedule-filing which these explicit disclaimers imposed left the door wide open for such corrections and adjustments of the filed rate structure as subsequently disclosed information might warrant. When this litigation was before the Commission, it did not see fit to pass through that door. Our decision today makes plain the Commission's responsibility to do so now." Again, these were hardly express remand instructions.

[15] Recognizing that the validity of *Raytheon* and *Mike-Sell's* was not squarely presented by the court's express remand instructions, my colleagues contend that they are justified in taking a "broader interpretation" of such instructions because, in their view, it will "effectuat[e] national labor policy [to] reconsider[] *Raytheon* and *Mike-Sell's*." They observe that the "Board is not required to decide cases on only the narrowest possible ground available to it. Rather, '[i]t is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy.'" However, this is a non sequitur. The fact that Congress charged the Board with implementing the Act in the first instance—subject, of course, to the oversight of the courts—does not in any way justify the Board's departure from an appellate court's narrowly tailored remand instructions. As set forth above, remand instructions from an appellate court are not recommendations. The Board is not free to disregard them in the interest of "encourag[ing] the practice and procedure of collective bargaining."

My colleagues' reliance on *NLRB v. Food Store Employees Union*, 417 U.S. 1, 9 (1974), does not help them in this regard. In that case, the question presented did not involve the scope of remand instructions but rather the "Board's broad discretion to fashion remedies." Id. at 10. Specifically, the D.C. Circuit had remanded that case to the Board for further consideration of additional remedies including requiring the employer to pay the litigation expenses and excess organizational costs. Id. at 5. On remand, the Board again refused to order the employer to reimburse the union for such expenses on the basis that such an award would not effectuate the policies of the Act. Id. When the case returned to the court, the D.C. Circuit concluded that the Board had, in subsequent decisions, abandoned its policy against awards of litigation expenses and excess organizational costs, and the court modified the Board's order to include reimbursement for such costs. Id. at 7. On review, the Supreme Court held that the court of appeals improperly exercised its authority by modifying the Board's order without first giving the Board an opportunity to resolve inconsistencies in its decisions. Id. at 9. Despite my colleagues' suggestion otherwise, the Court's decision does not stand for the proposition that the Board can disregard specific remand instructions from the appellate court in order to effectuate the policies of the Act.

Further, *Commun. Workers of Am., Local 5008 v. NLRB* , 784 F.2d 847, 851-52 (7th Cir. 1986), cited by my colleagues, is similarly distinguishable. In that case, the court had earlier enforced the Board's decision in *Illinois Bell Telephone Co*., 251 NLRB 932 (1980), finding that an employee was unlawfully denied her right to have a union representative under *NLRB v. J. Weingarten*, 420 U.S. 251(1975), but remanded with instructions to apply the Board's remedial doctrine set forth in *Kraft Foods, Inc*., 251 NLRB 598 (1980). 784 F.2d at 848-849. While the case was pending before the Board on remand, the Board overruled *Kraft Foods* and the aforementioned *Illinois Bell* in *Taracorp Industries*, 273 NLRB 54 (1984), holding that it would no longer order reinstatement and back pay for discharges arising solely from a *Weingarten* request. The Board then applied its new remedial standard to the decision on remand. When the case returned to the Seventh Circuit, the court held that the Board was entitled to apply that new law "as an exercise of its discretion over remedies for violations of the Act." Id. at 849. The court explained that the Board had authority to change its approach to remedies for *Weingarten* violations without the court's approval. Id. By contrast, here, the Board did not change its policy in an intervening case, but rather, the majority has used the court's remand to implement new precedent. Further, this case does not involve the Board's broad discretion over remedial matters.

inconsistent with *Katz*."[16] Again, my colleagues are ignoring the fact that the "law of the case" has been established by the D.C. Circuit. I am not aware of any case where an appellate court has found that, upon remand, the Board (or any agency or lower court) is free to reject the law of the case if, in their view, they deem it to be inconsistent with Supreme Court precedent. But, more importantly, my colleagues ignore the obvious fact that the D.C. Circuit is equally bound by Supreme Court precedent. I do not believe that the D.C. Circuit would blithely flout binding Supreme Court precedent, as my colleagues' reasoning suggests.[17]

III. IN AN ABUNDANCE OF CAUTION, I WILL BRIEFLY ADDRESS THE MERITS OF MY COLLEAGUES' ANALYSIS

As discussed above, I think it is obvious that my colleagues' purported overruling of *Raytheon* and *Mike-Sell's* is beyond the scope of the remand and that my colleagues are wrongfully addressing an issue not properly before the Board. However, in the extraordinarily unlikely event that the D.C. Circuit were to find otherwise—an event that, frankly, is hard to imagine—the court would effectively be finding that the issue was in fact before the Board.[18] Out of an abundance of caution, therefore, I will briefly address the merits of my colleagues' analysis, although in doing so, I am not suggesting that there is any question in my mind that the issue is not properly before the Board.

A. The Board's decision in Raytheon correctly articulated the Board's past practice standard.

For the reasons set forth in *Raytheon*, in which I participated, as well as the reasons below, I believe that the Board properly overruled the restrictive definition of past practice endorsed in *DuPont*, and championed by my colleagues today, as well as the precedent upon which that holding relied.

Briefly, in *Raytheon*, the Board, relying on the Supreme Court's decision in *Katz* and Board cases dating back to 1964, held that an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past. *Raytheon*, 365 NLRB No. 161, slip op. at 13, 16. The Board also found that its standard applies regardless of whether a collective-bargaining agreement existed when the past practice was created and regardless of whether no collective-bargaining agreement was in effect when the disputed action occurred. Id., slip op. at 13. Therefore, the relevant inquiry under *Raytheon* is whether the conduct at issue represents a material departure from past practice, regardless of how that past practice arose. Id., slip op. at 13. Unilateral action that is consistent with an established past practice does not constitute a change triggering the duty to give the union notice and opportunity to bargain merely because it may involve discretion. Id, slip op. at 16. In this respect, *Raytheon* overruled the principle "under *DuPont* that the exercise of any discretion precludes a 'past practice' defense to a *Katz*-type 8(a)(5) allegation." *Raytheon*, 365 NLRB No. 161, slip op. at 14. The *Raytheon* decision stated:

> We also reject the *DuPont* majority's conclusion that every action constitutes a "change" within the meaning of *Katz*, regardless of what an employer has done in the past, if the employer's actions involve *any* "discretion."

Id., slip op. at 13. (emphasis added). The Board further explained that "[t]he Supreme Court [in *Katz*] certainly did not articulate a blanket rule that every action taken by an employer involving any 'discretion' required advance notice and the opportunity for bargaining, even if the employer was continuing to do precisely what it had always done." Id., slip op. at 16.

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

> the [r]espondent's past practice was fixed as to timing (changes occurred annually in January from 2001 to 2012) and as to regularity (changes were made in each of those years) with premium increases occurring every year. Further, the changes were of the same kind and degree each year, consistently addressing premium

[16] It is not at all clear to me how the fact that the court *directed* the Board to *apply Raytheon* possibly supports my colleagues' position that the remand allowed for the overruling of *Raytheon* and an analysis under my colleagues' new standard. To that point, my colleagues take the position that they have followed the court's remand instructions by, in effect, finding that all five layoffs are similar in kind and degree under *Raytheon* and that, therefore, all five should be included as part of the past practice analysis. But if the court required the Board to apply the *Raytheon* analysis in deciding this case, and my colleagues are *applying Raytheon* in deciding this case, my colleagues cannot turn around and say that *Raytheon* is not good law. In the alternative, if my colleagues are claiming that they are *not* relying upon *Raytheon* in deciding this case and are *not* determining whether the layoffs were actually similar in kind and degree, then I do not believe they can possibly claim that they are abiding by the express remand instructions of the court.

[17] I further note that my colleagues' primary rationale for reaching and reversing *Raytheon* is that it conflicts with *Katz* by allowing a unilateral action "informed by a large measure of discretion" to be justified by a past practice. Nowhere in the D.C. Circuit's decision, let alone in its remand, is the issue of discretion mentioned. At the risk of sounding like a broken record, I again note that the issue of whether *Raytheon* should be overruled was not before the court and, therefore, is beyond the scope of the court's remand.

[18] Of course, even were this to happen, my colleagues' decision would still be nonbinding dicta, as explained earlier in this decision.

> increases and benefits availability. . . . Finally, the Respondent's discretion was significantly constrained by the requirement that the benefits plan offered to the 35 unit employees would be the same plan offered on the same basis to all of Raytheon's 65,000 domestic employees. . . . Therefore, the structure and design of Respondent's benefits program—which applied to an extremely large number of participants—constituted a significant limitation on the Respondent's discretion when evaluating changes affecting the 35-employee bargaining unit at issue here.

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

B. The majority has effectively returned to the erroneous DuPont standard that "any" discretionary action taken, even if consistent with a past practice, is a change requiring bargaining.

My colleagues' chief criticism of *Raytheon* and its progeny is that those "decision[s] dispensed with *Katz'* holding that unilateral action cannot be justified by past practice if it was informed by a large measure of discretion." As a result, my colleagues maintain that they are reinstating the pre-*Raytheon* case law and returning to their view of *Katz* that prohibits unilateral actions informed by a large measure of discretion. However, the majority pays little more than lip service to their interpretation of *Katz*. It is apparent that my colleagues have returned to the *DuPont* standard that an employer's actions involving "any" discretion, even if those actions are consistent with its past practice, is a "change" requiring bargaining.

To begin, throughout their analysis, my colleagues often refer to discretionary unilateral conduct, failing to mention that it has to be significant. For instance, my colleagues find "that discretionary conduct cannot be unilaterally implemented under the past-practice defense." Elsewhere, they observe that "discretionary changes are precisely the types of actions that require an employer to bargain with the union." In citing policy reasons for reversing *Raytheon*, they say that "[d]iscretionary unilateral conduct leaves the union in a weakened bargaining position during contract negotiations." In addition, my colleagues rely on certain Board precedent finding the exercise of "any" discretion precludes a past practice defense. See *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 843 (2004) (finding no past practice where the employer's prior unilateral action was not the type of "non-discretionary action that must remain in place as part of the status quo" after a union is certified); *Garrett Flexible Products, Inc.*, 276 NLRB 704, 706 (1985) ("Where an employer unilaterally implements an established condition of employment . . . and where that implementation involves no elements of discretion, that employer's bargaining obligation is not violated. However, when that employer . . . has retained discretion with respect to the terms and conditions of employment, unilateral exercise of that discretion will be found violative of Section 8(a)(5)" (citations omitted)).

Likewise, in *DuPont*, the Board stated that "[i]n most cases, an employer's past practice defense of unilateral action has been rejected because, as in the case of the wage increases at issue in *Katz* itself, they were in no sense automatic . . . ." 364 NLRB at 1654 (internal quotations omitted). Mirroring this language, my colleagues find that for unilateral conduct to be consistent with a longstanding past practice, it must be "automatic in nature rather than discretionary." Thus, as in *DuPont*, my colleagues essentially have endorsed a standard that limits past practices to the small group of non-discretionary decisions in which the actions taken by employers are identical.

In other words, under the majority's standard, they have reinstated the *DuPont* "standard with which most employers will find it impossible to comply." *Raytheon*, 365 NLRB No. 161, slip op. at 14.

That my colleagues have cited only two cases where the Board actually found that the employer established a past practice only bolsters this point. See, e.g.**,** *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002); *A-V Corp.*, 209 NLRB 451, 452 (1974). My colleagues speak about *Katz*'s holding with respect to substantial discretion but it is clear that they would not permit unilateral conduct involving any discretion. The *Raytheon* Board justifiably overruled the restrictive definition of past practice in *DuPont* and rightly held that an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past.[20]

[19] My colleagues seem to suggest that I did not fully support the standard set forth in *Raytheon*, which of course is not true. I signed the majority decision in that case. I did indeed have a concurrence, where I expressed my view that it could be argued that the "reservation of rights" clause contained within the company-wide health plan should not be treated as a "management rights" clause for purposes of the Act. It is obvious that view is not relevant here, where no management rights clause--let alone a management rights clause contained within a company-wide health plan--is at issue. Therefore, I am puzzled why my colleagues are even mentioning my concurrence in *Raytheon*.

[20] My colleagues argue that I "fail[] to grapple with [*Raytheon*'s] disregard of the significance of the discretion principle articulated by the Court in *Katz*." But as set forth above, my colleagues do not themselves adhere to *Katz*. They state that, under the "discretion principle" in *Katz*, employers may act unilaterally pursuant to an established practice only if the changes do not involve the exercise of significant managerial discretion. The majority's decision, however, demonstrates that they would

C. My colleagues wrongly assert that a past practice defense turns on the existence or non-existence of substantial employer discretion.

Moreover, I disagree with my colleagues' premise that the Board has found that the "absence of substantial employer discretion [is] a *prerequisite* for upholding a past-practice defense . . . ." (emphasis added). My colleagues argue that "*Raytheon*'s . . . kind and degree test . . . replace[d] the discretion analysis . . . under [their view of] *Katz* that discretionary conduct cannot be unilaterally implemented under the past-practice defense." They claim that "[*l*]*egions* of Board and court cases have applied the Supreme Court's instructions in *Katz* and rejected an employer's unilateral change defense during bargaining where the . . . changes are informed by a large measure of discretion." (emphasis added). Elsewhere my colleagues note that a "wealth of caselaw . . . . has applied that holding." I acknowledge that the Board has rejected an employer's past practice defense on the basis that the unilateral action was informed by a large measure of discretion in certain Board and court cases. However, the Board has not even mentioned this apparently critical "prerequisite" in many of its key decisions defining the parameters of the past practice doctrine.

In *Post-Tribune*, which has been regularly cited in Board decisions for defining the Board's past practice jurisprudence, including in *Raytheon*, the Board does not address whether the employer's unilateral changes were informed by any level of discretion in its analysis.[21] Rather, the Board, relying on *Katz* defined a past practice in the following manner:

> [W]here an employer's action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate Section 8(a)(5) and (1). An established past practice can become part of the status quo. Accordingly, the Board has found no violation of Section 8(a)(5) and (1) where the employer simply followed a well-established past practice.

Post-Tribune, 337 NLRB at 1280 (internal citations omitted).[22] Numerous other Board cases, including cases cited by my colleagues, similarly do not turn on what my colleagues have deemed the "discretion principle." See, e.g., *Santa-Barbara News Press*, 358 NLRB 1415, 1416 (2012), reaffd. 362 NLRB 252 (2015), enfd. 2017 WL 1314946 (D.C. Cir. 2017); *Caterpillar, Inc*., 355 NLRB 521 (2010), enfd. mem 2011 U.S. App. Lexis 11163 (D.C. Cir. 2011); *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349 (2003), enfd. mem. 112 Fed. App'x 65 (D.C. Cir. 2004).[23]

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

D. Raytheon does not undermine the collective-bargaining process.

In addition to *Raytheon*'s apparent deviation from *Katz*, my colleagues complain that *Raytheon* undermines the collective-bargaining process. They go on at length about the harm to collective bargaining from unilateral discretionary changes that are permitted under *Raytheon*. For the reasons set forth in *Raytheon*, however, I believe that my colleagues are incorrect. *Raytheon*, 365 NLRB No. 161, slip op. at 16, 18–19. It is my colleagues, by returning to the overly restrictive definition of past practice in

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not find an employer's actions consistent with its past practice lawful even if they involved only a "little" discretion.

On a related note, I have not criticized what my colleagues characterize as the *Katz* standard as an "overly restrictive definition of past practice." In fact, if any definition of past practice is overly restrictive, it is my colleagues' interpretation that the exercise of any discretion precludes a past practice defense.

[21] My colleagues conveniently cite *Post-Tribune* as one of the few cases where they find an employer established a past practice defense. They find that the Board found a past practice there because the "employer['s] discretion was limited." But the concept of discretion appears nowhere in the Board's rationale. My colleagues similarly cite *A-V Corp.*, to support their position but again the term discretion did not even appear in the Board's rationale in this case.

My colleagues note that in *E.I. du Pont de Nemours v. NLRB*, the D.C. Circuit cited *Post-Tribune* as involving an acceptable degree of discretion. First, the court addressed *Post-Tribune* in one sentence, and nowhere did it say that the case turned on the issue of discretion. Further, the court also cited several cases, including *Courier Journal,* 342 NLRB 1093 (2004), *Courier Journal*, 342 NLRB 1148 (2004), and *Capitol Ford*, 343 NLRB 1058 (2004), all of which my colleagues purport to overrule today, that did not turn on the issue of discretion. 682 F.3d at 69–70. Significantly, the D.C. Circuit did not in any way suggest that these cases violated what my colleagues characterize as "the discretion principle of *Katz*." If the D.C. Circuit had found those cases to be inconsistent with Supreme Court precedent, I have no doubt it would have said so and it certainly would not have given the Board the option of applying the past practice principles set forth in these cases on remand.

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

[23] See also *DMI Distrib. of Delaware*, 334 NLRB at 411 (2001).

My colleagues argue that the "courts of appeals have uniformly applied the *Katz* principle limiting the permissible scope of discretionary unilateral conduct." But *most* of the court precedent cited by my colleagues involves a line of court decisions in a discrete area where the employer unilaterally increased wages as part of a merit wage review program, arguing that it was maintaining the status quo, and the court found the increases were unlawful because the employer exercised substantial discretion in determining the increases. See, e.g., *NLRB v. Allis-Chalmers Corp*., 601 F.2d 870, 875-876 (5th Cir. 1979).

DuPont, who have adopted a standard that is inconsistent with the Board's duty to foster stable labor relations. My colleagues further maintain that the *Raytheon* standard "encourages piecemeal, fragmented bargaining, which is disfavored under the NLRA . . . ." But it is the *DuPont* standard that my colleagues return to today that disrupts the bargaining process by illogically imposing a duty on employers to negotiate, potentially to good-faith impasse, over each and every decision involving any modicum of discretion before it could take action—even if those decisions are precisely the same ones that the employer has taken innumerable times before.

E. Mike-Sell's properly applied the regularity and consistency requirements for a past practice defense and should not be overruled.

Again, venturing far beyond the scope of the court's remand, my colleagues overrule *Mike-Sell's*, a decision I joined. In one section of their opinion, my colleagues readjudicate the case on its facts. Relying on then-Member McFerran's dissent, they find that the Board there erred in concluding that the employer did not establish that its unilateral sale of sales routes was privileged by a regular and frequent practice. For all the reasons set forth in *Mike Sell's,* I believe that the Board there properly rejected then-Member McFerran's dissenting position and found that the employer's sale of the sales routes in 2016 were consistent with its 17-year past practice of unilaterally selling sales routes to independent distributors during which time it sold 51 company driver routes. Id., slip op. at 3–4.

My colleagues further purportedly overrule *Mike-Sell*'s on the same basis that they purportedly overrule part of *Raytheon*—i.e., they claim "it failed to abide by Supreme Court precedent in *Katz* forbidding unilateral conduct informed by a large measure of discretion." For the reasons discussed above, even were the issue properly before the Board, I believe that my colleagues' rationale for overruling *Raytheon* is meritless and that the application of *Raytheon* in *Mike-Sell's* shows that its approach is far superior to the overly restrictive definition of past practice endorsed in *DuPont* that my colleagues return to today.

F. My colleagues' secondary alternative rationale that an employer cannot rely on a past practice that developed before the employees were represented by a union is also flawed.

Finally, I note that my colleagues respond to a request by the General Counsel that is blatantly another level removed in terms of not being part of the D.C. Circuit's remand. Specifically, my colleague "hold that an employer can never defend a unilateral change in terms and conditions of employment by invoking a past practice that was developed before the union seeking bargaining represented employees—and thus before the employer had a statutory duty to bargain with that union." My colleagues freely admit that they "need not reach the issue here" but do so anyway because "Board precedent clearly supports the General Counsel's position" and "such precedent provides an alternative basis for finding the unilateral change violation in this case." Again, the majority's holding in this regard, as they concede, would be merely *dicta* if the issue were before the Board in the first place. As established above, it is not. Nevertheless, I am compelled to address this unusual, open colloquy between my colleagues and the General Counsel because, if my colleagues' musings were implemented in a future case, they would need to reconcile their position with the fact that the Board has used past practices developed *before the advent of the union* to force employers to take actions consistent with such practices.

To begin, it is apparent that my colleagues here are only speaking to a situation in which an employer uses past practice as a *shield* to defend a unilateral action by citing to its past practice that developed before the union. I do not take my colleagues to limit in anyway the General Counsel's use of past practice as a *sword* to force an employer to take an action consistent with a past practice that arose before the union came on the scene. After all, to hold otherwise, my colleagues would have to overrule all of the cases in which an employer was found to have violated Section 8(a)(5) by failing to grant a wage increase after the union won an election where the employer had a practice of granting such increases to employees; a step they do not take. See, e.g., *Mission Foods*, 350 NLRB 336, 337 (2007); *Daily News of Los Angeles,* 315 NLRB 1236, 1237 (1994), enfd. *73 F.3d* 406 (D.C. Cir. 1996), cert. denied 519, U.S. 1090 (1997). So, under their view, an employer is damned if it does and damned if it does not.[24]

[24] My colleagues go to great lengths to try to justify their inconsistent treatment of past practice as a "shield" against a unilateral change allegation with the General Counsel's use of past practice as a "sword" to force an employer to take an action. My colleagues' defense of this distinction "defies reason," to borrow their words. In defending the General Counsel's use of past practice, my colleagues posit that "the practice itself was a term and condition of employment, part of the status quo that the employer may not change unilaterally . . . ." An employer, on the other hand, cannot rely on past practice because the "practice of making unilateral changes [was] developed when there was no union and the employer was free to and did make *every* change unilaterally." These two positions are clearly contradictory. Employees' terms and conditions of employment cannot rise or fall simply based on who is making the argument.

Next, my colleagues mistakenly rely on their view that if the employer's actions involved "any" discretion, even if they were consistent with a past practice, this always means a change occurred requiring bargaining. In support of their position, my colleagues chiefly rely on the holding in *Amsterdam Printing & Litho Corp.*, 223 NLRB 370, 372 (1976), in which the Board rejected the employer's assertion that its

> unilateral changes [were] justified by past practice, as the practices of [employer] prior to the certification of the [u]nion do not relieve it of the obligation to consult with the certified [u]nion about the implementation of these practices as affecting the wages, hours, and other terms and conditions of employment of the unit employees.

Amsterdam, however, appeared to assume that the *implementation* of any changes involved *discretion* and was, therefore, subject to bargaining. In support of its holding, *Amsterdam* cites only to *Oneita Knitting Mills*, *Inc.*, 205 NLRB 500 (1973), in which the Board found that "[w]hat is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the *implementation* of that program (to the extent that *discretion* has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted." 205 NLRB at 500 fn.1 (emphasis added).[25] Indeed, in *800 River Road Operating Co., LLC d/b/a CareOne at New Milford*, 369 NLRB No. 109 (2020), the Board observed that the "Board has incorrectly interpreted *Oneita* in subsequent cases . . . as support for the proposition that *any* discretionary action taken, even if consistent with an established practice or policy, is a material change requiring bargaining under *Katz*." 369 NLRB No. 109, slip op. at 3 fn. 12.

In *Raytheon*, however, the Board correctly found there was no basis under either the Act or the Supreme Court's decision in *Katz* for applying a different standard to determine whether a past practice exists based upon the context under which the dispute arose. Specifically, in *Katz*, the employer was engaged in bargaining for an initial contract, and the Supreme Court held that the employer's unilateral actions would have been lawful if they were in line with its "long-standing practice." *Katz*, 369 U.S. at 746.[26] The *Raytheon* Board properly found that the restrictive *DuPont* standard, which my colleagues have effectively reinstated, erroneously created "multiple standards that parties would need to apply when evaluating whether a 'change' occurred." *Raytheon*, 365 NLRB No. 161, slip op. at 14 fn. 69. Accordingly, the *Raytheon* Board found that under *Katz*:

> when determining whether an employer's action constitutes a "change" and thus triggers the obligation to provide the union notice and the opportunity for bargaining, the only relevant factual question is whether the employer's action is similar in kind and degree to what the employer did in the past.

Id., slip op. at 13.[27] The Board further addressed this issue in *800 River Road*, 369 NLRB No. 109, slip op. at 5, where it observed that the Board has held that "*Katz* itself addressed employer actions taken after commencement of a bargaining relationship but before the parties have bargained to agreement or impasse, and the same bargaining principles apply as defined in *Raytheon*."

Moreover, I disagree with my colleagues that before *Raytheon*, "the Board consistently has held" that a past practice cannot justify unilateral action during bargaining for a first contract with a newly certified union. For instance, in *KDEN Broadcasting Co*., 225 NLRB 25, 35

Further, my colleagues reason that the different treatment is justified by the Board's policy to "to promote collective bargaining and avoid labor disputes." However, the majority's holding is not only contrary to *Katz* but would prevent employers from running its businesses while negotiating an initial contract. As set forth in *Raytheon* and further discussed above, under *Katz*, an employer unilaterally may implement changes "in line with [its] long-standing practice" because such changes constitute "a mere continuation of the status quo." 369 U.S. at 746. For instance, in *House of the Good Samaritan,* the Board found that by maintaining its past practice passing on a premium increase to employees that developed prior to the union's certification, the employer "maintained[ed] the status quo." 268 NLRB at 237.

[25] My colleagues contend that my point here "rest[s] on some imagined principle." And they claim that I ignore the "sampling of decisions" that they quote at length in support of their position. Yet, all but one of those cases cited by my colleagues expressly rely on *Amsterdam* and, as discussed above, *Amsterdam* solely relied on the discretion principle articulated in *Oneita*. Even the one decision that does not rely on *Amsterdam—Falcon Wheel Div., L.L.C.*—relies on the same discretion principle. 338 NLRB 576, 576-577 (2002) (citing *Adair Standish Corp*., 292 NLRB 890 fn. 1 (1989) ("However, because of the intervention of the bargaining representative, the [r]espondent could no longer continue unilaterally to exercise its *discretion* with respect to layoffs." (emphasis added)), enfd. in relevant part 912 F.2d 854, 863 (6th Cir. 1990)). Further, my colleagues effectively concede the point by arguing that it is employers' "unlimited"—i.e., completely discretionary—right to make changes pre-certification that should deprive them of the right to rely on past practice as a defense to post-certification actions.

[26] My colleagues argue that "[n]either logic nor law" supports applying the same standard to an employer's use of a precertification past practice as a defense to unilateral change as to a past practice that developed during a union's representation of employees. But *Katz* itself recognized the past practice defense where an employer was engaged in bargaining for an initial contract.

[27] My colleagues erroneously contend that *Raytheon* did not address whether an employer could rely on a precertification past practice as a defense to a unilateral change. Indeed, the *Raytheon* Board noted that "in *Katz*, the employer was engaged in bargaining for an initial contract, and the Supreme Court evaluated the employer's unilateral changes in comparison to other wage increases that occurred in the past . . . ." 365 NLRB No. 161, slip op. at 13.

(1976), the Board affirmed the judge's finding that an employer had a past practice of changing schedules that developed prior to the advent of the union. As stated in *KDEN Broadcasting*:

> The Board has clearly indicated that schedule and hour changes that are consistent with an employer's past practice are not violative of the Act. The rule is well reasoned because if an employer were prevented from operating in its normal routine fashion once a union is certified, it could bring the business to a grinding halt. A basic purpose of the Act is to encourage and promote industrial peace and it was never intended to bring about a cessation of production.

Id. In addition, in *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), enfd. 772 F.2d 421 (8th Cir. 1985), the Board found that following the union's certification, the employer could continue its past practice of paying one third of an insurance premium and requiring employees to pay the remaining two thirds that arose prior to the union's certification. See also *House of the Good Samaritan*, 268 NLRB at 237 (finding that the employer's unilateral conduct in passing on a premium increase to employees was consistent with its past practice prior to the union's certification); [28] *Kal-Die Casting Corp*., 221 NLRB 1068 (1975) (permitting production scheduling and adjustments relating to diminishing available hours of work based on a past practice developed prior to unionization).[29]

CONCLUSION

When the D.C. Circuit remands a case back for further consideration by the Board, the Board is bound by the scope of the court's remand. It is well established that, where remand instructions are narrowly tailored, as they were here, the Board is expected to follow them. It is also well established that, where those instructions include what precedent the Board is to apply upon remand, that law must be followed as the established law of the case. But most fundamentally, it is well established that the scope of a court's remand cannot exceed the scope of the issues presented to the court for consideration.

Unfortunately, my colleagues today cast these basic principles aside. In revisiting the merits of *Raytheon*, as requested by the General Counsel in her statement of position upon remand, they are addressing an argument not raised by any party—either before the Board or before the court. In fact, had the General Counsel attempted to raise this issue before the court, that argument would have been barred by Section 10(e) of the Act. This inconvenient fact, however, does not deter my colleagues.

My concurrence follows the D.C. Circuit's remand instructions. I have analyzed each of the five layoffs and concluded that the 2001 temporary layoff was similar to the 2018 layoff; that although the 2009 temporary layoff can be distinguished from the 2018 layoff, I will assume arguendo that it is similar enough to be included in the past practice analysis; that the 2015 permanent layoff was different in kind from the 2018 temporary layoff; and that the record does not contain sufficient evidence to conclude whether or not the layoffs in 2002 and 2003 were "materially similar" to the 2018 temporary layoff. I then considered each of the "materially similar" layoffs and determined that the Respondent failed to meet its burden to establish a past practice.

My colleagues have unquestionably exceeded the scope of the court's remand here by addressing the issue of whether *Raytheon* and *Mike-Sell's* should be overruled. Because that issue is not properly before the Board for consideration, my colleagues' attempt to use this remanded matter to overrule those cases must fail. Accordingly, although I concur in the result reached by my colleagues, it is clear to me that their musings regarding the

[28] My colleagues attempt to distinguish *House of the Good Samaritan* and *Luther Manor*, arguing that these cases are not contrary to precedent that holds that an employer cannot rely on precertification past practices as a defense to a unilateral change. My colleagues reason that *House of the Good Samaritan* "is not a case where an employer relied on a past practice . . . , but rather, a case where the General Counsel failed to prove that the status quo terms and conditions included a practice of covering all premium increases." They similarly argue that "*Luther Manor* is just another case where the Board determined that the status quo that must be maintained is a fixed ratio rather than an absolute amount." To begin, in *House of the Good Samaritan,* the Board found that by maintaining its past practice passing on a premium increase to employees, the employer "maintained[ed] the status quo." 268 NLRB at 237. And in *DuPont*, which my colleagues effectively seek to restore, the Board explained that the *Luther Manor* Board found that the employer did not violate 8(a)(5) because the employer acted "in accordance with [its] past practice of automatic change." 364 NLRB at 1654. Further, *DuPont* similarly cited *House of Good Samaritan*. 364 NLRB at 1655 fn. 22. Accordingly, it is clear that in both *House of the Good Samaritan* and *Luther Manor,* the Board permitted the respective employers to continue a past practice following the union's certification.

[29] My colleagues also attempt to minimize the Board's holdings in *KDEN Broadcasting* and *Kal-Die Casting* that the respective employers in those cases demonstrated a past practice that developed prior to the advent of the union. They argue that in *Mitchellace Inc*, 321 NLRB 191 (1996), the Board recognized that these cases were "exceptions to the usual rule." But in *Mitchellace*, the Board stated that "the *KDEN* and *Kal-Die* exceptions to the usual rule concerning the duty to bargain about schedule changes do not here govern." 321 NLRB at 195. And this is an accurate statement—past practice is an exception to the normal duty to bargain. Critically, the Board in *Mitchellace* did not say that these cases were exceptions to the holding my colleagues attempt to reinstate today: that a past practice cannot be used as a defense by an employer to justify unilateral action during bargaining for a first contract with a newly certified union. Nor did the Board in *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001), make any similar pronouncement, despite my colleagues' contention otherwise.

status of *Raytheon* and *Mike-Sells* not only hold no precedential value but are completely without effect.

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

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment by unilaterally laying you off.

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 make who were laid off whole for any loss of earnings and other benefits resulting from their unlawful layoffs, less any net interim earnings, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful layoffs, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate employees who were laid off, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for these individuals.

WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the corresponding W-2 forms reflecting the backpay awards for the laid off employees.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs, and WE WILL, within 3 days thereafter, notify in writing those laid off that this has been done and that the suspension and discharge will not be used against them in any way.

WENDT CORPORATION

The Board's decision can be found at https://www.nlrb.gov/case/03-CA-212225 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.