

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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E. I. DuPONT de NEMOURS & CO., INC.

and

Case 03-CA-090637

UNITED STEELWORKERS, LOCAL 6992

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**ANSWERING BRIEF IN OPPOSITION TO GENERAL COUNSEL'S EXCEPTIONS TO  
DECISION OF ADMINISTRATIVE LAW JUDGE STEVEN DAVIS**

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## **INTRODUCTION**

Respondent E. I. du Pont de Nemours and Company (hereinafter “DuPont” or the “Company”) submits this answering brief in opposition to Acting General Counsel’s Exceptions to the decision of Administrative Law Judge Steven Davis (“ALJ”) dated and filed on August 26, 2013.<sup>1</sup>

## **STATEMENT OF THE CASE**

The ALJ’s decision correctly recognized and rejected General Counsel’s unfounded attempt to “expand the remedies for Weingarten violations to include a make-whole order” in contravention of well-settled Board law. (ALJD 14:15-16.) The ALJ properly determined that “a make-whole order is not appropriate and would be contrary to Board law.” (ALJD 15:19-20.)

Assuming, *arguendo*, that a Weingarten violation occurred, the ALJ correctly applied the Board’s holding in Anheuser-Busch, Inc., 351 NLRB 644, 647 (2007) to preclude make-whole relief. It is undisputed that Smith was not discharged for asserting any purported right to union representation, that Smith was discharged for misconduct and for no other reason, and that DuPont’s actions regarding Smith did not involve any anti-union animus whatsoever. Thus, the Board’s holding in Anheuser-Busch, Inc. and its progeny preclude make-whole relief.

General Counsel’s improper attempt to expand Weingarten hinges on his complete disregard of Smith’s inconsistencies/dishonesty during numerous indisputably lawful discussions concerning his alleged accident. General Counsel disingenuously implies that Smith’s inconsistencies were isolated to two allegedly unlawful May 24 and June 1 Accident Interviews.<sup>2</sup>

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<sup>1</sup> Hereinafter cited as “ALJD \_\_\_:\_\_\_”.

<sup>2</sup> The term “May 24 Accident Interview” as used herein refers to the meeting attended by Joel Smith, Cheri Park, Barbara Pilmore and Michael Szymanski at approximately 8:30 p.m. on at Respondent’s Yerkes plant on May 24, 2012.

The term “June 1 Accident Interview” as used herein refers to the meeting attended by Joel Smith, Barbara Pilmore, Sharon Laskowski and Michael Szymanski at Respondent’s Yerkes plant on June 1, 2012 .

However, the ALJ determined and General Counsel agrees that “Smith was discharged for dishonesty because he allegedly gave inconsistent responses to questions asked **at his various interviews** during the investigative process.” (ALJD 14:45-47). Crucially, the General Counsel does not dispute the ALJ’s finding that Smith had at least five (5) discussions with co-workers, supervision and/or plant medical about his alleged accident before the May 24 Accident Interview and had another in-depth discussion with supervision about his alleged accident during the June 11 Meeting. The ALJ did not determine that any of these discussions were unlawful and the General Counsel did not except to the ALJ’s findings (or lack thereof) regarding these discussions.

General Counsel’s reliance on Advice Memoranda and Board precedent ordering or recommending make-whole relief based on anti-union animus or conduct that occurred solely at unlawful interviews is misplaced. Even if the ALJ correctly determined that DuPont learned of or obtained information regarding Smith’s dishonesty during the allegedly unlawful May 24 or June 1 Accident Interviews, Anheuser-Busch still precludes make-whole relief.

Make-whole relief is also unavailable under well-settled Board law because DuPont did not learn any new damaging information during the May 24 or June 1 Accident Interviews. Rather, DuPont obtained the information upon which Smith’s discharge was based from lawful sources separate from those two interviews and union representation would not have assisted Smith. Thus, make-whole relief is also inappropriate because there is no causal link between Smith’s discharge and any allegedly unlawful interview.

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The term “May 24 and June 1 Accident Interviews” as used herein refers collectively to the May 24 Accident Interview and the June 1 Accident Interview, as those terms are defined herein.

Last, General Counsel's objections to the proposed Cease and Desist Order are based its incorrect argument that make-whole relief should have been ordered. Thus, there is no basis for altering the form of the ALJ's proposed Cease and Desist Order.

Accordingly, the General Counsel's exceptions should be dismissed.

### **FACTS**

#### **A. Smith's Employment and Training.**

At the time of his discharge, Smith was a wind operator on D shift in the Tedlar<sup>®</sup> area of DuPont's Yerkes site located in Tonawanda, New York. (TR 56:18-57:2.)<sup>3</sup> On the evening of May 23-24, 2012, Smith worked on the "wind up" end of the Tedlar<sup>®</sup> process, where film is turned into a sheet, the wet trim is cut from the sheet, pulled off by a wind operator in the trim pit and placed in a vacuum tube for recycling. (TR 28:1-14, 47:19-24, 56:18-57:2.) The trim pit is underneath the area where the trim is cut and accessed by three grated steps with openings. (TR 28:15-29:12, 98:17-20, 104:5-7.) There is a north and south entrance to the trim pit, which is about 4 feet wide. (TR 29:14-4; 98:8-10.) The north and south side wind operators could access the pit by the respective stairs on each side at the same time. (TR 97:24-98:2.) A plastic mat was located at the bottom of the trim pit. (TR 103:19-104:3.)

Smith was scheduled to work from 7:30 p.m. on May 23, 2012 to 7:30 a.m. on May 24, 2012. (TR 157:25-158:4.) Smith's schedule at the time was four consecutive days on and four consecutive days off. (TR 158:5-15.) May 23-24, 2012 was the first of Smith's four consecutive days on for the new rotation and his first day returning to the wind up operation. (TR 119:22-120:7.) Smith previously completed 3 to 4 months of training for the wind up operator position in late 2011, although the normal training period is just seven weeks. (TR 54:8-25, 157:16-22.)

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<sup>3</sup> "TR" references refer to pages and lines of the hearing transcript from the April 15, 2013 hearing.

During his wind operator training, Smith was trained for 12 hours each day, or for all of each shift he worked. (TR 97:2-7.)

**B. Smith's Alleged Accident on May 24, 2012.**

On May 23-24, Smith was the north side wind operator, Dave Riester was the south side wind operator and Tim Eberle was the chipper and reliever. (TR 97:12-23.) At about 10:00 p.m. on May 23, supervisor Szymanski met with Smith, Riester and Eberle to review the status of production. (TR 101:13-21, 159:3-12.) Smith insisted at the hearing that he was not wearing any Band-Aids when he arrived at work that night or when he met with Szymanski, Riester and Eberle at the beginning of his shift. (TR 101:3-24.) Eberle and Riester – Smith's fellow Union members – both testified under oath before the Workers' Compensation Board, that Smith had bandages on his arms during the meeting. (TR 101:25-102:5, GC-4, pp. 38, 39, 53.) Szymanski testified that Smith wore two skin colored Band-Aids at the meeting and was even playing around with one of them. (TR 159:12-160:6.) At the Workers' Compensation hearing, Eberle testified that he noticed to Band-Aids because Smith was playing with them during the meeting. (GC-4, p. 56.)

It is undisputed that the May 23-24 shift was challenging for the Tedlar<sup>®</sup> line operators. There were more breaks in product than usual that evening. (TR 160:16-18.) However, wind operators receive four breaks per shift varying in length from 30 to 45 minutes each and Smith had already taken two breaks by midnight. (TR 99:25-100:7.)

Smith testified that he was involved in an incident which took place shortly after midnight on May 24. (TR 99:8-10.) Smith testified that he stepped up with his right foot, which slipped off of the steps while his left foot was on the ground. (TR 104:7-14.) Smith initially testified that he did not know if anyone was in the pit with him when he was allegedly injured, but then stated that Dave Riester may have also been in the pit. (TR 98:3-7.) After he allegedly

fell, Smith righted himself and briefly attended to the emergency he was responding to when he allegedly fell. (TR 100:8-12.)

Smith testified that he sought Szymanski out “just a couple of minutes” after the alleged accident when he noticed blood on the Tedlar® sheet, but Szymanski was not in his office. (TR 100:13-20.) Smith testified that he then went to put on a single Band-Aid which he had in his lunch pail. (TR 101:3-24.) Smith then went to get some air and shortly thereafter returned to Szymanski’s office and found him there with Dave Meredith. (TR 102:15-25.) Smith testified that 10-15 minutes had passed before Smith actually saw Szymanski. (TR 119:3-5.)

**C. Smith’s First Discussion With Szymanski Before the May 24 Accident Interview.**

Szymanski testified that Smith reported an injury to him at about 12:45 a.m. (TR 162:15-17.) It is undisputed that Smith did not request any union representation when he met with Szymanski, that Smith twice actively sought out Szymanski on his own and that Smith freely discussed the incident with Szymanski when Smith found him. (TR 100:8-20, 108:8-16.)

Smith testified that he pulled his Nomex suit down to show Szymanski his knee. (TR 103:2-13.) Smith testified that he wore shorts under his Nomex suit, so Szymanski and Meredith could see everything below his knee. (Id.) Smith testified that he told Szymanski that he slipped going up the steps from the trim pit, landed on his knee and threw his arms out to break his fall. (TR 103:14-18.) Smith testified that he also explained to Szymanski that he stepped up with his right foot, which slipped off of the steps while his left foot was on the ground. (TR 104:7-15.) Smith testified that he told Szymanski that he noticed his arm was cut when he noticed blood on the film. (TR 104:17-20.) Szymanski testified that Smith said he put Band-Aids on after the incident. (TR 187:4-8.)

Szymanski testified that Smith stated his knee hurt bad and was swollen. (TR 163:9-11, 164:20-24.) Szymanski observed Smith's knee from about 10 ft. away and did not notice any redness or swelling. (TR 165:2-18.) At the Workers' Compensation hearing, Riester testified that he spoke with Smith while Smith was getting air in the door way, and Smith stated that his knee was five times normal size. (GC-4, p. 43.) However, Riester saw Smith soon thereafter in Szymanski's office and viewed Smith's knee, which "just looked pretty much normal." (GC-4, p. 43.)

Smith and Szymanski testified that Szymanski gave him an ice pack to put on his knee and Smith soon thereafter moved the pack to his shoulder. (TR 104:24-105:3, 163:14-16.) Szymanski testified that he retrieved another ice pack for Smith's knee. (TR 163:15-17.) According to Smith, Szymanski did not give him any additional ice packs. (TR 10510:12.) Smith testified that he initially refused Szymanski's offer to go to the emergency room, but returned to Szymanski's office, on his own accord, about a half-hour later and accepted the offer. (TR 105:19-22.) Szymanski called a cab for Smith and drove Smith to the site gate. (TR 105:23-25.)

The line was down when Szymanski returned from escorting Smith to his cab. (TR 167:9-11.) Szymanski testified that he looked at the steps and the matted area at the bottom of the pit with Riester. (TR 167:11-15.) He and Riester looked but did not see any liquid of any nature and Szymanski put his foot on the stairs and did not find them to be slippery. (TR 167:14-16.) Per Company protocol, Szymanski called his supervisor, Barbara Pilmore, and informed her of the situation. (TR 168:14-169:3) Szymanski told Pilmore that Smith said he was in the pit, fell, hurt himself, that Smith was at the hospital and that Szymanski was waiting for Smith to come back. (TR 188:18-24.)

**D. Smith's Second Discussion With Szymanski Before the May 24 Accident Interview.**

Smith could not recall when he arrived at the Kenmore Mercy Hospital emergency room. (TR 106:1-4.) Smith testified that he was still wearing his shoes and Nomex suit when he arrived at the emergency room. (TR 106:5-11.) He previously threw his gauntlets (wrist to shoulder protection) where he left his gloves. (TR 106:12-18.) Smith's Band-Aid was not removed in the emergency room, as he testified that no one looked at his alleged wound. (TR 132:9-16.) Smith received ibuprofen and returned to the Plant from the emergency room at about 5:00 a.m. (TR 107:23-108:3.) Szymanski met Smith at the gate and drove him back to the wind operation. (TR 108:4-7.) Szymanski testified that Smith stated during the ride that his knee didn't really hurt much anymore, but that his shoulder was very sore. (TR 169:14-15.)

When they returned, Szymanski and Smith walked to his office, where Smith testified they further discussed how the accident occurred for about 10 minutes. (TR 108:8-12.) It is undisputed that Smith did not request any Union representation during this meeting. (TR 108:13-16.) Smith testified that he didn't "think" he returned with Szymanski to the location where the incident allegedly occurred and reenacted the incident for Szymanski. (TR 108:17-22.) Szymanski, however, testified that he had Smith put on his Nomex all the way and the two went down in the pit where Smith reenacted how he fell. (TR 170:1-16.)

Smith testified that Szymanski instructed Smith to report to plant medical at 7:00 a.m. (TR 109:13-20.) While Smith was in plant medical, Eberle and Riester approached Szymanski about the incident. (TR 194:1-23.) Riester stated that he did not recall Smith being in the pit with him. (Id.) Eberle stated that he asked Smith if something happened in the pit and Smith said "no, I've just got bad knees." (Id.)

**E. Smith's Discussion With Plant Medical Before the May 24 Accident Interview.**

Smith arrived at plant medical at about 6:45 a.m. (TR 110:11-13.) Smith testified that he spoke to the medical assistant at the reception desk first and then met with the assistant and the plant nurse. (TR 110:14-16, 111:1-6.) Smith provided the medical assistant and nurse with a description of how the alleged incident occurred. (TR 111:8-10.) Smith testified that they asked whether the floor was wet and Smith testified that he replied that he did not remember. (TR 111:11-16.) Smith testified he stated that there were sheets of trim covered with DMAC (a coating on the end of a Tedlar<sup>®</sup> roll) on the floor before the incident when they had encountered problems. (TR 111:17-21.) However, during his visit with plant medical, the medical assistant noted Smith's statements that the floor was wet and that his foot slipped off of the stair because of water. (CP-4, p. 4.) The medical assistant also noted Smith's statements that the area was soaked and water was everywhere at the time of the alleged accident. (Id.)

Smith was told to call his orthopedist and make an appointment which Smith did from plant medical. (TR 112:12-14) Smith testified that he called at around 7:30 a.m. and was able to reach the physician's office. (TR 112:19-20.) At the end of the visit with plant medical, the nurse told Smith that Cheri Park, plant safety specialist, wanted to speak with him. (TR 113:16-20, 217:21.) Park did not supervise Smith, or anyone else, and did not have the authority to hire, fire, transfer, promote, demote, recommend raises, etc. (TR 218:2-9.) Park was responsible for handling safety issues at the Site. (TR 218:10-14.)

**F. The May 24 Accident Interview.**

Smith testified that he went directly from plant medical to meet with Park and Szymanski, but could not recall whether Pilmore attended. (TR 113:21-114:2, 114:22-115:4, 115:5-8, 19-21.) Smith admitted that Park asked him the same questions Szymanski previously

asked when he and Smith met earlier, including whether there was film on the floor, what personal protective equipment he wore, why he was there, what he was leaving for, what the response was and whether Dave Riester was in the pit with him. (TR 118:14-20.) Importantly, Smith admitted that Park did not ask him anything that he had not already told Szymanski. (TR 118:21-23.) Szymanski's testimony confirmed that Smith provided the same responses during the meeting with Pilmore and Park as Smith previously provided when he met with Szymanski. (TR 206:18-207:18.) Although Smith testified that he had not taken his diabetes medication before the meeting (TR 77:23-78:7), Smith admitted that he did not mention anything to Park or Szymanski about his diabetes medication during this meeting. (TR 115:15-17.)

Smith testified that he stated he "would like a union rep with [him]" as he walked into the meeting. (TR 77:4-9.) When asked why at the hearing, Smith stated "[w]ell, the previous time I had her I got in trouble. So I just wanted someone there to advise me." (TR 77:10-14.) However, Ms. Park testified her involvement with the May 2011 accident was limited to inspecting the area with the supervisors who gathered preliminary information regarding the accident and assisting them with performing the root cause failure analysis. (222:20-223:17.)

According to Smith, Park responded to Smith's inquiry by stating that she just had a few questions for him. (TR 77:15-21.) Park and Szymanski contradicted Smith's account. Szymanski testified that Smith asked, at the beginning of the meeting, "do I need a union rep for this?" (TR 173:10-16.) Szymanski testified that he or Pilmore replied that he did not because the meeting was a regular, standard accident investigation. (TR 173:16-19.) Szymanski testified that Smith said "okay" and the meeting proceeded. (TR 173:20-25.)

According to Park, she began the meeting by stating that they were going to make a chronology based on information from Smith to fix any problems in the area. (TR 225:12-17.)

Park specifically stated “the sole purpose of this [meeting] is to prevent reoccurrence and we don’t want anybody else getting hurt.” (Id.) Park did not recall Smith asking for Union representation. (TR 225:18-21.) As Park testified, the purpose of the meeting with Smith was “to get a chronology of what happened from Joel, so that we could take a look at what happened and see if there was anything there that we could do and to ask further questions too, so that we could prevent reoccurrence.” (TR 224:12-16.)

During the meeting, Park took notes on a white board and a notepad. (TR 117:7-10.) Park or Pilmore asked for a chronology of how the incident happened and wrote Smith’s responses on the white board. (TR 116:18-117:6, 226:17-227:7.) The questions were in the nature of “tell us what went on” and “what happened next.” (TR 250:21-25.) Park testified that they did not confront Smith during the meeting, but rather wrote down what he said and asked for clarification when Smith stated that was not what he meant. (Id.)

Park submitted the flip charts to her supervisor, Sharon Laskowski, the Safety, Health and Environmental (“SHE”) manager, who made a verbatim summary from the charts because Park went on vacation. (TR 227:8-18, 260:3-8; R-2.) Park testified that the information reflected on R-2 is the information she recorded on the flip charts. (TR 228:13-16.) The times on R-2 are approximations, but the statements were not. (TR 230:22-231:4.) Park testified that there was no discussion about bandages or whether he was wearing his sleeves during the meeting. (TR 231:13-21.) Park testified that “there was really no aggression in the room whatsoever,” that Smith “seemed fine, calm” during the meeting, that he did not indicate that he was in any pain or that he needed a break at any time. (TR 232:9-14, 240:1-17.) Park and Pilmore interviewed Riester, Eberle and Carl Moeller that evening after the meeting to find out if

they possessed any further facts that might help prevent reoccurrence. (TR 232:18-233:8, 236:3-14.)

**G. The June 1 Accident Interview.**

After the incident, Smith was assigned to light duty and testified that he sat in a break room throughout his shift. (TR 131:4-9.) Smith did not provide any testimony about discussing the incident with anyone from management until June 1, 2012. (See TR 119:6-18, 124:1-7.)

Laskowski testified that she arranged this meeting because she had a few additional safety related questions after reading the chronology prepared by Park and Pilmore. (TR 261:10-15.)

Smith recalled that Laskowski and Pilmore attended for the Company, but did not remember Szymanski attending the meeting. (TR 119:6-18, 122:11-13.) Szymanski testified that his involvement with this meeting was retrieving sleeves and shoes from where Smith represented that they were. (TR 189:6-190:1, 215:21-216:1.) Szymanski was instructed to verify the kind of tread on the shoes, observed the shoes and found that they had the tread of very new shoes. (TR 192:2-20, 263:2-10.) Szymanski was also asked to look for Smith's sleeves, found one sleeve with a rip in it where Smith stated he left his sleeves, but the rip was horizontal whereas the blood showing through Smith's Band-Aid when Szymanski met with Smith earlier was vertical and the sleeves did not have Smith's name on them. (TR 209:1-1, 211:10-23, 212:21-23, 264:22-25.) Szymanski reported his observations to Laskowski and Pilmore and left the meeting. (TR 208:10-17.)

Crucially, it is undisputed that Smith did not ask for Union representation during the June 1 meeting. (TR 120:12-14, 261:16-18.) Moreover, Smith was never told that a Union representative could not attend this meeting with him. (TR 121:9-12.) Smith freely admitted that he had not spoken to a Union representative before this meeting because he had no reason to:

Q: Okay. Between the meeting with Cheri and the meeting with Sharon Laskowski, did you talk to your union representative?

A: No.

Q: Why not?

A: What was I going to talk to him about.

(TR 120:20-25.) Laskowski asked most of the questions during the meeting. (TR 261:25-262:1.) Smith admitted that the June 1 meeting was devoted mainly to blood borne pathogen concerns and how Smith disposed of his gloves and gurdas. (TR 121:17-20.) As Laskowski testified, most of her questions involved what PPE he was using at the time of the alleged incident. (TR 262:4-23.)

Although Smith claimed that he was agitated during the May 24 meeting, he conceded that he was not agitated during this meeting with Laskowski and Pilmore. (TR 122:20-123:2.) Laskowski echoed Smith's sentiment, as she recalled that Smith was "very pleasant, relaxed." (TR 261:19-21.)

#### **H. June 11 Meeting With Smith and Union Representative.**

Smith testified that he attended a meeting on or about June 11, 2012 with Paul Szulist and Szymanski (the "June 11 Meeting"). (TR 124:8-17.) Union representative Mark Khoury attended the meeting at the Company's request. (TR 125:1-6.) For the first time since the incident, the Company asked Smith about inconsistencies in his description of the incident to Szymanski and the circumstances surrounding the incident. (TR 90:5-91:2)

Szymanski testified that he was not previously suspicious of Smith (as he did not know him at the time of the incident (TR 205:4-5)), but noticed that something was not right when Smith's responses to Szulist's questions did not match with what Smith had first told Szymanski when he met with Smith on the night of May 24, 2012 and repeated during the May 24 Accident

Interview. (TR 206:7-207:7.) Smith admitted that Khoury asked Szulist several questions during the meeting. (TR 91:6-10.) The meeting lasted for approximately an hour. (TR 91:15-16.) Szulist wrote down everything and noted the several inconsistencies in Smith's shifting story. (TR 184:17-185:20, GC-6.) Smith even changed his story several times during just this meeting. (GC-6.)

**I. DuPont's Extensive Review Process Culminates in a Decision to Terminate Smith's Employment.**

Conni Krysiak, Employee Relations Supervisor, handles employee relations and discipline at the Plant. (TR 277:14-15, 278:9-12.) Krysiak became involved after the June 11 meeting. (TR 279:8-14.) Szulist and Pilmore shared the documentation from the June 11, 2012 meeting and the rest of the investigation with Krysiak. (TR 280:1-11.) Pursuant to Company practice, the area superintendent (in this case Pilmore) approached Krysiak with proposed discipline for what she believed was a serious act of misconduct. (TR 280:21-281:2, 282:6-21.) The first consideration for such a violation is always termination. (Id.)

DuPont followed its normal disciplinary policies and Ms. Pilmore assembled a "staff review" – a PowerPoint presentation that presents the facts from the investigation – and reviewed the information with her supervisor, then Tedlar<sup>®</sup> unit manager Tom Davis. (TR 281:7-13, 282:15-283:2, 300:12-21, CP-2.) Ms. Pilmore then made a presentation to site staff leadership – a team of about 15 individuals including Krysiak and the Plant Manager. (Id.) The presentation explained seven (7) inconsistencies in Smith's description of the alleged accident and with information collected from witnesses. (CP-2, pp. 3, 4.)

As Krysiak testified, to the extent CP-2 reflects any information from the May 24 Accident Interview, Smith previously shared that same information with Szymanski before the May 24 Accident Interview or the information otherwise came from sources other than Smith

(e.g. Smith's co-workers, emergency room records, site medical records, production records, etc.). (TR 285:17-292:16.)

Krysiak's testimony demonstrates that none of the information regarding the sources of the inconsistencies was discovered for the first time during the May 24 Accident Interview and/or June 1 Accident Interview:

- Inconsistency 1 regarding Smith's purported knee injury: Information regarding inconsistencies originally obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (TR 103:2-18; 104:24-105:3; 163:9-16; 164:20-24; 165:2-18), from Smith's co-workers (CP-4, p. 1), from emergency room and site medical records (GC-6, p. 4), and from the June 11 Meeting (GC-4, p. 2); (TR 285:17-286:23)
- Inconsistency 2 regarding Band-Aids: Information regarding inconsistencies originally obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (TR 159:12-160:6; 187:4-8), from information obtained from Smith's co-workers (TR 101:25-102:5; GC-4, pp. 38, 39, 53; CP-4, p. 1), and from the June 11 Meeting (GC-6, p. 3); (TR 286:24-287:9)
- Inconsistency 3 regarding Smith's breaks from work: Information regarding inconsistencies not reflected in Park's interview notes from May 24 Accident Interview (see R-2) and was otherwise obtained during the June 11 Meeting (GC-6, p. 1) and from production records and Szymanski's meetings with Smith before the May 24 Accident Interview (TR 287:10-288:3);
- Inconsistency 4 regarding:
  - blood/gloves: Information regarding inconsistencies not reflected in Park's interview notes from May 24 Accident Interview (see R-2) and was otherwise obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (TR 108:8-12; 167:11-19; 170:1-16; CP-4, p. 3), site medical records (CP-4, p. 4), and from the June 11 Meeting (GC-6, p. 2); (TR 288:4-289:6)

- presence of employees in pit with him at the time of the purported accident: Information regarding inconsistencies obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (TR 108:8-12; CP-4, p. 3), from interviews with Smith's co-workers (CP-4, p. 1) and from the June 11 Meeting (GC-6, p. 2); (TR 289:7-290:11)
- Inconsistency 5 regarding task Smith was performing at the time of the purported accident: Information regarding inconsistencies not reflected in Park's interview notes from May 24 Accident Interview (see R-2) and was otherwise obtained from Szymanski's meetings with Smith from before the May 24 Accident Interview (CP-4, p. 3; 108:8-12; 170:1-16); (TR 290:16-291:1)
- Inconsistency 6 regarding the conditions of the area where the purported accident occurred: Information regarding inconsistencies obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (CP-4, p. 3; 108:8-12; 170:1-16), site medical records and discussions with medical (CP-4, p. 4; 111:11-16), and from the June 11 Meeting (GC-6, p. 3); (TR 291:2-15)
- Inconsistency 7 regarding purported injury to shoulder: Information regarding inconsistencies not reflected in Park's interview notes from May 24 Accident Interview (see R-2) and otherwise obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (TR 104:24-105:3; 163:9-16; 164:20-24; CP-4, p. 3) and site medical records (CP-4, p. 4); (TR 292:5-292:16)

(TR 285:17-292:16.)

Each member of the staff review listened to the presentation and indicated whether they supported Pilmore's recommendation. (TR 284:14-25.) Pursuant to Company policy, the Plant Manager made the final decision and in this case, upheld the decision to terminate. (TR 284:22-285:6.) Smith was terminated for falsification of information in association with an investigation. (TR 285:7-13.)

## ARGUMENT

### POINT I

#### **THE ALJ CORRECTLY DETERMINED THAT MAKE-WHOLE RELIEF IS UNAVAILABLE EVEN ASSUMING, *ARGUENDO*, THAT A WEINGARTEN VIOLATION OCCURRED<sup>4</sup>**

**A. Make-Whole Relief is Unavailable Under the Controlling and Well-Settled Board Precedent Set Forth in Anheuser-Busch, Inc., 351 NLRB 644, 647 (2007).**

“[B]oth the Board and reviewing courts consistently have held that Section 10(c) precludes the Board from granting a make-whole remedy to employees disciplined for misconduct uncovered through an unlawfully-conducted investigatory interview.” Anheuser-Busch, Inc., 351 NLRB 644 (2007). Thus, “the Board does not order make-whole remedies for the *denial* of employees’ *Weingarten* rights.” Barnard College, 934 NLRB 934, 936, n. 12 (2003), citing Taracorp., Inc., 273 NLRB 221, 223 (1984) (emphasis in original). “The appropriate remedy for a *Weingarten* violation is an order requiring the employer to cease-and-desist from further such violations and to post a notice to that effect.” Id.

“A make-whole remedy is appropriate only if the General Counsel can prove an *additional* violation, i.e., that [an employee] w[as] disciplined, at least in part, for *asserting* their *Weingarten* rights.” Barnard College, 934 NLRB at 936 (citation omitted); see also, Taracorp., Inc., 273 NLRB 221, 223, n.12 (1984) (“A make-whole remedy can be appropriate in a *Weingarten* setting if, but only if, an employee is discharged or disciplined for asserting the right

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<sup>4</sup> DuPont filed cross-exceptions and a brief in support thereof, both dated October 24, 2013, which except to the ALJ’s finding that DuPont violated Smith’s purported rights under NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975) and its progeny. As set forth in the cross-exceptions and supporting brief, DuPont’s position is that Smith was not entitled to Weingarten protections during any of the allegedly unlawful interviews. Thus, Anheuser-Busch, Inc., 351 NLRB 644, 647 (2007) is inapplicable because there was no underlying Weingarten violation or other unlawful conduct. However, assuming, *arguendo*, that a Weingarten violation occurred, Anheuser-Busch, Inc. would still preclude make-whole relief. DuPont thus assumes for the limited purpose of responding to the General Counsel’s exceptions that a Weingarten violation occurred. DuPont does not hereby waive or otherwise limit any argument raised in its cross-exceptions by doing so.

to representation.”); United States Postal Service, 314 NLRB 227 (1994) (reversing ALJ order ordering expunction of discipline based on Weingarten violation where discipline was for cause, the violation was a denial of representation during interviews and “there was no demonstrated nexus between the wrongful denial of representation and the subsequent discipline”).

The ALJ properly determined that here, “a make-whole order is not appropriate and would be contrary to Board law.” (ALJD 14:19-20.) The ALJ relied on the Board’s decision in Anheuser-Busch, Inc., 351 NLRB 644 (2007). (ALJD 13-14.)

In Anheuser-Busch, the Board painstakingly explained the reasoning behind its long-held position that Section 10(c)<sup>5</sup> precludes ordering make-whole relief for a Weingarten violation where the employee was terminated for cause. The Board held that make-whole relief is not available where an employer disciplines an employee for cause, even if the underlying misconduct is detected through unlawfully implemented means. Id. at 645. The Board thus refused to order make-whole relief for employees who were discharged because of undisputed misconduct revealed by unlawfully installed surveillance cameras. Id. at 646-47.

As the Board noted in Anheuser-Busch, “both the Board and reviewing courts consistently have held that Section 10(c) precludes the Board from granting a make-whole remedy to employees disciplined for misconduct uncovered through an unlawfully-conducted investigatory interview.” Id. at 646 (citing Board and U.S. Circuit Court of Appeals precedent). “[T]he reason for the discipline is not that the employee engaged in union or other protected concerted activities. Rather . . . the employee is disciplined for actions the employer considers to be misconduct, i.e., the discharge or suspension is ‘for cause.’” Id. at 646.

The General Counsel does not attempt to distinguish Anheuser-Busch, which precludes make-whole relief here. The ALJ properly determined and the General Counsel does not dispute

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<sup>5</sup> 29 U.S.C. 160(c).

that **there is no allegation and no proof that Smith was discharged for asserting his right to union representation at the interviews.**” (ALJD 14: 12-13) (emphasis added). The ALJ also properly determined and the General Counsel also does not dispute that **“Smith . . . was discharged for misconduct and for no other reason”** and **“there is no evidence that [DuPont] possessed antiunion animus toward Smith.”** (ALJD 14:42-43) (emphasis added). As the ALJ noted, “[a] make-whole remedy would apply only if the employee was discharged for asserting his right to representation.” (ALJD 14:11-12.) Under well-settled Board law, make-whole relief is clearly unavailable. (ALJD 14-15.)

The General Counsel ignores this well-settled precedent and “seeks to expand the remedies for Weingarten violations to include a make-whole order . . .” (ALJD 14:15-16.) The General Counsel incorrectly argues that Smith “was terminated because of his conduct (inconsistent recall) during the unlawful interrogations.” (GC Brief, pp. 17.) General Counsel conveniently ignores Smith’s inconsistent responses (i.e., dishonesty) during several indisputably lawful interviews which occurred both before and after any alleged unlawful interview.

The General Counsel concedes “the ALJ appropriately determined that ‘Smith was discharged for dishonesty because he allegedly gave inconsistent responses to questions asked **at his various interviews** during the investigative process.” (GC Brief, p. 19) (emphasis added). The ALJ properly determined that Smith had at least five (5) discussions with co-workers, supervision and/or plant medical about his alleged accident before the May 24 Accident Interview (i.e., two discussions with Szymanski, a discussion with Eberle, a discussion with Riester, and a discussion with plant medical). (ALJD 3:33-45; 4:21-39.) The ALJ also noted Smith’s several inconsistencies during the lengthy June 11 Meeting. (ALJD 7:37-9:15.) The ALJ did not determine that any of these interviews were unlawful. (See ALJD.) The General

Counsel did not file any exceptions regarding the ALJ's determinations (or lack thereof) regarding these interviews and cannot now dispute those findings.

Moreover, the testimony and documentary evidence demonstrate that Smith's dishonesty/inconsistent responses originally occurred (i) during Smith's five (5) discussions before the May 24 Accident Interview, or (ii) during the indisputably lawful June 11 interview. (TR 285:17-292:16; GC-6, p. 3, 4.) At most, Smith merely repeated his prior representations during the May 24 and/or June 1 Accident Interviews. (TR 285:17-292:16; GC-6, p. 3, 4.)

Thus, the ALJ determined that Smith was (at most) discharged "based on information obtained during" the allegedly unlawful May 24 and/or June 1 Accident Interviews. (ALJD 14:25) (emphasis added). The ALJ determined that (at most) DuPont learned of Smith's misconduct (i.e., dishonesty) during the May 24 and/or June 1 Accident Interviews. (ALJD 14:26-29.) Therefore, Anheuser-Busch and Section 10(c) preclude any order of reinstatement or other make-whole relief. See, Anheuser-Busch, Inc., 351 NLRB at 648, 650 (holding that Section 10(c) precludes the Board from granting make-whole relief where the employee is discharged for cause and the employer "*learns of* misconduct through unlawful means" or discipline is "based on information *obtained during* the [unlawful] interviews") (emphasis added).

General Counsel's reliance on Advice Memoranda is misplaced. As the ALJ noted (ALJD 14:19-20), Advice Memoranda have no precedential weight, are not controlling as to the Board's view of the law and may freely be rejected by an Administrative Law Judge. See e.g., Dresser-Rand Co., 358 NLRB No. 97, at 5, fn. 4 (2012) (declining to consider an Advice Memorandum and noting General Counsel's argument that "advice memoranda are not

controlling as to the Board's view of the law, but are statements of positions taken by the General Counsel, and the reasons therefor").

Moreover, Smith's inconsistent statements during numerous indisputably lawful discussions separate this case from the cases discussed in the Advice Memoranda. Dishonest/inconsistent statements did not occur outside of the allegedly unlawful interview in Birds Eye Foods. Advice Memorandum in Birds Eye Foods, Case 03-CA-26833 (employee confronted during unlawful interview about misconduct which had been caught on camera denied that the misconduct had occurred and was discharged based on his misconduct and his dishonesty). The Advice Memoranda in National Rehabilitation Hospital, Case 5-CA-24870 and Cinevue, Inc., d/b/a The Lusty Lady, Case 19-CA-26979 involve completely different factual scenarios. The employees in those cases were discharged based on "irate" or other inappropriate misbehavior during the allegedly unlawful interviews.<sup>6</sup> Thus, the Advice Memoranda on which General Counsel relies are inapposite and were properly rejected by the ALJ.

As the ALJ correctly determined, the General Counsel's reliance on Supershuttle of Orange County, Inc., 339 NLRB 1 (2003) is also misplaced. (ALJD 14:31-43.) The ALJ correctly noted that the entire investigatory process and resulting discipline in Supershuttle were caused by anti-union animus. (ALJD 14:31-36; see also, Supershuttle, 339 NLRB at 2 ("[T]he entire disciplinary procedure seems to have been shaped by [the manager's] concern about a notorious union adversary.")) Again, there is no evidence whatsoever of antiunion animus in this case. (ALJD 14:42-43; cf. Supershuttle, 339 NLRB at 1 ("[The employee's] false statements in those reports constituted misconduct only in the context of Respondent's tainted investigation."))

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<sup>6</sup> In The Lusty Lady, the allegedly unlawful interview was prompted by misconduct, but "there was no evidence indicating that, absent the Charging Party's conduct during the meeting, termination would have resulted. To the contrary, the Employer discharged the Charging Party during the meeting in a contemporaneous reaction to her meeting conduct."

The ALJ also noted that the discharge in Supershuttle “**was not based on misconduct uncovered by the investigation**, but rather on misconduct that was triggered by and elicited during the tainted investigation” and the Board thus “conclude[ed] that ‘there [was] a direct connection between [the manager’s] antiunion animus and [the employee’s] discharge.’” (ALJD 14: 36-40) (emphasis added).

Here, the ALJ determined that Smith’s discharge was based on misconduct obtained or learned during the investigation (ALJD 14:25-29, 45-47). The ALJ did not determine that Smith’s discharge was based on misconduct triggered by or elicited during the May 24 or June 1 Accident Interviews. (See id.) The ALJ’s determination is supported by his correct finding that Smith had five (5) lawful discussions about his purported accident before the May 24 Accident Interview and another lengthy lawful discussion about his purported accident during the June 1 Meeting. (ALJD 3:33-45; 4:21-39; 7:37-9:15.) Per the ALJ’s determination, Anheuser-Busch is controlling, not Supershuttle.

Closer analysis of Supershuttle confirms it has no bearing on this case. The Respondent in Supershuttle “[d]id not contend that it discharged [the employee] for the misconduct that was the subject of the tainted investigation,” as it was undisputed that such misconduct was not a dischargeable offense. Id. at 1-2. Rather, the Respondent in Supershuttle “relied solely on” the misconduct triggered by and elicited during the tainted investigation – the dischargeable offense. Id. at 3. Thus, “the only claimed basis for his discharge . . . did not exist independently of the unlawfully motivated investigation.” Id. Here, Smith’s numerous lawful conversations and inconsistent statements about his purported accident provided an independent basis for his discharge. (See ALJD 3:33-45, 4:21-39, 7:37-9:15; TR 285:17-292:16; GC-6, p. 3, 4.)

The other cases on which the General Counsel relies – Kolkka Tables & Finish American Saunas, 335 NLRB 844 (2001) and Business Products-Division of Kiddie, Inc., 294 NLRB 840 (1989) – are similarly distinguishable. In Anheuser-Busch, the Board distinguished those cases from cases (like this case and Anheuser-Busch) in which misconduct was uncovered or learned of (and not triggered) through unlawful means. 644 NLRB 649, n. 18. Thus, the Board noted that Business Products-Division of Kiddie, Inc. involved discipline for conduct which the employer investigated using unlawfully motivated examinations only after employees began union activities. *Id.*, citing Business Products-Division of Kiddie, Inc., 294 NLRB at 840 fn. 3. The Board also noted that Kolkka Tables & Finish American Saunas involved discipline that was provoked by the employer’s unfair labor practice, i.e., employee’s discipline for refusal to leave the plant after being unlawfully directed to remove pro-union stickers and suspended and directed to leave the plant based on the refusal. *Id.*, citing Kolkka Tables & Finish American Saunas, 335 NLRB at 849-51.

In short, the Smith’s inconsistencies during his numerous and indisputably lawful discussions both before and after the May 24 and June 1 Accident Interviews undercut the General Counsel’s exceptions. As the ALJ correctly determined, “a make-whole order is not appropriate and would be contrary to Board law.” (ALJD 15:19-20.) Smith cannot receive any make-whole relief.

**B. Make-Whole Relief Is *Also* Unavailable Because There Is No Connection Between The Alleged Weingarten Violation And Discipline Ultimately Imposed Upon Smith.**

Where “the [allegedly] unlawful interview produced no information other than that which [the Employer] already possessed, [the Board] will issue only a cease-and-desist order.”

Houston Coca Cola Bottling Co., 265 NLRB 1488, 1489 (1982). In other words, reinstatement and back pay are unavailable where no new damaging information is revealed during an

unlawful interview. See id.; see also, Pacific Telephone and Telegraph Co., 262 NLRB 1034 (1982), order enf'd, Pacific Tel. & Tel. Co. v. NLRB, 711 F.2d 134 (9th Cir. 1983); Radisson Muehleback Hotel, 273 NLRB 1464 (1985).

The Board's decision in Houston Coca Cola Bottling Co. is on point. There, the Board rejected the ALJ's recommendation that reinstatement was the proper remedy for the Weingarten violation. Id. at 1488. General Counsel established that an unlawful interview occurred and that the employee was discharged for conduct that was the subject of the interview. Id. During the unlawful interview, the employer asked the employee to explain why he left his post without permission and whether he knew that he entered a restricted area. Id. The employee provided his explanation, which reiterated his statement to his supervisor from the previous day that he did not know how product was put in his forklift. Id. The Board found that the explanation "amounted to nothing more than what Respondent already knew," as "[n]o additional damaging information was obtained." Id. at 1488-89.

The Board determined that a make-whole remedy was inappropriate and issued only a cease-and-desist order. Id. at 1489. Importantly, the Board noted:

[T]he mere fact that discipline is imposed for misconduct which was the subject of a *Weingarten* violative interview does not irrefutably establish the required casual [sic] link between the interview and the discipline. To hold otherwise would render meaningless any attempt by respondent to establish that it did not rely on any information obtained during an unlawful interview in deciding to interview an employee . . . Since Ross was discharged for cause and the unlawful interview produced no information other than that which Respondent already possessed, we will issue only a cease-and-desist order.

Id. at 1489.

The Board has refused to order reinstatement in other cases where the employer did not learn any new information during the unlawful interview. For instance, in Pacific Telephone and

Telegraph Co., 262 NLRB 1034 (1982) the Board adopted the ALJ's recommendation that reinstatement was inappropriate for the employer's Weingarten violation. The employer violated two employees' Weingarten rights by denying their requests to consult with union representatives before interviews concerning improper long distance calls. Id. at 1036, 1038. The employer knew the information on which the decision to discharge was based before the interviews – the employer did not obtain any further information during the interviews. Id. at 1038. The ALJ thus determined that the employer's decision to discharge was not based on any information obtained during the unlawful interviews. Id. The Board affirmed, "satisfied that the discharges were based on information other than that obtained during the unlawful interviews." Id. at 1034.

In Radisson Muehlbach Hotel, 273 NLRB 1464 (1985) the Board adopted the ALJ's recommendation that a cease-and-desist order be issued for the employer's Weingarten violation. The ALJ determined that the employer violated employee Grimes's Weingarten rights by denying his request for representation during an interview concerning whether suspension was appropriate. Id. at 1477-78. During the interview, however, Grimes merely corroborated another witness's account and denied bad intent, "add[ing] nothing to Respondent's knowledge." Id. at 1481. Because "Respondent learned nothing it did not already know from its unlawful interview of Grimes . . . . the appropriate and proper remedy [was] the standard cease-and-desist order . . ." Id. at 1481. The Board adopted the ALJ's recommendation in this respect. Id. at 1464-65.

The foregoing cases demonstrate the impropriety of a reinstatement remedy for any alleged Weingarten violation during the May 24 and June 1 Accident Interviews. Like the employers in the above cases, DuPont did not learn any of the information that the discharge was

based on (CP-2, pp. 3, 4) for the first time during the allegedly unlawful interviews (here, the May 24 and June 1 Accident Interviews). Rather, DuPont first obtained this information by lawful means, or more specifically, through (i) Smith's conversations with Szymanski on May 24 before the May 24 Accident Interview, (ii) Smith's conversations with his co-workers before the May 24 Accident Interview, (iii) Smith's conversations with plant medical before the May 24 Accident Review, (iv) production records, and (v) Smith's statements during the June 11 Meeting (during which it is undisputed that he had Union representation). (285:17-292:16; GC-6, p. 3, 4; see also, pp. 14 - 15, supra.)

Thus, all of the inconsistencies which formed to basis for Smith's termination (CP-2, pp. 3-4) were either disclosed for the first time via lawful sources and repeated during May 24 and/or June 1 Accident Interviews or were not discussed at all during the May 24 and/or June 1 Accident interviews. (121:17-20; 262:4-23; 285:17-292:16; GC-6, p. 3, 4; R-2; see also, pp. 14 - 15, supra.) A termination based on such lawfully obtained information does not magically become tainted merely because Smith may have repeated the information during the May 24 or June 1 Accident Interviews. See e.g., Houston Coca Cola Bottling Co. 265 NLRB at 1488-89 (holding that employer learned no new information during the unlawful interview despite the fact that employee repeated his statement from the prior day to his supervisor that he did not know how product was put in his forklift).

Thus, even assuming, *arguendo*, that the May 24 and June 1 Interviews were unlawful (which they were not), the undisputable facts show there is no causal link between those interviews and the termination. Thus, make-whole relief is not available. See, Houston Coca Cola Bottling Co., supra, Pacific Telephone and Telegraph Co., supra, Radisson Muehlbach Hotel, supra.

Moreover, the fact that Union representation could not have improved Smith's position during the May 24 or June 1 Accident Interview demonstrates that any alleged denial of Smith's Weingarten rights had nothing to do with his ultimate discipline.

A Union representative could have advised Smith to (i) refuse to provide answers, (ii) provide the same answers that Smith previously provided to Szymanski and others before the May 24 Accident Interview or (iii) provide different answers than Smith previously provided to Szymanski and others. If Smith was instructed in accordance with (i) or (ii) above, Smith would have been in the same position that he was in after completing the May 24 Accident Interview without Union representation (i.e., the Company would have had only the information Smith previously provided to Szymanski). If Smith was instructed in accordance with (iii) above, he would have revealed prior dishonesty. (Indeed, this was the result during the June 11 Meeting. See, GC-6.)

Union representation during the May 24 or June 1 Accident Interviews could not have improved Smith's position. Thus, there can be no causal link between Smith's discharge and any allegedly unlawful interview. Make-whole relief is, therefore, unavailable.

Accordingly, any alleged denial of Smith's Weingarten rights during the May 24 or June 1 Accident Interviews was not factor in his discipline and make-whole relief is, therefore, unavailable.

## POINT II

### **THE ALJ CORRECTLY FASHIONED THE CEASE AND DESIST ORDER ASSUMING, *ARGUENDO*, THAT A WEINGARTEN VIOLATION OCCURRED**

As set forth above, the ALJ properly determined that make-whole relief would be contrary to Board law. The General Counsel's exceptions to the form of the proposed Cease and Desist Order are based on its incorrect argument that make-whole relief is appropriate. Thus, there is no basis for altering the form of the ALJ's proposed Cease and Desist Order.

### **CONCLUSION**

Based on the foregoing, DuPont respectfully submits that the General Counsel's Exceptions must be dismissed in their entirety.

Dated: Buffalo, New York  
October 24, 2013

PHILLIPS LYTLE LLP

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**STATEMENT OF SERVICE**

I hereby certify that on October 24, 2013, I caused to be electronically filed the ***Answering Brief in Opposition to General Counsel's Exceptions to Decision of Administrative Law Steven Davis*** on Behalf of E. I. du Pont de Nemours and Company in Case No. 03-CA-090637 to the National Labor Relations Board using the NLRB E-Filing system, and I hereby certify that I provided the same document via electronic mail (e-mail) to the following individuals:

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