BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and **CASE 03-CA-090637**

UNITED STEELWORKERS, LOCAL 6992

GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF IN OPPOSITION TO GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. Introduction

The General Counsel herein seeks to reply only to those portions of Respondent's brief that warrant a response. The record contains all of the evidence, argument and case law necessary for the Board to find that Administrative Law Judge Davis erred in failing to provide a make-whole remedy to Respondent's employee Joel Smith as a result of Respondent's violations of Section 8(a)(1) of the Act.[1]

In its brief, Respondent misconstrues controlling case law and the administrative record, including the ALJ's decision. As such, the General Counsel respectfully requests that the Board examine the relevant case law and the administrative record in its entirety and base its findings on the evidence therein.

II. Smith was terminated as a result of alleged misconduct that occurred during an unlawful Weingarten interview.

Respondent's claim that it obtained all of the information it needed to terminate Smith from "lawful" discussions with witnesses and Smith, and its one lawful interview of Smith on

[1] The ALJ appropriately determined that Respondent violated Section 8(a)(1) of the Act by denying employee Joel Smith's request for union representation on May 24 and June 1, 2012.

June 11, is simply not supported by the administrative record. Counsel for the General Counsel has previously, in great detail, demonstrated that Respondent used statements made by Smith during the unlawful interrogations on May 24 and June 1 to determine that Smith had been untruthful, and that Respondent used information obtained during these unlawful interviews in framing its continuing investigation.

Importantly, documentary evidence created by Respondent during the investigation that led to Smith's termination fully supports Counsel for the General Counsel's claim. The written presentation, created by Respondent Area Superintendant Barb Pilmore in support of her recommendation to terminate Smith, states that some of the information relied upon in making the termination recommendation was collected during the May 24 and June 1 interrogations. In fact, the written presentation lists numerous inconsistencies that Respondent learned from questioning Smith during the May 24 and June 1 interrogations, including: which gloves Smith used to wipe the blood away and what he did with the gloves; inconsistencies regarding whether there was anyone with Smith in the trim pit when he fell; inconsistencies regarding what roll of film Smith was working with at the time of the accident; whether Smith was standing on wet film and whether the floor was wet; and the manner in which Smith fell. (ALJD at 9-10; Tr. 300-302; CP Ex. 2).

Regarding how the inconsistencies were uncovered, the presentation notes that "[e]mployee was interviewed the morning of the incident (May 24). Follow-up interviews with the employee were conducted 6/1 and 6/11. Additional interviews were conducted with FLS, 2 coworkers and site medical on date of incident. There were multiple inconsistencies in Joel's own description of the event and with information collected from others that were involved." (emphasis added). (ALJD at 9; CP Ex. 2).

Further, the termination letter that was written by Respondent and issued to Smith notes that Smith was terminated for "giving false or incomplete information …in connection with management investigations." It is notable that Pilmore attended both the May 24 and June 1 interrogation sessions, that she did not speak to Smith on any other occasion about his injury, and that she was the sole author of the recommendation to terminate Smith. (Tr. 280-285, 301-302, 307; GC Ex. 3, CP Ex. 2).

Additionally, during the June 11 meeting (at which a union representative was present), Smith was confronted with nine groups of questions that clearly challenged the validity of the statements he made during the May 24 and June 1 interrogations. Several of the questions referenced responses Smith provided during the May 24 or June 1 interrogations and compared them to other statements Smith made during those interviews, or to statements Smith made outside of those interviews, clearly evidencing that Respondent used information obtained during the unlawful interrogations against Smith. In fact, the first five groups of questions specifically referenced statements Smith made during either the May 24 and June 1 interrogations, and asked Smith to rationalize those statements in the face of other evidence obtained by Respondent. The other four groups of questions did not specifically refer to statements made in the two initial interrogations but were in fact previously discussed with Smith during the May 24 and/or June 1 interrogation sessions. Despite Respondent's claim to the contrary, a review of Respondent's notes of Smith's responses from the June 11 interrogation fails to reveal any evidence that Respondent obtained new information from Smith during the June 11 interrogation. (GC Ex. 6).

Respondent's position statement to the Region (provided during the initial investigation) specifically points to several alleged inconsistencies in Smith's statements throughout the

investigation. Respondent learned of a majority of those inconsistencies as a result of the unlawful interrogations of Smith on May 24 and June 1. (GC Ex. 8)

Counsel for the General Counsel does not dispute that Respondent learned some information about the circumstances surrounding Smith's injury outside of the May 24 and June 1 interrogations as a result of Smith's conversations with management, plant medical and coworkers prior to the May 24 meeting. However, Respondent greatly exaggerates the length of these conversations and the information it obtained during these conversations. In fact, the record reflects that during these rather brief conversations, Smith did not reveal great detail about the circumstances surrounding his accident. (ALJD at 3-4; Tr. 68-75, 164-166, 169-170, 232, 236, 244-245; GC Ex. 7; CP Ex. 3).

It should first be noted that the May 24 and June 1 interrogation sessions lasted a combined 150 minutes, during which time Smith was asked countless questions about the specific circumstances surrounding his injury. Purely based on the length of the interviews, there is no doubt that these sessions comprised a substantial portion of information obtained by Respondent about Smith's injury. As noted below, Smith's conversations with other employees were much shorter, more focused on Smith's health than the circumstances of his injury, and lacked the specificity of the May 24 and June 1 interrogation sessions. (Tr. 81, 88).

Though Respondent claims that Supervisor Mike Szymanski spoke with Smith on several occasions following the injury, the record reflects that during only one of those instances, for about ten minutes, did Szymanski and Smith discuss in any detail the circumstances surrounding Smith's injury. Smith refuted Szymanski's testimony that the two returned to the scene of the accident to demonstrate what had occurred. (ALJD at 3-4; Tr. 69-73, 164-166, 169-170).

Smith's discussions with receptionist Shannon Thomas and nurse Charlene Hanson in the Yerkes Plant medical office immediately prior to the initial May 24 interrogation were similarly brief. His visit to the medical office lasted no more than 20 to 30 minutes, during which he was in great deal of pain. Hanson performed numerous range of motion exercises to determine the extent of Smith's injury. The record reflects that during that time, the two engaged in some conversation about the circumstances surrounding Smith's injury. The ALJ found that Smith explained how he fell, and stated that the floor may have been wet. It is notable that Respondent failed to call either Thomas or Hanson to testify regarding their interactions with Smith. (ALJD at 4; Tr. 74-75).

Smith's discussions with employees Eberle and Reister, which occurred immediately after his fall, were extremely brief, solely regarding whether or not Smith was OK, and were wholly unrelated to the circumstances surrounding his injury. Respondent interviewed Eberle and Reister only after first meeting with Smith, and the record reflects that the purpose of those meetings was to fact-check the information it had already garnered from Smith. Respondent safety, health and environmental manager Sharon Laskowski ordered Pilmore to interview Eberle and Reister after comparing the notes of the Smith's May 24 interrogation with the notes summarizing Szymanski's, Thomas' and Hanson's notes of their interactions with Smith immediately after his injury. Reister's recollection of the events in question essentially confirmed Smith's recollection of the events (the lone exception being that Reister did not see Smith fall). Eberle had very little information to provide. He saw Smith limping, and Smith told him that he had hurt his knee. Notably, this was consistent with Smith's recollection of the events. The record further reveals that Respondent compared the information provided by Eberle

and Reister to the information provided by Smith during the May 24 interrogation, in preparation for the June 1 interrogation of Smith. (Tr. 68, 232, 236, 244-245; GC Ex. 7; CP Ex. 3).

The record reveals that Respondent did not solely use the information obtained from these interactions to terminate Smith. Indeed, if those outside interviews provided enough ammunition to terminate Smith, then there would have been no need to interrogate Smith on three separate occasions about the circumstances surrounding his injury. (ALJD at 3-4; Tr. 68-75, 164-166, 169-170, 232, 236, 244-245; GC Ex. 7; CP Ex. 3).

Even more importantly, Smith was not terminated because of what happened on the line. Indeed, Smith's termination letter indicates that he was terminated not because of the circumstances surrounding his injury, but because he allegedly provided "false or incomplete information" about the circumstances surrounding his injury. As such, the record clearly reflects that the allegedly inconsistent statements made by Smith during the May 24 and June 1 interrogations caused Respondent to terminate Smith. Any argument to the contrary by Respondent is simply without merit. (GC Ex. 3).

In sum, the record demonstrates that Respondent relied heavily on information it obtained during the May 24 and June 1 interviews in terminating Smith for providing false or incomplete information about his injury. According, it is wholly disingenuous and contrary to the weight of the evidence for Respondent to argue that it obtained all of the information it needed to terminate Smith outside of the May 24 and June 1 interrogation sessions.

III. The Board has <u>never</u> held that make-whole relief is unavailable under the circumstances at bar.

In its brief, Respondent erroneously claims that "controlling and well-settled Board precedent" bars a make-whole remedy for an employee terminated for misconduct during an unlawful Weingarten interview. In support of this inaccurate assertion, Respondent cites

inapposite precedent which stands for the well-established principal that make-whole relief is not available to an employee disciplined for prior misconduct detected during a subsequent unlawful investigatory interview. *See* Anheuser-Busch, Inc., 351 NLRB 644 (2007). That precedent is simply not applicable to the instant matter.

As noted above, the record reflects that Smith was not terminated as a result of misconduct that was uncovered as a result of the unlawful interrogations, but rather, alleged misconduct that occurred during the unlawful interrogations sessions. Not a single case cited by Respondent in its brief stands for the principal that make-whole relief is not available to an employee under those circumstances. In fact, a review of relevant Board case law illustrates that while the Board has never considered such a fact pattern, the Board would consider a make-whole remedy under these circumstances. In Supershuttle of Orange County, 339 NLRB 1 (2003), the Board unequivocally held that an employee terminated because he gave false statements during an unlawfully motivated investigation was entitled to a make-whole remedy because "the discharge…was not based on misconduct uncovered by the investigation, but rather, misconduct that was triggered by and elicited during the investigation." Id. at 3. Further, as previously noted by the General Counsel in earlier briefs, the Division of Advice, in Birds Eye Foods, *specifically* held that because an "employer's Weingarten violation was…a proximate cause of the Charging Party's misconduct during the interview" the terminated employee was entitled to backpay and reinstatement. Birds Eye Foods, Case 03-CA-26833, Advice Memorandum dated February 3, 2010 (emphasis added). Applying the rationale of both the Board and the Division of Advice to the instant matter, regardless of Respondent's motivation for subjecting Smith to multiple unlawful interrogation sessions, because Smith was clearly

terminated as a result of the his alleged dishonesty during those sessions, he is entitled to backpay and reinstatement.

Respondent cites Houston Coca-Cola Bottling Co., 265 NLRB 1488 (1982), in support of its contention that Smith is not entitled to a make-whole remedy. In Houston Coca-Cola Bottling, a supervisor caught an employee with a package of product in a restricted area. The next day, the employee was asked to attend a meeting. On the way to the meeting, he requested the presence of a union representative. After waiting while two members of management conferred, the employee was called into the meeting, asked why he left his post without permission and if he knew that he had been in a restricted area, and was then terminated. The Board determined that the employer had committed a Weingarten violation by refusing to grant his request for union representation, and that the employee was terminated for "conduct that was the subject of the interview." Id. at 1488. The Board further determined that, even though the employee was not terminated until after he provided an explanation as to what occurred, because the employee's "'story' amounted to nothing more than what [the employer] already knew – that he was in a restricted area with a case of product," the employee was not entitled to a make-whole remedy. Id. at 1488-1489.

Houston Coca-Cola Bottling Co. is simply not applicable to the instant matter. First of all, unlike the employee in Coca-Cola, Smith was not terminated for conduct that occurred *prior* to the interview. Rather, he was terminated for conduct (allegedly providing inconsistent responses) that took place *during* the interview. Further, unlike Coca-Cola, Respondent did not have Smith's whole "story" prior its interrogation of him. To the contrary, the Employer spoke with Smith, at length, on three separate occasions before it was satisfied that it had a full understanding of what had occurred. In addition, even after its first interrogation of Smith,

Respondent spoke to additional non-party witnesses (employees Eberle, Reister and Moeller) in order to get a more complete understanding of Smith's "story."

Thus, contrary to Respondent's contention, the Board has never ruled that a make-whole remedy is unavailable to an employee for misconduct that occurs during an unlawful Weingarten interview.

IV. Conclusion

The General Counsel respectfully requests that the Board examine the full administrative record, including the transcripts, briefs and all relevant case law. Such an examination will illustrate that, contrary to Respondent's assertions, Smith was terminated for providing "false or incomplete information" based on information Respondent obtained during the unlawful interrogations that took place on May 24 and June 1. The General Counsel respectively submits that, based on relevant case law, such a determination necessitates that the Board reverse the remedial determination of the ALJ and find that Smith is entitled to a make-whole remedy, including reinstatement and backpay, as result of Respondent's unlawful denial of Smith's request for union representation during the May 24 and June 1 interrogations in violation of Section 8(a)(1) of the Act.

DATED at Buffalo, New York this 4th day of November, 2013

Respectfully submitted,

/s/ Jesse Feuerstein

JESSE FEUERSTEIN
Counsel for the General Counsel
National Labor Relations Board, Region Three
130 South Elmwood Avenue, Suite 630
Buffalo, New York 14202