UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and Case 03-CA-090637

UNITED STEELWORKERS, LOCAL 6992

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

Submitted By:

Linda T. Prestegaard, Esq.
Christopher L. Hayes, Esq.
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203-2887

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

Respondent E. I. du Pont de Nemours and Company (hereinafter "DuPont" or the "Company") submits this reply brief in response to General Counsel's answering brief and in further support of its cross-exceptions to the decision of Administrative Law Judge Steven Davis ("ALJ") dated and filed on August 26, 2013.[1] As set forth below, undisputed evidence demonstrates that make-whole relief is not available under controlling Board precedent even if there was an alleged Weingarten violation and that there was no Weingarten violation to support any remedial order.

Regarding the remedial order, the ALJ determined and General Counsel does not dispute that Smith was terminated for cause. The ALJ thus properly determined that make whole relief is unavailable under well-settled Board precedent. However, make whole relief is also unavailable because undisputed evidence demonstrates that DuPont learned of the inconsistencies upon which Smith's termination was based using lawful means (e.g., Smith's undisputed numerous discussions which preceded any allegedly unlawful interview). DuPont, therefore, learned no new information during either of the allegedly unlawful interviews. Any remedy involving make whole relief is thus precluded on this additional ground.

Regarding the alleged Weingarten violation, the evidence demonstrates that Smith had no objective basis to anticipate that discipline would result from either of the allegedly unlawful accident interviews. Rather, the evidence demonstrates that any alleged belief by Smith that discipline would follow was purely subjective and, thus, insufficient to trigger Weingarten protections. Moreover, not only did Smith have no objective belief, the amount of time that passed and the circumstances between the two allegedly unlawful interviews prevented any

[1] Hereinafter cited as "ALJD __:__".

request for Weingarten protections at the first interview from somehow carrying over to the second interview.

Based on the foregoing and as set forth below, the Complaint must be dismissed in its entirety, or, at a minimum, be adopted insofar as it ordered only a cease-and-desist order.

ARGUMENT

POINT I

SMITH WAS INDISPUTABLY TERMINATED FOR CAUSE AND THERE IS NO CONNECTION BETWEEN THE ALLEGED WEINGARTEN VIOLATION AND SMITH'S TERMINATION

The ALJ properly determined and General Counsel wisely does not dispute that Smith was terminated for cause (i.e., dishonesty during "**his various interviews** during the investigative process.") (ALJD 14:45-47) (emphasis added). Unable to attack the undisputable termination for cause, General Counsel desperately attempts to link the May 24 and June 1 Accident Interviews[2] with Smith's undisputed misconduct in arguing for make-whole relief. However, controlling Board law and the record before the Board defeat General Counsel's unsupported argument.

General Counsel argues at length that DuPont used information "gleaned from" the May 24 and June 1 Accident Interviews to terminate Smith. (Answering Brief, pp. 16-20.) In doing so, General Counsel totally ignores or disregards undisputable evidence that the May 24 and June 1 Accident Interviews produced no information DuPont did not obtain from indisputably lawful means. General Counsel disingenuously attempts to conflate Smith's

[2] 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 .

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.

numerous, detailed discussions about the incident with numerous individuals before any allegedly unlawful interview occurred, with the May 24 and June 1 Accident Interviews. However, the simple fact is that Smith, at most, repeated information during the May 24 or June 1 Accident Interviews which he had previously disclosed to numerous individuals.

General Counsel begrudgingly concedes and in fact could not deny Smith's several conversations with numerous individuals before the May 24 Accident Interview even occurred. ("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." GC Answering Brief, p. 18.) General Counsel then incredibly states "that during these rather brief conversations, Smith did not reveal great detail about the circumstances surrounding his accident." (GC Answering Brief, p. 19.)

General Counsel paints the May 24 Accident Interview as a lengthy investigatory interview during which Smith was allegedly grilled about the incident by three individuals. (GC Answering Brief, p. 3, 5, 19.) However, Smith admitted that Szymanski had previously asked him all of the questions that were posed to him during the May 24 Accident Interview. (118:13-23.) Moreover, Szymanski's testimony confirmed that Smith's responses during the May 24 Accident Interview did not differ from what Smith had told Szymanski before the May 24 Accident Interview. (206:18-207-18.) The record thus irrefutably demonstrates that Smith provided detailed information about the incident to Szymanski before any allegedly unlawful interview occurred. Moreover, it is undisputed that Smith discussed the incident before the May 24 Accident Interview at least once with Szymanski alone, once with Szymanski and co-

worker Meredith, once with Thomas and Hanson − two individuals in plant medical, and once with co-worker Reister. (103:2-105; 108:8-12; 111:8-21; GC-4, p. 43.)

DuPont's October 24, 2013 brief in support of its cross-exceptions sets forth the inconsistencies upon which Smith's termination was based and discusses the evidence in the record demonstrating that none of this information was discovered for the first time during the May 24 or June 1 Accident Interviews. (Brief in Support of Cross Exceptions, pp. 13-15.) General Counsel merely claims that Smith's undisputed conversations preceding the May 24 Accident Interview were "brief" without attempting to rebut DuPont's detailed demonstration that it learned no new information during the May 24 or June 1 Accident Interviews. (See GC Answering Brief, pp. 18-20.)

The proof thus demonstrates that DuPont did not learn any new information during the May 24 and June 1 Accident Interviews. Having learned all information upon which Smith's termination was based outside of the two allegedly unlawful interviews, controlling Board law precludes make-whole relief based on Smith's mere repetition of such information during the allegedly unlawful interviews. Houston Coca Cola Bottling Co., 265 NLRB 1488, 1489 (1982) (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.") Under this precedent, 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).

DuPont discussed the facts of these controlling Board decisions at length in its brief in support of its cross-exceptions. (Brief in Support of Cross Exceptions, pp. 27-30.) No repetition

is necessary here. DuPont notes, however, that General Counsel's attempt to distinguish this well-settled precedent incorrectly assumes that DuPont learned new information upon which the termination was based during the May 24 and June 1 Accident Interviews. (GC Answering Brief, pp. 25, 26.) Again, the record clearly demonstrates that DuPont learned no new information during any allegedly unlawful interview. Therefore, the well-settled authority cited by DuPont prohibits any make whole relief. Moreover, Supershuttle of Orange County, 339 NLRB 1 (2003) and the Birds Eye Foods Advice Memorandum are plainly inapposite not only because here there is no evidence whatsoever of anti-union animus and DuPont at most learned of or obtained information concerning Smith's misconduct during the May 24 and June 1 Accident Interviews, but also because there is no evidence that Smith's misconduct occurred solely during those allegedly unlawful interviews.

Thus, the ALJ erred by not determining that make whole relief is also unavailable because there is no connection between any alleged Weingarten violation and the discipline ultimately imposed upon Smith and because Smith was also terminated for cause.

POINT II

SMITH WAS NOT ENTITLED TO WEINGARTEN PROTECTIONS DURING THE MAY 24 OR JUNE 1 ACCIDENT INTERVIEWS

The General Counsel misconstrues the nature of DuPont's accident investigation program and Smith's and other employees' understanding thereof in an attempt to create an objective belief of discipline where none could have existed.

General Counsel argues that "Smith's knowledge of workplace investigations clearly indicates that Smith had concrete reason to believe that he was likely to be disciplined as a target of a workplace investigation." (GC Answering Brief, p. 7.) The undisputed evidence in the administrative record concerning Smith's and other employees' approach to accident

investigations plainly disproves this contention. Smith knew from his prior accidents during his 7 years of employment with DuPont that standard practice required investigation and generation of a report concerning accidents. (96:13-21, 122:14-19; 125:17-20.) There is no evidence in the record that Smith or any other employee previously requested representation during any other accident investigation.

Indeed, Park's undisputed testimony establishes that she has performed 10-15 employee accident investigations involving injuries and no employee had ever asked for Union representation. (226:4-14, 234:2-5.) All evidence in the record demonstrates that DuPont's accident investigation program is a safety program. It is undisputed that DuPont's SHE department always conducts a safety investigation when there is an injury or purported injury on site, the purposes being (i) to find out what happened to prevent the cause from reoccurring and (ii) to ensure that the Company has fulfilled its responsibilities regarding investigating accidents and alleged accidents under applicable OSHA regulations. (220:25-221:7; 257:16-258:13, 278:19-279:4.)

Against all of this *objective* evidence is Smith's prior singular discipline for late reporting of an accident. (See GC-2.) However, it is undisputed that late reporting was never an issue here, as Smith stopped work and reported the accident within minutes. (100:13-20; 101:3-24; 102:15-25; 119:3-5.) At the hearing, Smith's sole justification for his request was "[w]ell, the previous time I had her I got in trouble. So I just wanted someone there to advise me." (77:10-14.) Smith could not identify any basis for his inquiry besides his single prior late reporting issue (which was not in play here). (See id.) All that is left is Smith's purely subjective reason − "just want[ing] someone there to advise [him]" − which under these circumstances cannot trigger

Weingarten protections under well-settled Board precedent. See NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

The Board's adoption of the ALJ's determination in Southwestern Bell Telephone Co., 338 NLRB 552 (2002) confirms that an employee cannot reasonably believe that a meeting involving the subject of a non-disciplinary program will result in discipline even if the employee previously received discipline in relation to that non-disciplinary program. In Southwestern Bell, the non-disciplinary program was the EAP program. Id. at 557. Here, the non-disciplinary program is DuPont's accident investigation program. In Southwestern Bell, it was undisputed that the employee's statement that he was "about to snap" could not have led to a Workplace Violence Policy violation pursuant to which the employee previously received discipline. Id. at 557. Here, there is no evidence that Smith's accident itself could have led to discipline for late reporting or for any other reason. (See 100:13-20; 101:3-24; 102:15-25; 119:3-5.) The Board's adoption of the ALJ's reasoning in Southwestern Bell and its well-settled precedent prohibiting usage of a purely subjective standard thus precludes any finding of an objective belief of discipline.

Moreover, any objective belief that the General Counsel claims Smith had was allayed by Park's and/or Szymanski's assurance regarding the purpose of the investigation and with Smith's undisputed understanding of the accident investigation process. Szymanski credibly testified and the ALJ correctly assumed that, responding to Smith's inquiry regarding representation, "he or Park replied 'no, we are just doing a regular, standard investigation.'" (ALJD, 12.) Combined with Smith's knowledge regarding protocol and the purpose of accident investigations, nothing further could have been necessary.

Smith also had no right to representation as the June 1 Accident Interview insofar as Smith had no right to representation at the May 24 Accident Interview. Moreover, even if the right somehow attached to the May 24 Accident Interview, the precedent cited by the ALJ and the General Counsel only demonstrates that a prior request for representation carries over to a subsequent meeting soon thereafter when the employee remains subject to employer intimidation or coercion. See e.g., Amoco Oil Co., 278 NLRB 1 (1986) (subsequent disciplinary interview was held just 8 hours after the initial disciplinary interview during which union representation was requested); Ball Plastics Div., 257 NLRB 971 (1981) (subsequent disciplinary meetings almost immediately followed the initial disciplinary interview during which union representation was requested); Cf. Advice Memorandum in Wal-Mart Stores, Inc., Case 19-CA-27720 (Weingarten protections cease when employee is no longer subject to employer intimidation and coercion).

Unlike the decisions relied upon by the ALJ and the General Counsel, here it is undisputed that DuPont never explicitly denied Smith Union representation at any point, Smith admittedly saw no reason whatsoever to consult with the Union after the May 24 Accident Interview and there is no evidence that Smith discussed the incident with anyone from management between the May 24 and June 1 Accident Interviews. (116:1-5, 120:20-25, 121:9-12.) The General Counsel essentially argues that Weingarten protections apply to non-disciplinary interviews during which an employee may subjectively believe that he might be dishonest and also to every interview thereafter regarding the same subject regardless of the circumstances and how much time passes between the non-disciplinary interviews. Neither Weingarten nor it's progeny provide any such sweeping protection.

CONCLUSION

Based on the foregoing and the matters addressed in DuPont's October 24, 2013 cross-exceptions and brief in support thereof, DuPont respectfully submits that the General Counsel's Exceptions must be dismissed in their entirety.

Dated: Buffalo, New York
December 2, 2013

PHILLIPS LYTLE LLP

By: /s/ Christopher L. Hayes

Linda T. Prestegaard, Esq.
Christopher L. Hayes, Esq.
Attorneys for Employer
E. I. du Pont de Nemours and Company
One Canalside
125 Main Street
Buffalo, NY 14203-2887
Telephone: (716) 847-8400
Facsimile: (716) 852-6100
lprestegaard@phillipslytle.com
chayes@phillipslytle.com

Doc #01-2733414.4

STATEMENT OF SERVICE

I hereby certify that on December 2, 2013, I caused to be electronically filed the ***Reply Brief to General Counsel's Answering Brief in Opposition to Respondent's Cross-Exceptions to the 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:

Jesse S. Feuerstein, Esq.
Field Attorney
(Counsel for the Acting General Counsel)
National Labor Relations Board
130 South Elmwood Ave., Suite 630
Buffalo, NY 14202-2387
E-MAIL: jesse.feuerstein@nlrb.gov

Catherine Creighton Esq.
(Counsel for United Steelworkers, Local 6992)
Creighton Johnsen & Giroux
560 Ellicott Square Building
295 Main Street
Buffalo, NY 14203-2412
E-MAIL: ccreighton@cpjglaborlaw.com

/s/ Christopher L. Hayes
Christopher L. Hayes