

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

E.I. DU PONT DE NEMOURS
AND COMPANY

and

Case 05–CA–101359

AMPTHILL RAYON WORKERS, INC.,
LOCAL 992, INTERNATIONAL
BROTHERHOOD OF DU PONT
WORKERS

Timothy P. Bearese, Esq. and Patrick J. Cullen, Esq.,
for the General Counsel.
Christopher M. Michalik, Esq. and Summer Speight, Esq.,
(*McGuireWoods, LLP*) of Richmond, Virginia,
for the Respondent.
Kenneth Henley, Esq., of Bala Cynwyd, Pennsylvania,
for the Charging Party.

DECISION

Statement of the Case

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Richmond, Virginia, on September 25, 2013. The Charging Party, Ampthill Rayon Workers, Inc., International Brotherhood of DuPont Workers (the Union) filed a charge in this matter on March 26, 2013, and a complaint was issued on June 27, 2013. The complaint alleges that since March 14, 2013, E.I. DuPont de Nemours Company (the Respondent) has violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to provide and failing and refusing to timely provide information requested by the Union in connection with a grievance.¹ The Respondent filed its timely answer, generally denying any and all unlawful

¹ At trial, I granted (without objection) the General Counsel’s motion to amend the par. 8 of the complaint to add: “[I]n the alternative, the Respondent has unreasonably and unlawfully delayed in furnishing the requested information to the Union or provided incomplete response to the Union’s request for information,” in violation of Sec. 8(a)(1) and (5). (Tr. 152–153).

conduct. The Respondent’s affirmative defense that the National Labor Relations Board (the NLRB) and its agents lack jurisdiction to pursue this case will be addressed later in this decision.

On the entire record, including my observation of the demeanor of the witnesses, and consideration of the briefs filed by the General Counsel² and the Respondent, I make the following

FINDINGS OF FACT

I. Jurisdiction

The Respondent, a Delaware corporation, has been engaged in the manufacture of synthetic fibers and related products at its Richmond, Virginia facility, where it annually sells and ships products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Virginia. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Parties

This dispute involves the Respondent’s DuPont Spruance Plant (Spruance facility) in Richmond, Virginia, where it manufactures three of its major products, including Tyvek, Nomex, and Kevlar, across separate operations called, “areas.” Each of these areas has its own administration and unit/area manager who report directly to the plant manager, Joseph Internicola (Internicola). Bruce Harris (Harris) testified on behalf of the Respondent, and at all times material, has been the labor relations manager and the Respondent’s representative for all matters dealing with the Union. The Respondent’s counsel is Christopher Michalik, Esq. (Michalik).

The Respondent and the Union have a longstanding collective-bargaining relationship at the Spruance Plant (since about 1947), with the most recent collective-bargaining agreement (the Agreement) effective from September 1, 2012 until September 1, 2015. For all relevant time periods, the Union has been the exclusive collective-bargaining representative of a unit comprised of “production, maintenance, service and Plant technical hourly wage roll employees . . .” (U. Exh. 1).³ Donny Irvin (Irvin), who testified on behalf of the General Counsel has been the chairperson of the Union’s grievance committee for many years. He and the Union’s counsel, Kenneth Henley, Esq. (Henley), represented the Union in matters relevant to this case.

As stipulated by the parties, these individuals are their supervisors and/or agents for all times material within the meaning of Section 2(11) and (13) of the Act. (Jt. Exh. 1.)

² For brevity purposes, counsel for the General Counsel will be referred to as the “General Counsel.”

³ Abbreviations used in this decision are as follows: “Tr.” for Transcript; “GC Exh.” for General Counsel Exhibit; “R. Exh. for Respondent Exhibit; U. Exh. for Union Exhibit; “Jt. Exh. for Joint Exhibit; “GC Br.” for General Counsel’s Brief; and “R Br.” for Respondent’s Brief.

B. Site Administration Manual Policies

5 In addition to the Agreement, the parties have bargained and agreed to policies and standards, included in the various sections of the Respondent's Site Administration Manual (SAM). The SAM D-5 sets forth the reasons for which bargaining unit employees would be subject to discharge, and provides in relevant part:

- 10 • Failure to meet standards of performance on a continuing and satisfactory basis can subject an employee to discharge. This includes unsatisfactory performance and/or unsatisfactory attendance due to unexcused absences. Unsatisfactory fitness can subject an employee to discontinuance.
- 15 • An act of serious misconduct can subject an employee to discharge. This is an action that is a flagrant violation of Plant rules, policies, or unacceptable conduct which includes, but is not limited to, the following:

.....
20 Flagrant safety violation- a violation (either deliberate or an error) of a safety rule, procedure, or safety judgment that could (or did) result in serious injury. Examples of this action might be (but are not limited to) violation of the Lockout Procedure, violation of the Tank and Vessel Entry Procedure, or a rule violation that seriously jeopardizes a person's safety and health.

25
Sleeping- the act of sleeping during work time either on the job assignment or away from it. Casual dozing during work time is also not allowed and, if observed, will be handled as a performance/safety problem through use of the Development Procedure. Repeat violations of this standard (casual dozing) could eventually result in discharge through continued unsatisfactory performance.

(R. Exh. 1).

35 The development procedure (similar to progressive discipline) for bargaining unit employees is set forth in the Respondent's SAM D-7, and reads in pertinent part:

40 Depending upon the severity of the violation or mistake, an employee may be taken to any step in the Development Procedure, or a recommendation may be made for immediate discharge. Violations or mistakes of a lesser nature should be processed through the following steps: *INFORMAL REPRIMAND, SPECIAL CONTACT, PRE-PROBLEM CONTACT, PROBLEM CONTACT, AND DISCHARGE.*

(R. Exh. 2.) The problem contact, similar to a probationary period, is the employee’s last opportunity to prove or correct his/her performance problem. When an employee’s performance does not improve, the last step, suspension with intent to discharge, is proposed. An employee could be referred for discharge without the benefit of the development procedure when the individual has committed an act of serious misconduct.

The SAM D-7 development procedure and the SAM D-5 are not applicable to exempt employees such as supervisors. However, there is no dispute that the Spruance Plant supervisors must still adhere to all of the Respondent’s safety polices and standards of conduct which are described in the SAM D-5. This includes the more serious acts of misconduct set forth in the SAM D-5 (e.g., flagrant safety and sleeping violations). (Tr. 20–21, 120–121.) Harris initially testified that the Respondent does not have any disciplinary procedures (written or otherwise) for its supervisors, but instead metes out discipline to them on a case by case basis. He finally acknowledged, however, that supervisors can be subject to various types of discipline such as warnings, suspension, discharge and monetary sanctions, depending on the seriousness of the conduct, past discipline, work history, and seniority.

C. *The Respondent’s Site Review Process And Safety Procedures*

The Respondent utilizes an investigative process, called a site review, to investigate incidents of serious safety and misconduct violations; it is undisputed that not only bargaining unit employees, but also supervisors, are sent for site review when they engage in these types of violations. This process culminates in a site review report presented to a site review team comprised of the plant manager and his administrative staff. The site review team makes the determination to either discharge or otherwise discipline the employees sent for site review.⁴ The Union is not involved in the site review process, nor is it privy to the discussions that take place during the presentation meeting.

In the last few years, all violations or errors involving the Respondent’s “Tag, Lock, Clear, and Try” (TLCT) safety policy/procedure (referred to in the SAM D-5 as the “Lockout Procedure”) have been presented for site review. This TLCT procedure is required of all employees, unit and supervisors alike, and is a step in the operation of most or all machinery at the Spruance Plant. Regarding the TLCT safety violations, area management also prepares Serious Site Incident (SI) reports for each violation, which are publicized via computer for everyone in the Spruance Plant to see. Irvin testified that the Union learns of these incidents through witnesses, affected unit employees, SI reports; and/or from supervisors who discuss them in beginning of shift meetings (referred to as “rackup” meetings). (Tr. 23–26.)

D. *Discharge of James Lewis*

In December 2012, the Respondent verbally discharged unit employee, James Lewis (Lewis), a windup operator in the Tyvek area, based on a site review presentation (also referred to as site review report) and recommendation to “[s]uspend with intent to discharge.” The Respondent typically does not issue written termination notices. On December 17, 2012 (prior to

⁴ Irvin testified that unit member site reviews result in either a discharge or “problem write-up.” (Tr. 63.)

his discharge), the Respondent prepared a summary/report of its reasons for terminating Lewis, entitled, “Site Review Presentation.” According to this report, the SAM “D-5 Discharge Reasons” listed under “*Policy/Procedure Violated*” were:

- 5 • Failure to meet standards of performance on a continuing and satisfactory basis can subject an employee to discharge. This includes unsatisfactory performance and/or unsatisfactory attendance due to unexcused absences. Unsatisfactory fitness can subject an employee to discontinuance.
- 10 • Operator failed to properly follow SP-2316- Line 2 Windup Operation
- 15 • Sleeping- the act of sleeping during work time either on the job assignment or away from it. Casual dozing during work time is also not allowed and, if observed, will be handled as a performance/safety problem through use of the Development Procedure. Repeat violations of this standard (casual dozing) could eventually result in discharge through continued unsatisfactory performance.

20 (Jt. Exh. 1-A, p. 2.) These reasons were taken verbatim from the SAM D-5 discussed above. The “SP-2316- Line 2 Windup Operation” refers to the standard practice/procedure for operating the equipment used in the operation, a part of which is the “Roll Doffing Cycle.” The Site Review Presentation includes a detailed description, with illustration, of the steps involved in the roll doffing cycle, including the TLCT or lockout procedure required towards the end of the cycle. It also includes a chronology of the incident leading to Lewis’ discharge and an overview of Lewis’ 2012 work performance (consisting of a summary of his development/discipline progression from April 2012 to the problem stage in November 2012 and an unsatisfactory performance rating in October 2012). (Tr. 30–31; Jt. Exh. 1-A.)

30 There is no dispute regarding the incident leading to Lewis’ site review. In summary, after Lewis successfully completed an 8-hour shift on December 9, 2012, he volunteered to work an additional 8 hours on the next shift. During this second shift, he fell asleep several times. The second time that he fell asleep, he was awakened by a series of bells, and prematurely engaged what is called a hot knife, which fired into a full mill roll of product (Tyvek) too soon. This error caused the machine to go into “sheet break,” or rather, to continue to make sheet (or product) and create wasted product.⁵ Although Lewis did not recall, the report states that managers and employees observed him falling asleep again, in a chair, while other employees attempted to salvage the product. (Tr. 76, 102–106; Jt. Exh. 1-A, pp. 8–9.)

40 There is, however, some relevant dispute as to the reasons for Lewis’ discharge. Irvin testified that the site review report was not clear as to the reasons for Lewis’ termination, as it contained multiple violations, including TLCT and other serious or flagrant safety

⁵ Normally, the operator makes sure the roll is full and ready to “doff off,” which is to oversee the process in which the full mill roll and an empty core/roll rotate 180 degrees, so that they in effect switch sides. It is after this rotation is complete that a hot knife fires into a sheet completing the transfer (the sheet is blown onto the empty core/roll). Then, operator must perform the TLCT or lock out procedure. (Tr. 102–105; Jt. Exh. 1-A.)

policy/procedure violations. He also testified that management never told the Union or Lewis the reason or real reason for termination. (Tr. 32, 75–76, 86.) Harris, on the other hand, testified that the Respondent’s performance-based reasons for discharging Lewis were made clear in the site review report, and were two-fold: (1) he had already progressed all the way through the development procedure to the problem phase, and “did not respond appropriately to regain satisfactory performance,” and (2) he had a “culminating event,” sleeping, “and that’s when we decided to terminate him.” (Tr. 129–130.) He asserted that Lewis was not discharged for violating any of the flagrant, serious or other safety procedures, including the TLCT policy, and that the Union had not raised these safety issues in the step three grievance meeting.

I find that Irvin’s assertion that he and the Union never knew the reasons or real reason why Lewis was terminated is clearly inconsistent with the site review report, if not somewhat disingenuous. Based on my review of this report, and no other evidence to the contrary, I find the Respondent accepted the area’s recommendation to terminate Lewis because of his continued progressive discipline and the final sleeping incident (causing the sheet break error). (Tr. 106–107, 110; Jt. Exh. 1-A.) The second page of the report sets forth two main “Discharge Reasons,” as set forth above. As shown, Lewis’ failure to follow the SP-2316- Line 2 Windup Procedure is a sub-bullet/paragraph underneath the primary reason for discharge- “[f]ailure to meet standards of performance on a continuing and satisfactory basis can subject an employee to discharge . . . [including] unsatisfactory performance and/or unsatisfactory attendance . . .” Thus, the failure to properly follow the standard procedure for the windup operation is cited as a continued performance reason. The second discharge reason, also taken verbatim from the SAM D-5, is “[s]leeping.” Even though the sleeping violation states that, “[c]asual dozing...if observed, will be handled as a performance [or] safety problem through use of the Development Procedure,” a review of the site review report in its entirety supports the Respondent’s view, and Harris’ testimony, regarding the reasons for termination. This is quite evident by the inclusion of Lewis’ progressive discipline/development through the problem stage.

I credit Harris’ testimony that in the past, when an employee has been disciplined for a flagrant safety or TLCT violation, it is specifically referenced as such, along with that portion of the SAM D-5.⁶ Irvin did not refute this point. Here, the site review does not include or even reference a flagrant or other safety violation, or TLCT infraction, as a reason for termination. The background description of the TLCT/lock out procedure as one of the steps in the doffing cycle, and the undisputed testimony that the overall standard practice/procedure for the windup operation implicitly involves safety, does not support Irvin’s testimony (or Union’s belief) that a safety violation was a basis for Lewis’ discharge. Harris’ testimony is consistent with the chronology of events in the site review, showing that Lewis had not even reached the TLCT/lockout requirement stage of the doffing cycle when he prematurely initiated the hot knife and sheet break. (R. Exh. 1, Jt. Exh. 1-A, pp. 4–9.) Moreover, the formal grievance reflects that the Union was fully aware that Lewis was in the problem stage at the time of the site review, and had been discharged for sleeping. The grievance only references Lewis’ falling asleep on the job and progressive discipline to the problem stage. It does not mention safety violations or reflect

⁶ Although I found Harris to be somewhat evasive when he testified about the Company’s practices (or lack thereof) for supervisory discipline, and disagreed with his opinion that falling asleep at or near moving machinery would not pose a safety threat, his testimony regarding the Company’s reasons for termination are overwhelmingly supported by the evidence.

any confusion it may have had about the reasons for Lewis’ discharge. (Jt. Exh. 1-B.) Accordingly, I find the Respondent terminated him because of his continued performance problems and the sleeping incident which caused the sheet break, and not because of safety concerns.

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E. Lewis Discharge Grievance and the Union’s Initial February 27 Information Request

10 On January 8, 2013, the Union filed a formal grievance over Lewis’ discharge. Plant Manager Internicola denied the grievance on January 11. On January 28, Grievance Chairman Irvin notified the Respondent’s labor relations manager, Harris, that the Union intended to arbitrate Lewis’ grievance. At the time of trial, Lewis’ discharge had not gone to arbitration, as Irvin contended that the Union needed the information requested to help determine whether or not to arbitrate (Jt. Exhs. 1-B to 1-D).

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On February 27, the Union’s counsel, Henley, sent the Respondent’s counsel, Michalik, an email requesting information “necessary for the Union to prepare for and present its case” in the discharge of Lewis. Although the Union requested 11 sets of documents in its request, the parties agree that only the requests reflected in paragraphs 6, 7, and 11 are at issue in this case. These requests read as follows:

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6. Beginning on January 1, 2002 and continuing to December 31, 2012, for each employee who engaged in conduct considered by the Respondent to be a flagrant safety violation or a violation of the sleeping policy, provide the name of the employee, the date of the conduct, the nature of the conduct, the discipline administered and the employee’s disciplinary status at the time of the discipline[.]

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7. Provide all information that was considered by the Respondent in making its decision to discharge Mr. James Lewis that concerns how other employees were treated in terms of discipline who engaged in flagrant safety violations or sleeping violations.

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11. All documents relating to the safety violations, including site incident reports, site reviews, and other like investigative and/or disciplinary records, committed by the following supervisors: Lauren Ramos, Steve Sharwisky, Jim Davenport, Kevin Saunders, and Keith Estes. These actions were committed sometime in 2012 or 2013.

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a. Also provide the discipline, if any, and the written record of such, administered to each of these supervisors for the actions in question.

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b. Also provide the written policy from the SAMS Manual regarding TLCT’s that [were] in effect from 1/1/12 through the present. If there is a separate policy regarding TLCT’s that you allege applies to supervision during that time period, please provide a copy of that policy and the date (including the written record) of when it [went] into effect.

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Henley also asked that the information be provided by March 14, 2013, and that Michalik not hesitate to contact him if he had any questions regarding the request. (Jt. Exh. 1-E.)

F. Henley’s March 7, 8, and 15 Emails to Michalik and Michalik’s March 18 Response

On March 7, via email to Michalik, Henley stated that since he had not heard back from him (Michalik) regarding the Union’s settlement offer, he was renewing his request for information previously sent on February 27. He also asked when he could expect to hear back regarding the requested information. (Jt. Exh. 1-H.) On March 8, Michalik acknowledged receipt of Henley’s March 7 email, but did not indicate when the Respondent would provide responses to the information request. On March 15, Henley sent another email to Michalik stating that while he understood the parties were discussing a possible resolution of the “James Lewis matter,” he still expected him to provide the information requested on February 27, or he would file a charge with the NLRB. On Monday, March 18, Michalik responded that he understood the Respondent either had already provided information, or would be doing so on March 18. (Jt. Exh. 1-H.)

G. The Respondent’s March 14 Response to the Union’s Information Request and Henley’s March 20 Email to Michalik Explaining Relevance

In the meantime, on March 14, Labor Relations Manager Harris provided Grievance Committee Chairperson Irvin, with the Respondent’s written responses (in red type next to each par.) along with some documentation. Next to paragraphs 6 and 7, the Respondent wrote “TBD” (to be determined). Next to paragraph 11, the Respondent wrote “Irrelevant.” It is undisputed that Harris told Irvin that he was still gathering information regarding paragraphs 6 and 7, and “that it was awful broad.” Regarding paragraph 11, Irvin testified that Harris told him, “you’re not going to get the information, you don’t represent exempts.” Irvin testified that he responded, “. . . it’s a comparison case; I need to see D-5. . . D-5 is very broad⁷; I need to find out how these managers were treated in their site review,” in comparison to Lewis. He said that Harris told him “[w]e’re not going to give you any information . . . we’re not going to tell you how we treat the managers,” to which Irvin replied that he needed to see their site reviews so he could see “. . . how—why their violation was less severe than Mr. Lewis’ violation . . . so could you give me the information minus the discipline?” Harris said that the Respondent would not furnish any supervisor records. (Tr. 46, 59.) Harris did not contradict Irvin’s version of this discussion.

After Henley reviewed the responses provided to Irvin, he notified Michalik by email on March 20 that the Union disagreed with the Respondent’s position that the information relating to certain supervisors in paragraph 11 was irrelevant. He explained that since the Respondent acknowledged that,

. . . supervisors are subject to the same safety rules as employees, particularly with regard to the serious safety violations the named supervisors in paragraph 11 are believed to have committed . . . how the Respondent treated these employees as a

⁷ Here, “D-5” refers to the SAM D-5 discussed above.

result of those violations relates directly to how the Respondent should have treated James Lewis.

Henley advised that the Union was still entitled to the information requested. (Jt. Exh. 1-H.)

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H. The Respondent’s Updated March 28 Response to the Union’s Information Request and Henley’s April 5 Email to Michalik Explaining Relevance

10 On March 28, Harris met and provided Irvin with updated responses to paragraphs 6, 7, and 11. The Respondent amended its response to paragraph 6 to: “Mr. Lewis was progressed through each step of the disciplinary/development policy for a variety of unacceptable performance concerns. Comparison cases include anyone who has been involved in or put through progressive discipline steps.” The Respondent’s amended response to paragraph 7 was, “See response to Number 6.” It did not, however, provide any documentation responsive to paragraphs 6 and 7. Irvin testified that upon receipt of the updated responses, he told Harris that, “ . . . this is ridiculous . . . we have always gotten comparison cases in the past...you keep a spreadsheet,” and that Harris replied, “ . . . that’s what you’ve got; that’s what I’m giving you.” He explained that the Respondent had long maintained a spreadsheet/grid listing all discharge and problem stage cases, the discipline status, and the reason for discipline/discharge, and had provided the Union with this information in other grievance cases. Irvin stated that he told Harris that in connection to paragraph 7, he needed to find out “what the Respondent compared Mr. Lewis to, since [he] personally knew that they had never fired anybody for sleeping.” (Tr. 47–48, 51; Jt. Exh. 1-G.)

25 The Respondent expanded its previous answer to paragraph 11 to: “(Irrelevant—The exempt employees listed are not part of the bargaining unit, therefore, the union does [not] represent these employees and the case of relevancy has not been made convincingly by the union.)” Irvin verbally reiterated that he needed the documents because these managers had engaged in “D-5 violations,” as had Lewis. He contended that Harris asked why he (Irvin) was bothering with the arbitration since Lewis was not a “model employee.” Irvin replied that he had a duty to fairly represent Lewis, and that it was not clear in the site review “of what he was discharged for.” (Tr. 52). Harris did not deny these March 28 discussions with Irvin concerning paragraphs 6, 7, and 11.

35 On April 5, Henley emailed Michalik, renewing the Union’s request for documentation responsive to paragraphs 6, 7, and 11 and explaining why they were relevant. Regarding paragraph 7, Irvin stated that the answer was “non-responsive,” and that “[s]uch consideration of specific comparison cases . . . is required by the Respondent’s own written procedures for making the decision to discharge and has been a matter for which evidence has been presented by both the Respondent and the Union in past arbitration cases.” He also asked Michalik to let him know if there was no information responsive to paragraph 7. He provided a similar explanation for paragraph 6, asking that the Respondent furnish the information even if it had not been in Lewis’ case. Henley stated that the requests in paragraph 11 were relevant to compare how the supervisors, who were subject to the same safety rules as unit employees, had been treated for committing safety violations similar to the one allegedly committed by Lewis. (Jt. Exh. 1-I.)

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I. The Respondent’s September 23 Response to the Union’s February 27 Request

5 The Respondent did not provide any additional responses or information until September
 23, when Harris left a package of documents for Irvin, generally marked as responses to requests
 6 and 7. (Tr. 53.) This package included four site reviews; however, Irvin testified that this was
 not a complete response in that the Union had requested “all” comparison cases from 2002
 through 2013. Irvin asserted that he knew there were many more cases which were potentially
 responsive to the paragraphs 6 and 7 because he had processed all of the proposed discharge
 10 cases in the last 5 years. I credit Irvin’s testimony in this regard. Although Harris established his
 own search criteria as described below, he did not refute Irvin’s estimate of the number of cases
 processed, or otherwise claim that the four site reviews were completely responsive to the
 requests. (Tr. 54, 57.)

15 Instead, Harris testified that he found the four comparative site reviews submitted in
 response to paragraphs 6 and 7 by searching his site review files from 2008 to the present for “all
 cases of either progressive discipline, which a unit employee was progressed all the way through
 every step of the development procedure [from the pre-problem stage through discharge], or in
 the case of where a unit employee was taken for site review for sleeping.” He did not include
 20 cases resulting in settlements, and excluded incidents which did not result in a site review or a
 lesser form of discipline. Although he recalled telling Irvin these requests were too broad,
 neither he nor Michalik requested that the Union narrow the scope or timeframe as he (Harris)
 had sometimes done in the past. (Tr. 45.) He also confirmed that the Union never agreed to
 limit the scope or timeframe of the information requests, and that he gave the Union what “[he]
 25 thought was relevant.”⁸ (Tr. 126–128, 138–140.)

Irvin testified that paragraphs 6 and 7 pertained to “very relevant” comparative
 information that the Respondent typically provided, and was actually supposed to consider
 before discharging anyone. He claimed this information would assist the Union in determining
 30 whether to “arbitrate or not.” It is undisputed that the Respondent never asked for any
 clarification, indicated any confusion or requested any extended period of time regarding these
 requests.

Regarding paragraph 11, Irvin testified that pursuant to the site review, Lewis “was
 35 discharged for violating the standard practice procedure, which involved safety implications
 . . . [t]here’s one set of safety standards for the whole plant site, and we knew that these
 managers had . . . recently violated the TLCT policy” which could lead to a SAM D-5 discharge.
 He asserted that the Union had attempted to limit their information request to what they
 considered to be serious safety or sleeping policy violations which might result in a SAM D-5
 40 automatic discharge. (Tr. 62.) He further testified that in late July or August of 2012, the
 supervisors named in paragraph 11 had engaged in “strike preparation training,” performing the

⁸ Irvin initially testified that he believed that the attorneys for the parties may have discussed narrowing the
 time frame for the requested information from 10 to 5 years, but there is no evidence in the record that any
 such discussions or agreements between the parties’ counsel took place. In addition, Irvin later admitted
 that he might have been confusing conversations between the parties’ counsel in this case with another
 case. (Tr. 45, 55, 58) .

same work as unit employees, i.e., operating the same machinery pursuant to the “exact standard practices.” He learned the names of these supervisors from unit employees who had actually witnessed their TLCT violations (e.g., failing to lock equipment), and obtained additional information through SI reports and shift “rackup” meetings. He knew these supervisors had not been terminated since they continued to work at the Spruance Plant. (Tr. 35–39, 40–42, 82.) Harris did not attempt to search any files for supervisors. Harris maintained this information was not relevant to a unit employee’s grievance, but acknowledged that some managers had performed unit work for strike preparation sometime in the summer of 2012. He said they were not disciplined to his knowledge, but did not deny that they were sent for site review for violating the TLCT policy (Tr. 132).

III. Discussion And Analysis⁹

A. Legal Standards

It is well established that an employer has a statutory obligation to provide requested information to a union that is potentially relevant in fulfilling the union’s responsibility as the employees’ bargaining representative, including its responsibilities regarding the processing of grievances and arbitrations. *NLRB v. Truitt, Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436, 438 (1967). Generally, information concerning wages, hours, and terms and conditions of employment for unit employees is presumptively relevant to the union’s role as exclusive collective-bargaining representative, and must be provided. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005); *Curtis-Wright Corp.*, 145 NLRB 152 (1963), *enfd.* 347 F. 2d 61 (3d Cir. 1965). Presumptively relevant information sought by a union also includes information regarding discipline of bargaining unit employees. *Dish Network Service Corp.*, 339 NLRB 1126, 1134 (2003) (citing *Booth Newspapers, Inc.*, 331 NLRB 296, 299–300 (2000)).

By contrast, requests for information concerning employees outside the bargaining unit, such as supervisors, are not presumptively relevant. Thus, the union bears the burden of establishing relevance. *United States Testing*, 324 NLRB 854, 859 (1997), *enfd.* 160 F.3d 14 (D.C. Cir. 1998); *Reiss Viking*, 312 NLRB 622, 625 (1993); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994); *Associated General Contractors*, 242 NLRB 891, 894 (1979), *enfd.* 633 F.2d 766, 770 (9th Cir. 1980). A union must offer “more than mere suspicion for it to be entitled to the information.” See *Sheraton Hartford Hotel*, 289 NLRB 463, 464 (1988).

⁹ In its answer, the Company raised the affirmative defense that the Board, the Regional Director, and the administrative law judge lacked the authority to proceed in this case because the Board lacked a quorum required by the NLRA. The Board has acknowledged the United States Court of Appeals for the District of Columbia Circuit’s conclusion that the President’s recess appointments to the Board were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (petition for certiorari filed April 25, 2013). However, the Board has noted that same Court’s acknowledgement that its decision was in conflict with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied* 544 U.S. 942 (2005); *U. S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). In addition, the Board has determined that while the question regarding the validity of the recess appointments remains in litigation, and is pending a definitive resolution, it will continue to fulfill its responsibilities under the Act. See *Bloomingtondale, Inc.*, 359 NLRB No. 113 (2013); *ORNI 8, LLC*, 359 NLRB No. 87 (2013). Accordingly, I reject this affirmative defense.

However, the “[t]he Board uses a broad, discovery-type standard in determining relevance in information requests.” *Shoppers Food Warehouse*, 315 NLRB at 259; *NLRB v. Acme Industrial Co.*, supra at 437; *United States Testing*, supra; *Postal Service*, 310 NLRB 391, 394 (1993). In this regard, the Board does not rule on the merits, and the union is not required to demonstrate that information is accurate, not hearsay, or even, ultimately reliable. *Postal Service*, 337 NLRB 820, 822 (2002). Therefore, the information requested must have some bearing on the issue between the parties, but does not have to be dispositive. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Postal Service*, supra. When information about supervisory personnel is requested, a union must communicate the reason for the relevance of that information to the employer, unless the relevancy is apparent. *Disneyland Park*, supra.

An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) and (1) of the Act as a refusal to provide the information. *Monmouth Care Center*, 354 NLRB 11, 51 (2009), reaffirmed and incorporated by reference, 356 NLRB No. 29 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012). It is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). Rather, what is required is a reasonable good-faith effort to respond to the request “as promptly as circumstances allow.” *Id.* See also *Woodland Clinic*, 331 NLRB 735, 737 (2000). In evaluating the promptness of an employer’s response, the Board considers the complexity and extent of the information sought, its availability, and the difficulty in retrieving the information. *West Penn Power Co.*, 339 NLRB 585, 587 (2003), citing *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005).

B. Respondent Violated Section 8(a)(5) and (1) of the Act in Failing to Provide Complete Information Responsive to Paragraphs 6 and 7

I find that the information sought by the Union in paragraphs 6 and 7 involving disciplinary records for bargaining unit employees was in furtherance of its representative role in the grievance of Lewis, and was therefore presumptively relevant to its legal responsibilities associated with that role. See *Postal Service*, 332 NLRB at 635. The Union has no burden to show relevance, and the Respondent has an obligation to provide complete responses to paragraphs 6 and 7 of the Union’s February 27 requests. The Union requested information regarding other bargaining unit employees who, from January 1, 2002 to December 31, 2012, had engaged in conduct considered to be a flagrant safety policy or sleeping policy violation. Paragraph 6 also requested the nature of the conduct, the discipline administered and the employee’s disciplinary status. On March 28, the Respondent noted since Lewis had been “progressed through each step of the disciplinary/developmental policy for a variety of unacceptable performance concerns,” comparison cases included those in which a unit employee had “been involved in” or “put through progressive discipline steps.” (Jt. Exh. 1-G). I find that the Respondent’s definition of what should be relevant would include (and should have included) the information about bargaining unit employees which the Union requested in paragraphs 6 and 7. When the Respondent finally provided the four site review packages on September 23, they were not fully responsive to the Union’s requests. In fact, Harris’ testimony reflects that he further limited the Respondent’s responses from cases in which unit employees had been “involved in or [emphasis added] put through progressive discipline steps,” to just those cases in which employees had progressed through every stage of the process (pre-problem to discharge)

and/or had been taken to site review for sleeping. There is no evidence in the verbal exchanges between Irvin and Harris, or the email exchanges between the parties' attorneys, that the Respondent ever expressed any misunderstanding about, or requested clarification of or raised objections to, the scope of the requests or relevancy of flagrant safety violations.

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The Respondent now argues that the Union's requests in paragraphs 6 and 7 are overly broad and not reasonably necessary to process Lewis' arbitration because Lewis was not terminated for violating any flagrant or other safety procedures. I do not accept these arguments regarding bargaining unit employees. First, I agree with the General Counsel that these objections are untimely, given that the Respondent had not, in the seven months between the initial request and the trial, raised them or requested that the Union narrow the scope or time frame for its requests. It is well settled that an employer has an obligation to seek clarification of an ambiguous or overbroad request. *Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990). Further, to the extent that the Respondent never voiced these objections prior to the trial, they were not timely raised so as to allow the Union an opportunity to modify its requests or seek the information through other documents. See *Pulaski Construction Co.*, 345 NLRB 931, 937–938 (2005) (the respondent had the obligation to raise and discuss with the union any arguments that a request was burdensome or raised confidentiality concerns).

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In its brief, the Respondent has relied on *Equitable Gas Co.*, 227 NLRB 800, 802 (1977) and *Pfizer, Inc.*, 268 NLRB 916, 919 (1984), to show lack of relevance. I find this reliance is misplaced. In *Equitable Gas Co.*, supra, the Board found the Union was not entitled to absentee records for all bargaining unit employees because they were totally unrelated to its representative role. The grievant's suspension in that case was based on "willful misconduct" in calling in sick after being denied vacation leave, and not because of his absenteeism record. Further, the Board in that case allowed the rather broad request for absentee records of unit employees in another grievance about chronic absenteeism. Here, Lewis was terminated for his progression through the development stages and falling asleep while performing his job. The Respondent admits in this case that it considers prior discipline of bargaining unit employees who commit acts of serious misconduct, and the Union explained that it needed these records to compare cases of other bargaining unit employees. In *Pfizer, Inc.*, supra, the question before the Board was whether information requested of employees in another bargaining unit was relevant, and thus the union had a greater relevance burden than in this case. Nevertheless, this case turned on an information request related to bargaining unit employees, who worked side by side, under the same broad rules of conduct and progressive discipline, regardless of which union represented them. In addition, the Respondent here, unlike the employers in *Equitable Gas Co.*, supra, and *Pfizer, Inc.*, supra, never raised this objection to the Union.

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Moreover, for the reasons stated above, I find the Respondent should have provided the requested information for the time period requested. Consequently, I find the Respondent violated Section 8(a) (5) and (1) of the Act when it failed to provide full, complete responses to the presumptively relevant requests for information in 6 and 7.

C. *The Respondent Violated Section 8(a)(5) and (1) of the Act in its Unreasonably Delay In Providing Information Responsive To Paragraphs 6 & 7*

5 I find the Respondent’s delay of almost seven months in providing documentation
 responding to the Union’s inquiry in paragraphs 6, 7 is an independent violation of Section
 8(a)(5) and (1) of the Act. As stated, an employer is required to furnish relevant information,
 requested by a Union, in a timely fashion. *Overnight Transportation Co.*, 330 NLRB 1275
 10 (2000); *Monmouth Care Center*, supra at 354. In the instant case, the Respondent failed to
 provide any explanation or argument to justify an almost seven month delay, as discussed above.
 Harris did testify that he did not search for any documents before 2008 because “he ran out of
 time,” but there is no evidence whatsoever to support his claim. He had almost seven months,
 and never once actually requested an extension of time. (Tr. 140.) In fact, the Respondent
 never requested any kind of accommodation or narrowing of the scope of the request. The
 15 burden of formulating a reasonable accommodation is on the employer. *United States Testing
 Co. v. NLRB*, supra at 21. As discussed above, on May 28, the Respondent only provided its
 determination of what a relevant response would be; it failed to provide any documentation.
 Finally, after almost seven months, the Respondent provided incomplete/insufficient responses.
 In this regard, the Board has found delays of 5 weeks and 2 months to be excessive. See *Postal
 20 Service*, 308 NLRB 547, 550 (1992), *Postal Service*, 310 NLRB 530, 536 (1993). And, as the
 General Counsel points out, the delay in this case far exceeds the one-month delay that the Board
 found reasonable in *Woodland Clinic*, 331 NLRB 735, 737 (2000). Furthermore, I reject the
 Respondent’s argument that the Union suffered no harm from delay because of its own delay in
 filing the grievance and arbitration notice.

D. *The Respondent Violated Section 8(a) (5) and (1) of the Act in Failing to Provide and Delaying Providing Information Responsive to Paragraph 11(b)*

30 The first sentence in paragraph 11(b) requested the written policy from the SAMS
 Manual “regarding TLCT’s that [were] in effect from 1/1/12 through the present.” The Union
 also asked the Respondent to provide any separate policy, if any, regarding TLCT’s that applies
 to supervision during that time period, which will be addressed below. The first part of
 paragraph 11(b) pertains to the SAMS Manual policies governing bargaining unit employees,
 and is presumptively relevant. Furthermore, there is no evidence that the Respondent provided
 35 the requested information responsive to this request, denied having it or requested clarification so
 as to allow the Union an opportunity to modify its request. Therefore, for the same reasons set
 forth in sections B and C of this decision, I find the Respondent violated the Act when it failed to
 respond to paragraph 11 (b) relating to unit members.

E. *The Respondent Did Not Violate Section 8(a)(5) and (1) of the Act When it Failed to Provide Information relating to Supervisors in Paragraph 11*

45 The General Counsel asserts that the Union ‘s request for information about supervisor
 discipline and violation of safety policies is relevant because Lewis was terminated for violating
 the same safety policies as those violated by the named supervisors, particularly the TLCT

policy. The Respondent argues that such information is not relevant because the Union does not represent supervisors, and further, because Lewis was not discharged for violating any safety policies. I have already decided that the General Counsel has failed to show that Lewis was terminated for safety violations. My finding (as to why Lewis was discharged) is especially germane to the Union’s burden to establish the relevancy of supervisory information requests.

As set forth above, the Union has a burden to show relevancy in this case. Further, the Board has consistently held that an employer has an obligation to provide information regarding disparate treatment between unit employees and supervisory personnel when the union has shown that the two groups were subject to a common rule or prohibition and has shown a reasonable belief of the disparate treatment based on objective evidence. *Postal Service*, 332 NLRB 635, 635 (2000). The Board has also rejected arguments by employers that supervisory disciplinary information is generally irrelevant because supervisors and unit employees are not subject to the same disciplinary criteria. See *Postal Service*, 289 NLRB 942, supra.

The General Counsel relies on several cases to show that the Union has established the relevance of information concerning the Respondent’s supervisors who violated its safety policy. However, these cases are easily distinguishable in that they required a showing that the supervisors violated the same or common rule as the unit employees. In *Postal Service*, 289 NLRB 942, 934 (1988), the Board concluded that the Union was entitled to disciplinary records of supervisors who had violated the same gambling prohibition which applied equally to supervisors and unit employees. Similarly, in *Postal Service*, 332 NLRB 635, supra, the Board held that the Union established relevance of information requests pertaining to a supervisor’s discipline under an attendance policy applicable to supervisors and unit employees. In *E.I. du Pont & Co.*, 346 NLRB 553, 553 (2006), the Board found that the union’s information request regarding supervisor discipline was relevant where the supervisor, involved in an altercation with the unit employee, was subjected to an investigation pursuant to the employer’s “People Treatment” policy because the policy applied to both supervisors and unit employees. *Id.* at 583. See also *Postal Service*, 309 NLRB 309, 312 (1992) (relevancy found where supervisor and employee violated the “same” falsification of documents prohibitions applicable to both); *Postal Service*, 332 NLRB 635 at 646 (relevancy found where a supervisor violated the same attendance policies applicable to unit and supervisory personnel). The common thread in these cases was that the supervisors and unit employees were not only subject to a common rule or prohibition, but that the unit employees were actually disciplined for violating the same or common rule as the supervisors. Even if the Union in this case shows sufficient objective evidence that the named supervisors possibly violated the TLCT safety policy or other flagrant safety policies applicable to supervisors and unit members at the Spruance Plant (and were not disciplined or terminated), it has not shown that Lewis was discharged for violating a safety policy, including the TLCT procedure.¹⁰ It is not enough that the named supervisors violated (or may have violated) one of Respondent’s policies applicable to both supervisors and bargaining unit employees, nor is it enough that Lewis violated a policy or procedure which tangentially

¹⁰ It is not relevant at this point, but I will note that the Union’s belief (contrary to the Company’s argument) that the named supervisors in par. 11 had violated the TLCT/lock out policy was supported by undisputed objective evidence (contrary to the Company’s argument) that unit employees had witnessed the supervisor’s alleged misconduct. See *Postal Service*, 332 NLRB 635, supra (where this type of objective, hearsay evidence was sufficient).

involved safety. Therefore, the General Counsel has failed to establish that the Union's requests for information regarding supervisors in paragraph 11 were relevant (i.e., that Lewis and the named supervisors engaged in similar conduct in violation of the same or common rule/prohibition).

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Consequently, I find that the Respondent did not violate Section 8(a)(5) and (1) when it refused to provide information pertaining to the supervisors in response to paragraph 11 of the Union's February 27, 2013 requests, and recommend that the complaint charges relating to this allegation be dismissed.

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Since the General Counsel has not met the relevancy standard required for supervisory information requests, it is unnecessary to address other arguments presented by the Respondent regarding its refusal to provide documents pertaining to supervisors.

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Conclusions of Law

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

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

3. The Respondent has committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act by failing and refusing to fully furnish the relevant information to the Union in its February 27, 2013 information requests, paragraphs 6 and 7 and part of paragraph 11(b) pertaining to the SAM D-5 for bargaining unit employees.

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4. The Respondent has committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act by delaying and refusing to promptly provide the relevant information to the Union in its February 27, 2013 request for information, paragraphs 6 and 7 and part of paragraph 11(b) pertaining to the SAM D-5 for bargaining unit employees.

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5. The Respondent has not committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act by failing and refusing to furnish information requested by the Union in its February 27, 2013 request for information, paragraph 11 pertaining to supervisory personnel.

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REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that Respondent shall cease and desist from refusing to bargain collectively and in good faith with the Amphill Rayon Workers Union, Inc., Local 992, International Brotherhood of Dupont Workers (Union) by refusing to provide the information it needs to represent unit employees. Additionally I recommend that the Respondent immediately supply the Union with all information requested in the Unions information requests dated February 27, paragraphs 6, 7 and 11(b) pertaining to bargaining unit employees and which

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is necessary for the Union to perform its responsibilities as the bargaining representative for unit employees.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

10 The Respondent, E.I. du Pont De Nemours and Company, Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

15 (a) Refusing to bargain collectively and in good faith with Amphill Rayon Workers Union, Inc., Local 992, International Brotherhood of Dupont Workers (the Union) by refusing to provide the presumptively relevant information it needs to represent bargaining unit employees.

20 (b) Refusing to furnish the information to the Union of all of the information in the Union's February 27 requests, paragraphs 6, 7 and 11 (b) pertaining to bargaining unit employees.

25 (c) Refusing to promptly and without delay to furnish all of the information in the Union's February 27 requests, paragraphs 6, 7, and 11 (b) pertaining to bargaining unit employees.

(d) 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.

30 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly furnish the Union with the full information it requested on February 27, 2013 in paragraphs 6, 7, and 11(b) pertaining only to bargaining unit employees.

35 (b) Notify the Regional Director for Region 5, in writing, within 20 days from the date of the Administrative Law Judge's Order, what steps have been taken to comply with the Order.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 (c) Within 14 days after service by Region 5, post at the Spruance Plant in
Richmond, Virginia, a copy of the attached notice marked "Appendix."¹² Copies of the notice,
on forms provided by the Regional Director for Region 5, after being signed by the Respondent's
authorized representative, shall be posted by the Respondent and maintained for 60 consecutive
10 days in conspicuous places including all places where notices to employees are customarily
posted. In addition to physical posting of paper notices, the 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 notices are not altered,
15 defaced, or covered by any other material. In the event that, during the pendency of these
proceedings, the Respondent has gone out of business or closed the facility involved in these
proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to
all current employees and former employees employed by the Respondent at any time since
February 27, 2013.

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

20 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges
violations of the Act not specifically found.

Dated, Washington, DC February 20, 2014

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30 **Donna N. Dawson**
Administrative Law Judge

¹² 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."

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 refuse to bargain collectively with Amphill Rayon Workers, Inc., Local 992, International Brotherhood of Dupont Workers by refusing to furnish it or delaying in furnishing it with information it requests such as that contained in its February requests, paragraphs 6, 7 and 11 (b), pertaining to bargaining unit employees, about the termination of James Lewis.

WE WILL furnish Amphill Rayon Workers, Inc., Local 992, International Brotherhood Of Dupont Workers with the information it requested in paragraphs 6, 7, and 11 (b) of its February 27, 2013 request pertaining to bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

E.I. DU PONT DE NEMOURS AND COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Bank of America Center, Tower II; 100 S. Charles St., Ste. 600; Baltimore, MD 21201
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410-962-2864).