

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

E.I. DU PONT DE NEMOURS AND)	
COMPANY)	
)	
and)	Case No. 5-CA-101359
)	
AMPTHILL RAYON WORKERS, INC.,)	
LOCAL 992, INTERNATIONAL)	
BROTHERHOOD OF DU PONT)	
WORKERS)	

**RESPONDENT E.I. DU PONT DE NEMOURS AND
COMPANY'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS**

Christopher M. Michalik
McGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
Tel: 804-775-4343
Fax: 804-225-5411
cmichalik@mcguirewoods.com

Summer L. Speight
McGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
Tel: 804-775-1839
Fax: 804-698-2128
sspeight@mcguirewoods.com

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. STATEMENT OF FACTS.....	2
A. Background Information on DuPont, Charging Party, and Controlling Policies.....	2
B. Lewis' Employment and Discharge.....	6
C. Charging Party's Grievance.....	9
D. The Requests for Information.....	10
III. QUESTIONS PRESENTED.....	13
IV. ARGUMENT.....	13
A. Introduction and Legal Framework	13
B. The ALJ Properly Found that Charging Party Did Not Have a Reasonable Belief that Lewis Was Terminated Due to Safety Violations.....	14
C. The ALJ Properly Considered the Reasons for Lewis' Termination in Assessing the Relevance of the Requested Information.....	18
V. CONCLUSION.....	19
CERTIFICATE OF SERVICE.....	21

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Brawley Beef, LLC</i> , 339 NLRB 476 (2003).....	15
<i>Daikichi Sushi</i> , 335 NLRB 622 (2001).....	15
<i>Disneyland Park</i> , 350 NLRB 1256 (2007).....	18
<i>Double D. Constr. Grp.</i> , 339 NLRB 303 (2003).....	15
<i>GTE Cal., Inc.</i> , 324 NLRB 424 (1997).....	13
<i>Holiday Inns, Inc.</i> , 317 NLRB 479 (1995).....	14, 15, 19
<i>NLRB v. Truitt Mfg. Co.</i> , 351 U.S. 149 (1956).....	13
<i>NLRB v. U.S. Postal Serv.</i> , 888 F.2d 1568 (11th Cir. 1989).....	13, 14, 18
<i>Pfizer, Inc.</i> , 268 NLRB 916 (1984).....	14
<i>St. Bernard Hosp. & Health Care Ctr.</i> , 360 NLRB No. 12, 2013 NLRB LEXIS 735 (2013).....	15
<i>Standard Dry Wall Prods.</i> , 91 NLRB 544 (1950).....	15
<i>U.S. Postal Serv.</i> , 289 NLRB 942 (1988).....	13
<i>U.S. Postal Serv.</i> , 301 NLRB 709 (1991).....	19
<i>U.S. Postal Serv.</i> , 310 NLRB 391 (1993).....	14, 19
<i>U.S. Postal Serv.</i> , 332 NLRB 635 (2000).....	14, 15
<i>United States Testing Co.</i> , 324 NLRB 854 (1997).....	15
OTHER AUTHORITIES	
National Labor Relations Act Section 8(a)(5).....	1

I. STATEMENT OF THE CASE

In December 2012, Respondent E.I. de Pont de Nemours and Company (“DuPont” or the “Company”) discharged bargaining unit member James Lewis (“Lewis”) for falling asleep on the job and continuous, unsatisfactory performance. His sleeping on the job served to advance Lewis to the final step of the Company’s progressive discipline system—discharge. The Amptill Rayon Workers, Inc. (“Charging Party”) subsequently grieved his termination and issued an expansive request for information. Among other things, Charging Party requested information about general safety violations committed by supervisors. Not only are these supervisors unquestionably outside of the bargaining unit and subject to different discipline policies and procedures, but Charging Party also failed to show the relevance of the alleged safety violations to Lewis’ sleeping and continued, unsatisfactory performance.

Charging Party filed a charge in this matter on March 26, 2013, and the Region issued a Complaint against DuPont on June 27, 2013, alleging that the Company violated Section 8(a)(5) of the National Labor Relations Act (“NLRA” or the “Act”) by failing to provide or timely provide information requested by Charging Party in connection with Lewis’ grievance. Following a September 25, 2013 trial in Richmond, Virginia, the Administrative Law Judge (“ALJ”) issued a decision on February 20, 2014.

The ALJ found that the Company violated the NLRA by failing to furnish or timely furnish Charging Party with presumptively relevant information pertaining to bargaining unit employees. On the other hand, the ALJ found that the Company did not violate the Act when it failed to provide requested information pertaining to supervisor violations of safety policies. In making this finding, the ALJ weighed the credibility of the witnesses who testified before her and determined that Charging Party had no reasonable belief that Lewis was discharged for

violating a safety policy and instead knew that Lewis was terminated due to his continued performance problems and the sleeping incident. The ALJ then correctly applied well-established National Labor Relations Board (the "Board") law in finding that Charging Party failed to establish the relevance of the requested information.

In its exceptions brief, General Counsel challenges the ALJ's credibility determinations and contends that Charging Party had a reasonable basis to believe that Lewis was terminated due to safety violations. General Counsel also claims the ALJ improperly considered evidence as to the actual reason behind Lewis' termination. The ALJ correctly determined that Charging Party had failed to demonstrate the potential relevance and usefulness in processing Lewis' grievance of information related to safety violations. Accordingly, the Board should affirm the ALJ's rulings, findings, and conclusions.

II. STATEMENT OF FACTS

A. Background Information on DuPont, Charging Party, and Controlling Policies

DuPont operates a large manufacturing operation at its Spruance Facility. (ALJ Decision 2:23; Tr. 17). That facility essentially consists of three separate manufacturing plants, also known as areas, where it makes Nomex, Tyvek, and Kevlar. (ALJ Decision 2:23-25; Tr. 17-18). Each of the three areas has its own administration and area manager, who in turn reports to the plant manager. (ALJ Decision 2:25-27; Tr. 18).

Charging Party represents certain hourly production and maintenance employees at the Spruance Facility. (ALJ Decision 2:34-37; Tr. 19). In September 2012, DuPont and Charging Party negotiated and agreed to a three-year collective bargaining agreement ("CBA") that governs the bargaining unit employees' terms and conditions of employment. (ALJ Decision 2:32-34; Tr. 19). The Company and Charging Party further have bargained various policies,

collectively contained in the Site Administrative Manual (“SAM”), that also govern bargaining unit employees’ terms and conditions of employment. (ALJ Decision 3:4-6; Tr. 28, 66). The Company is required to follow these policies with regard to bargaining unit employees. (ALJ Decision 3:4-7, 35-36; Tr. 66). In contrast, neither the CBA nor the parties’ bargained policies/procedures generally apply to supervisory employees at the Spruance Facility. (ALJ Decision 4:8-9).

One such bargained policy, SAM D-5, is entitled “DISCHARGE REASONS” and lists conduct that would subject a bargaining unit employee to discharge. (Company Exhibit 1; ALJ Decision 3:6-32; Tr. 28-29). SAM D-5 provides in relevant part:

- 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 including unexcused absences. Unsatisfactory fitness can subject an employee to discontinuance.

- 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:

....

- 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.

....

- Sleeping – the act of sleeping during work time either on the job assignment or away from it. Causal 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 (causal dozing) could eventually result in discharge through continued unsatisfactory performance.

(Company Exhibit 1 (emphasis added); *see also* ALJ Decision 3:9-32; Tr. 67-69). The lockout procedure listed in the “Flagrant safety violation” section refers to the Tag Lock Clear Try (“TLCT”) system that DuPont employees must use before working on certain equipment. (ALJ Decision 4:32-34; Tr. 24). As recognized by the Charging Party’s witness, Donald Irvin (“Irvin”), “[s]afety is [DuPont’s] number one priority.” (Tr. 20). Accordingly, DuPont has “a lot of rules concerning safety,” and those rules apply to all employees, including supervisors. (Tr. 20, 21, 119; ALJ Decision 4:9-11, 32-34). However, safety violations have varying degrees of seriousness, and SAM D-5 covers the most serious violations—flagrant safety violations. (Company Exhibit 1; ALJ Decision 3:18-24; Tr. 63).

SAM D-7, another bargained policy entitled, “**DEVELOPMENT PROCEDURE**,” provides supervisors with “guidelines to manage employees whose job performance is not satisfactory.” (Company Exhibit 2, at 1; ALJ Decision 3:35-4:4; Tr. 70-71). Under the development procedure, “[v]iolations or mistakes of a lesser nature should be processed through the following steps: INFORMAL REPRIMAND, SPECIAL CONTACT, PRE-PROBLEM CONTACT, PROBLEM CONTACT, AND DISCHARGE.” (Company Exhibit 2, at 2; ALJ Decision 3:40-43; Tr. 64). As recognized by Irvin, a problem contact is the last step just prior to discharge and “the most severe penalty a person can suffer short of discharge.” (Tr. 61; *see also* ALJ Decision 4:2-3). An employee who has received a problem contact remains on problem status for a year, and “if [he or she] violate[s] any procedure during that time, [he or she is] subject to discharge.” (Tr. 61; *see also* Company Exhibit 2, at 5 (describing problem contact as “giving [the employee] a last opportunity to [im]prove his/her performance; and if improvement

is not made by the employee, it will result in suspension with a recommendation to discharge.”); ALJ Decision 4:2-4).

While the Company is required to adhere to SAM D-7 when disciplining bargaining unit employees, the development procedure does not apply to exempt employees. (ALJ Decision 4:8-9; Tr. 71, 97). Instead, exempt employees are treated as at-will employees and may be discharged in a manner not in accordance with SAM D-7. (Tr. 98). Discipline for supervisors could include verbal contacts, notes to file, probation, monetary penalties, and discharge. (ALJ Decision 4:12-17; Tr. 123-25). DuPont does not have to follow and does not follow any particular order in issuing discipline to supervisors, and the appropriate level of discipline is decided on a case-by-case basis. (ALJ Decision 4:12-17; Tr. 99-100, 135).

For bargaining unit employees, serious acts of misconduct, problem contacts, and discharge cases are taken to a site review. (ALJ Decision 4:21-24; Tr. 63, 127). Supervisors may also be subject to a site review for continued poor performance or for egregious acts that may result in probation or termination. (ALJ Decision 4:21-24; Tr. 127). In the site review process, the area presents a review of the conduct warranting discipline and makes a recommendation to the plant manager and his immediate staff on whether to discipline or discharge an employee. (ALJ Decision 4:24-26; Tr. 22). The site review team then makes a determination of whether or not to support the area recommendation. (ALJ Decision 4:24-26; Tr. 22). Irvin, the chairman of Charging Party’s Executive Committee and Grievance Committee, is made aware of the team’s decision (Tr. 19, 23), and the employee is informed of “the decision that has been reached and the reasons for the decision.” (Company Exhibit 2, at 9; Tr. 23). In conducting a site review of bargaining unit employees, the Company does not consider disciplinary actions taken against exempt employees. (Tr. 99).

B. Lewis' Employment and Discharge

Lewis worked as a bargaining unit employee in the Tyvek area. (ALJ Decision 4:42-43; Tr. 27). Over the course of 2012, he proceeded through the steps of progressive discipline detailed in SAM D-7. (Joint Exhibit 1-A, at 10; ALJ Decision 5:24-27; Tr. 107). He received an informal contact in April 2012 for poor performance relating to his failure to fill out patrol sheets. (Joint Exhibit 1-A, at 10; Tr. 107). In June 2012, Lewis received a special contact due to his failure to fill out QAT logbooks. (Joint Exhibit 1-A, at 10; Tr. 107). He was issued a pre-problem write-up for attendance issues in August 2012. (Joint Exhibit 1-A, at 10; Tr. 107). He advanced to the problem category in November 2012 for additional attendance issues. (Joint Exhibit 1-A, at 10; Tr. 107-08). In December 2012, while at the last step of the development procedure, Lewis incurred further discipline for falling asleep on the job. (ALJ Decision 5:29-37). Accordingly, DuPont conducted a site review¹ dated December 17, 2012 and decided to terminate his employment due to poor performance. (ALJ Decision 4:42-5:2; Joint Exhibit 1-A).

In the second slide of the site review presentation entitled "Policy/Procedure Violated," the Tyvek area identifies two specific SAM D-5 discharge reasons for Lewis:

- 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 including unexcused absences. Unsatisfactory fitness can subject an employee to discontinuance.
 - Operator failed to properly follow SP-2316 – Line 2 Windup Operation.
- **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 the use of the **Development Procedure**. Repeat violations of this standard (causal dozing) could eventually result in discharge through continued **unsatisfactory performance**.

¹ The ALJ acknowledged that Charging Party is not involved in the site review meetings or privy to discussions that take place during those meetings. (ALJ Decision 4:27-28). However, it is undisputed that Charging Party had access to Lewis' site review presentation during the grievance process.

(Joint Exhibit 1-A, at 2 (emphasis added); *see also* ALJ Decision 5:5-17). The first recites the situation under SAM D-5 in which an employee works his or her way through the progressive discipline steps due to continued unsatisfactory performance. (Tr. 29, 74; ALJ Decision 3:9-12, 5:19). The sub-bullet under this section lists the specific performance problem—Lewis’ failure to properly follow the standard procedure for the windup operation, a shortcoming caused by his falling asleep. (Tr. 29-31, 131; ALJ Decision 5:20-21). The second repeats the SAM D-5 discharge reason relating to sleeping. (Tr. 29, 75; ALJ Decision 3:26-32, 5:19). Importantly, the flagrant safety violation section of SAM D-5 is not included or referenced in the site review. (Tr. 76-77, 134; ALJ Decision 6:31-32). The Company’s witness testified that in his experience, site reviews for TLCT violations or flagrant safety violations specifically reference that portion of SAM D-5. (ALJ Decision 6:29-31; Tr. 134). Irvin did not refute that point. (ALJ Decision 6:31).

The site review next lists the standard procedure for the windup operation (the job performed by Lewis at the time) and the steps an operator must take to stop a full mill roll from turning and start turning a new empty mill roll. (ALJ Decision 5:21-24; Tr. 27, 31, 77, 101). Under this procedure, once the full mill roll and the empty mill roll rotate 180 degrees, the operator hits a button which fires a hot knife to cut the sheet from the full mill roll. (Tr. 103; Joint Exhibit 1-A, at 4-5; ALJ Decision 5 n.5). The sheet is then blown onto the empty core and starts a new roll. (Tr. 103; Joint Exhibit 1-A, at 4-5; ALJ Decision 5 n.5). The operator then uses the TLCT procedure to remove the full mill roll and replace it with an empty roll. (Tr. 104; Joint Exhibit 1-A, at 4-5; ALJ Decision 5 n.5). This process is repeated every 25 to 30 minutes. (Tr. 103).

The site review then outlines the sequence of events surrounding Lewis' unsatisfactory performance. (ALJ Decision 5:24). On December 8, 2012, Lewis worked the 4pm to 12am shift and then volunteered for overtime and worked the 12am to 8am shift on December 9, 2012. (Tr. 78, 105-06; ALJ Decision 5:29-30). Lewis fell asleep during the first roll doff on his overtime shift, but completed the doffing cycle with no issue after being awoken by a coworker. (Tr. 78-79, 105-06; ALJ Decision 5:31). He then fell asleep during the second roll doff, was startled awake, and initiated the hot knife before the full mill roll had completed its rotation. (Tr. 79, 105-06; ALJ Decision 5:32-33). He fired the hot knife too soon in the process, before even reaching the TLCT stage. (Tr. 79, 105-06, 135; ALJ Decision 6:37-39). This caused the machine to go into sheet break for about 4.5 hours and resulted in the loss of approximately 25,000 pounds of product. (Tr. 79-81, 106; Joint Exhibit 1-A, at 9; ALJ Decision 5:34-35).

The site review presentation closes with a list of Lewis' previous performance issues and his then-problem status. (Joint Exhibit 1-A, at 10, 13; Tr. 27, 106-07; ALJ Decision 5:24-27). The area recommended that Lewis be suspended with the intent to discharge. (Tr. 32; Joint Exhibit 1-A, at 15; ALJ Decision 4:43-44).

Irvin provided the following conflicting testimony about Charging Party's understanding of the reasons behind Lewis' discharge:

- First, he testified that the reason for Lewis' termination was not clear based on the site review presentation. (Tr. 32-33).
- He next testified that he knew Lewis' sleeping played no role in the Company's decision to discharge him. (Tr. 33). At the same time, he admitted that: (1) the site review presentation listed sleeping and progressive discipline as a discharge reason; (2) bargaining unit employees had received levels of progressive discipline for sleeping in

the past; (3) that Lewis was on problem status at the time of his site review; and, (4) that an employee is subject to discharge for any violation once he or she has reached problem status. (Tr. 61, 70, 74, 75).

- Finally, he testified he believed that Lewis was terminated due to a TLCT or safety violation based on the site review presentation, while simultaneously admitting that the presentation never listed safety violations as a discharge reason. (Tr. 34, 37, 76-77).

The ALJ weighed Irvin's conflicting testimony and the other evidence presented and found that his "assertion that he and [Charging Party] never knew the reasons or real reason why Lewis was terminated is clearly inconsistent with the site review report, if not somewhat disingenuous." (ALJ Decision 6:11-13). The ALJ found that the site review presentation made clear that Lewis was terminated due to his continued poor performance and the culminating event of sleeping on the job. (ALJ Decision 4:42-44, 7:2-4; Tr. 106, 110). The site review makes clear that Lewis was not terminated due to a flagrant safety violation or a TLCT violation. (Tr. 106; ALJ Decision 6:31-39).

C. Charging Party's Grievance

Additional support of the ALJ's credibility finding is found in reviewing Charging Party's January 8, 2013 grievance over Lewis' termination. (Joint Exhibit 1-B; Tr. 32, 110; ALJ Decision 7:8). This grievance did not make any mention of a flagrant safety violation or TLCT violation. (ALJ Decision 6:42-7:1; Tr. 83). Instead, the grievance focused on the issue of sleeping and Lewis' problem status:

Points Brought out in the Investigation:

#1 Mr. Lewis made the error because he nodded off while in the process of doffing. Jimmy was doubling over from graveyard to daywork when the incident happened. This combination of shifts typically results in the most loss of sleep causing drowsiness. Jimmy was observed asleep by coworkers and management.

Management ultimately sent Jimmy home because he was not physically capable of working.

...

#3 Jimmy was on Problem write-up but each step was for something different. Management unfairly listed two contacts that are not supposed to be recorded just to make the site review look worse. The disability days without FMLA protection were under review and the actual problem write-up was being challenged but the union had not had time since it just happened in November.

#4 The worst thing that Jimmy is guilty of is accepting overtime when he was not physically able. This error of judgment should not cost Jimmy his job.

(Joint Exhibit 1-B (emphasis added); ALJ Decision 6:39-42). The grievance shows that Charging Party understood the reasons for Lewis' termination—his sleeping on the job and his progression through the development procedure. (ALJ Decision 6:39-7:4).

Similarly, Charging Party never mentioned or discussed any TLCT or flagrant safety violation during the grievance meeting held with Charging Party's Grievance Committee, Lewis, the plant manager, and Labor Relations Manager Bruce Harris. (Tr. 19-20, 111). Charging Party never suggested that it did not understand the reasons behind Lewis' termination, nor did they ask for the termination reasons during the grievance proceedings. (Tr. 112-13). The plant manager denied Lewis' grievance and upheld the discharge on January 11, 2013. (Joint Exhibit 1-C; ALJ Decision 7:8-9). A few weeks later, on January 28, 2013, the Charging Party informed DuPont of its intent to take the grievance to arbitration. (Joint Exhibit 1-D; ALJ Decision 7:9-11).

D. The Requests for Information

On February 27, 2013, two months after Lewis' termination, Charging Party submitted information requests allegedly related to the processing of the Lewis arbitration. (Joint Exhibit

1-E; Tr. 34; ALJ Decision 7:15-17). These information requests included the following:

6. Beginning on January 1, 2002 and continuing to December 31, 2012, for each employee who engaged in conduct considered by the Company 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.

7. Provide all information that was considered by the Company 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.

.....

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.

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

b. Also provide the written policy from the SAMS Manual regarding TLCT's that was 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.

(Joint Exhibit 1-E (emphasis added); ALJ Decision 7:21-45).² The language used in Request Numbers 6 (“a flagrant safety violation or a violation of the sleeping policy”) and 7 (“flagrant safety violations or sleeping violations”) made clear that Charging Party understood that safety violations and sleeping violations were separate offenses covered under different sections of SAM D-5. In Request Number 11(a), Charging Party sought information regarding safety

² General Counsel's exceptions relate to the ALJ's findings and rulings as to Request Number 11(a). However, General Counsel relies on the Company's responses to Requests Numbers 6 and 7 in an attempt to support its position that Charging Party reasonably believed Lewis was terminated due to safety violations.

violations—violations not at issue in Lewis’ case—committed by non-bargaining unit employees. Irvin testified that he had never before asked for discipline involving supervisors, but believed that the listed supervisors committed TLCT violations. (Tr. 25, 37, 42).

On March 14, 2013, DuPont provided Charging Party with a cover letter along with responsive information. (Joint Exhibit 1-F; Tr. 43; ALJ Decision 8:21-23). At this time, DuPont was still working on its responses to Request Nos. 6 and 7 (Tr. 44; Joint Exhibit 1-F; ALJ Decision 8:23-24), and Harris informed Irvin that the requests were “awfully broad.” (Tr. 45; ALJ Decision 8:25-26). For Request Number 11, DuPont stated that the request sought irrelevant information. (Tr. 43, 46; Joint Exhibit 1-F; ALJ Decision 8:24). In response, Irvin stated: “I said, but it’s a comparison case; I need to see D-5. I said, D-5 is very broad; I need to find out how these managers were treated in their site review in regards to Mr. Lewis. . . . I need to see the site reviews so I can see how – why their violation was less severe than Mr. Lewis’ violation.” (Tr. 46; ALJ Decision 8:27-28). Essentially, Charging Party admits that it did not attempt to limit its request for information to those SAM D-5 discharge reasons identified in Lewis’ site review (development procedure and sleeping policy), but instead sought information about D-5 discharges in general.

On March 28, 2013, DuPont supplemented its responses to Charging Party’s requests for information. (Joint Exhibit 1-G; Tr. 47; ALJ Decision 9:9-10). For Request Nos. 6 and 7, DuPont explained that “Lewis was progressed through each step of the disciplinary/developmental policy for a variety of unacceptable **performance concerns**. Comparison cases include anyone who has been involved in or put through progressive discipline steps.” (Joint Exhibit 1-G (emphasis added); ALJ Decision 9:10-13). Therefore, the Company informed Charging Party on March 28th at the latest that Lewis was terminated for

performance concerns (and not safety concerns) under the progressive discipline policy. In response to Request Number 11, DuPont again asserted that the request sought irrelevant information: “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.” (Joint Exhibit 1-G; ALJ Decision 9:25-28).

III. QUESTIONS PRESENTED

1. Did the ALJ err in finding that Charging Party did not have a reasonable belief that Lewis was terminated for safety violations based on the weight of the evidence and credibility assessments?
2. Did the ALJ err in considering the reasons for Lewis’ termination in assessing the relevance of information requested about safety violations committed by non-bargaining unit members?

IV. ARGUMENT

A. Introduction and Legal Framework

Under the NLRA, an employer has an obligation to provide requested information that is potentially relevant and useful to a union in fulfilling its responsibilities as bargaining representative. *GTE Cal., Inc.*, 324 NLRB 424, 426 (1997). “The duty to furnish information turns upon ‘the circumstances of the particular case.’” *NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1570 (11th Cir. 1989) (quoting *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956)). Although “[t]he standard for determining the relevancy of requested information is a liberal discovery-type standard that merely requires that the information have some bearing on the issue between the parties,” *U.S. Postal Serv.*, 289 NLRB 942, 942 (1988), the requested information

must be “related to the Union’s function as bargaining representative and reasonably necessary to performance of that function.” *Holiday Inns, Inc.*, 317 NLRB 479, 481 (1995).

Information that pertains to employees in the bargaining unit is presumptively relevant. *Pfizer, Inc.*, 268 NLRB 916, 918 (1984). However, where the information sought concerns persons outside the bargaining unit, the union bears the burden of establishing the relevance of the requested information. *U.S. Postal Serv.*, 332 NLRB 635, 636 (2000). As noted by the Board: “Requests for information relating to persons outside the bargaining unit require a special demonstration of relevance. Thus, the requesting party must show that there is a logical foundation and a factual basis for its information request.” *U.S. Postal Serv.*, 310 NLRB 391, 391 (1993). If the union does not meet this required burden, it is not entitled to the requested information.

In this case, Request Number 11(a) seeks expansive information relating to any safety violations committed by non-bargaining unit supervisors in 2012 and 2013. Charging Party, however, cannot meet the relevance burden necessary to justify such a request. In particular, DuPont undisputedly did not terminate Lewis for a safety violation, and Charging Party had no reasonable belief otherwise. Accordingly, the ALJ properly ruled that potential safety violations of non-bargaining unit employees proves entirely inapposite to Charging Party’s obligation to represent Lewis in his grievance.

B. The ALJ Properly Found that Charging Party Did Not Have a Reasonable Belief that Lewis Was Terminated Due to Safety Violations

The Board and the courts have repeatedly held that non-bargaining unit information is relevant to a union’s grievance obligation only where supervisors are subject to the same standards of behavior and where supervisors have committed the same offense as the grieving employees. *NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1569 (11th Cir. 1989) (enforcing the

Board's order requiring the company to furnish records disclosing disciplinary actions taken against supervisors for violating the same rule as that charged against the union employees); *U.S. Postal Serv.*, 332 NLRB 635, 635-36 (2000); *Holiday Inns, Inc.*, 317 NLRB 479 (1995). The ALJ recognized this authority and properly considered whether Charging Party had demonstrated a "reasonable belief" that information regarding safety violations would be related to potential disparate treatment between Lewis and supervisory personnel. (ALJ Decision 15:7-11). In resolving this issue, the ALJ weighed the evidence and made a credibility assessment, finding that Charging Party had not met its burden in demonstrating the relevance of safety violations committed by supervisors because it had no reasonable belief that Lewis was terminated for safety violations.

"A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *St. Bernard Hosp. & Health Care Ctr.*, 360 NLRB No. 12, 2013 NLRB LEXIS 735, at *28 (2013) (citing *Double D. Constr. Grp.*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001)). Accordingly, an ALJ's credibility findings are entitled to great deference. *Brawley Beef, LLC*, 339 NLRB 476, 476 n.1 (2003). In recognition of the fact that the ALJ is in the best position to assess credibility, the Board has long held that a credibility determination cannot be overruled "unless the clear preponderance of all the relevant evidence convinces [the Board] that [it] is incorrect." *United States Testing Co.*, 324 NLRB 854, 854 n.2 (1997) (citing *Standard Dry Wall Prods.*, 91 NLRB 544 (1950)). Here, General Counsel has not met this high burden.

The evidence clearly demonstrates that Charging Party's claim of uncertainty as to the reason for Lewis' discharge is not credible. The site review expressly states DuPont terminated Lewis because he had fallen asleep on the job and had exhausted the progressive discipline steps. (ALJ Decision 4:42-44, 5:5-17, 6:31-39, 7:2-4; Tr. 29, 75-77, 106, 110, 134). Specifically, it clearly listed the "Policy/Procedure Violated" as continued unsatisfactory performance and sleeping under SAM D-5. (Joint Exhibit 1-A, at 2). Irvin acknowledged this and admitted that the flagrant safety violation procedure was not included in the site review. (Tr. 74-77). In the past, site reviews for TLCT violations or flagrant safety violations specifically referenced that portion of SAM D-5. (ALJ Decision 6:29-31; Tr. 134). Additionally, the site review presentation listed Lewis as in problem status, making discharge the next step under the development procedure. (ALJ Decision 4:2-4, 5:24-27; Tr. 27, 61, 106-07). As reflected by the grievance, Charging Party was fully aware that Lewis was in problem status at the time of the site review, had exhausted the other steps of the development procedure, and had been sleeping on the job. (ALJ Decision 6:39-7:4; Tr. 83, 111; Joint Exhibit 1-B). Irvin acknowledged that employees had received some level of formal discipline for sleeping on the job and that employees had been discharged previously for working their way through the steps of the development procedure. (Tr. 70).

Even more tellingly, Charging Party's grievance likewise references only sleeping on the job and exhausting the progressive discipline process. (ALJ Decision 6:39-7:4; Tr. 83, 111; Joint Exhibit 1-B). If Charging Party had any confusion, it surely would have been reflected in its grievance. Instead, the grievance exactly mirrors the site review. The grievance did not reference any confusion or safety violations at all because Charging Party understood the actual reasons for Lewis' discharge.

Irvin also provided contradictory testimony about his understanding of the reasons behind Lewis' discharge (Tr. 32-34, 37, 70, 74-77), and his testimony was further undermined by the site review presentation and grievance documentation. The ALJ weighed the evidence and Irvin's credibility and found that his "assertion that he and [Charging Party] never knew the reasons or real reason why Lewis was terminated is clearly inconsistent with the site review report, if not somewhat disingenuous." (ALJ Decision 6:11-13). Her credibility assessment finds ample support in the record. Safety played no role in Lewis' discharge. Instead, the Company terminated him due to continued unsatisfactory performance. Specifically, Lewis fell asleep on the production line. As a result, he fired a hot knife too early which forced the production process to stop and caused a significant amount of ruined product. With Lewis already on Problem (the final pre-discharge step in SAM D-7's progressive discipline), this last incident caused Lewis to exhaust the progressive discipline policy. The site review presentation, which specifically lists the SAM D-5 discharge reasons of continued poor performance and sleeping as the reasons for discharge, made these reasons for discharge clear. Consistent with the site review, Charging Party's grievance focuses exclusively on Lewis falling asleep on the job, firing the hot knife too early, and exhausting the progressive discipline steps.

In its exceptions, General Counsel ignores the ample evidence supporting the ALJ's credibility determination and attempts to argue that Charging Party did not understand the reasons behind Lewis' termination because the Company failed to adequately respond to Request Number 7. (General Counsel's Br. Supp. 16). However, the Company's March 28th supplemental response to Request No. 7 (which came two weeks after Charging Party's initial response deadline of March 14th) made clear to Charging Party that "Lewis was progressed through each step of the disciplinary/developmental policy for a variety of unacceptable

performance concerns. Comparison cases include anyone who has been involved in or put through progressive discipline steps.” (Joint Exhibit 1-G (emphasis added); ALJ Decision 9:10-13). Therefore, Charging Party was fully aware that Lewis was terminated for performance issues under the progressive discipline policy, and not safety violations.

C. **The ALJ Properly Considered the Reasons for Lewis’ Termination in Assessing the Relevance of the Requested Information**

General Counsel next contends that the ALJ erred in considering the reasons for Lewis’ termination. General Counsel argues that by doing so, the ALJ failed to consider whether Charging Party had a reasonable belief in the relevance of the requested information and improperly intruded into the merits of the underlying grievance. The ALJ necessarily looked to the reasons for Lewis’ termination in assessing whether General Counsel had demonstrated the relevance of the requested information.

“To demonstrate relevance, the General Counsel must present evidence either (1) that [Charging Party] demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the [Company] under the circumstances.”

Disneyland Park, 350 NLRB 1256, 1258 (2007). The ALJ properly considered the reasons for Lewis’ termination in deciding whether Charging Party had demonstrated the relevance of the requested information³ and in determining whether the relevance of the information should have been apparent to DuPont. Past Board and court decisions assessing the relevance of an information request relating to non-bargaining unit members have done the same. *See, e.g.*, *NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1569 (11th Cir. 1989) (enforcing the Board’s order requiring the company to furnish records disclosing disciplinary actions taken against

³ The ALJ recognized that Charging Party need show only a “reasonable belief” of disparate treatment between bargaining unit employees and supervisory personnel who violated the same or common rule to demonstrate the relevance of the requested information. (ALJ Decision 15:7-19).

supervisors for violating the same rule as that charged against the union employees); *Holiday Inns, Inc.*, 317 NLRB 479, 482 (1995) (finding that the union was entitled to information on the Company's disciplinary response to other cash shortages comparable to those which led to the bargaining unit members' terminations); *U.S. Postal Serv.*, 310 NLRB 391, 391 (1993) (finding that the union was entitled to see supervisor timecards where a bargaining unit employee was suspended for attendance irregularities); *U.S. Postal Serv.*, 301 NLRB 709, 710 (1991) (finding that the Company should have turned over information regarding supervisors who were disciplined for allegedly falsifying certain postal documents where the bargaining unit employee was disciplined for falsification of his application for employment). In assessing the reasons for Lewis' termination, the ALJ did not encroach upon the issue for an arbitrator—whether Lewis' termination was unjust. (See Joint Exhibit 1-B).

V. CONCLUSION

Based on the foregoing, DuPont requests that the ALJ's decision be affirmed and the recommended order be adopted.

Respectfully submitted,

E. I. du Pont de Nemours and Company

Date Submitted: May 1, 2014


By Counsel

Christopher M. Michalik
McGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
Tel: 804-775-4343
Fax: 804-225-5411
cmichalik@mcguirewoods.com

Summer L. Speight
McGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
Tel: 804-775-1839
Fax: 804-698-2128
sspeight@mcguirewoods.com

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2014, I will electronically file the foregoing with the National Labor Relations Board using the Agency's E-Filing system and will have sent a copy of the same by electronic mail to the following:

Kenneth Henley, Esq.
Suite 500
One Bala Avenue
Bala Cynwyd, PA 19004
khenleyesq@aol.com

Timothy Bearese
Patrick Cullen
National Labor Relations Board, Region 5
Bank of America Center – Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201
Timothy.Bearese@nlrb.gov
Patrick.Cullen@nlrb.gov



By Counsel

Christopher M. Michalik
McGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
Tel: 804-775-4343
Fax: 804-225-5411
cmichalik@mcguirewoods.com

Summer L. Speight
McGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
Tel: 804-775-1839
Fax: 804-698-2128
sspeight@mcguirewoods.com