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E.I. Du Pont de Nemours and Company and Amphyll Rayon Workers, Inc., Local 992, International Brotherhood of Du Pont Workers. Case 05–CA–101359

August 27, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

The sole issue before the Board is whether Respondent E.I. Du Pont de Nemours and Co. violated Section 8(a)(5) and (1) of the Act by failing to provide certain information related to supervisors that the Union had requested for the purpose of evaluating whether to arbitrate an employee’s discharge.¹ Contrary to the judge and our dissenting colleague, we find that the Union’s request for information on the safety violations and attendant discipline issued to five supervisors was relevant and reasonably necessary to the Union’s performance of its function as a bargaining representative. We therefore reverse the judge’s finding that the Respondent did not violate the Act by failing to respond to paragraph 11 of the Union’s February 27, 2013 request for information as it pertains to supervisors.²

Background

The Respondent manufactures synthetic fibers and related products and has a longstanding collective-bargaining relationship with the Charging Party Amphyll Rayon Workers, Inc., International Brotherhood of Du Pont Workers (the Union), which represents certain production and maintenance employees at its Spruance facility in Richmond, Virginia. In addition to their collective-bargaining agreement, which contains a grievance/arbitration provision, the parties have agreed to workplace policies set forth in a Site Administration

¹ On February 20, 2014, Administrative Law Judge Donna N. Dawson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

² We have amended the judge’s conclusions of law and remedy consistent with our findings and legal conclusions herein. We shall modify the judge’s recommended Order to conform to our findings, and to the Board’s standard remedial language, as set forth in full below. We shall also substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

Manual (SAM). Section D-5 of the SAM, entitled “Discharge Reasons,” sets forth “Guidelines” describing two categories of conduct for which bargaining unit employees could be subject to discharge:

- 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.
- 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

The second bullet point is followed by a non-exclusive list of examples of “serious misconduct.” The two relevant to this case are:

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.

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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.

Next, Section D-7 of the SAM gives guidance on a development procedure akin to progressive discipline, applicable to bargaining unit employees. It provides for different levels of discipline commensurate with the severity of the violation. For a severe violation, immediate discharge may be recommended, or the employee may be taken to any step in the development procedure. For lesser violations, four progressive disciplinary steps may precede the decision to recommend discharge: “*INFORMAL REPRIMAND, SPECIAL CONTACT, PRE-PROBLEM CONTACT, PROBLEM CONTACT, AND DISCHARGE.*” The SAM D-5 and SAM D-7 do not apply to exempt employees such as supervisors, but it is undisputed that supervisors must adhere to all of the

safety policies and standards of conduct described in SAM D-5.

Serious safety and misconduct infractions by both bargaining unit employees and supervisors are investigated through the Respondent's site review process. The relevant management representatives in the area present their findings and recommendations for discipline in a site review report, also known as a "site review presentation," to a site review team made up of the plant manager and his administrative staff. The team then makes the final determination whether or not to support the area's recommendation to discharge or discipline the employee. The Union is not involved in the site review process or the meeting in which the report is presented. During the grievance procedure, however, the Union is provided with a document entitled: "Site Review Presentation," which contains a summary of the incident and the Respondent's reasons for disciplining the employee.

Employee Lewis's Discharge

James Lewis worked as a windup operator in the area in which the Respondent manufactured the product Tyvek. Part of the windup operation includes a process referred to as "roll doffing." A windup operator oversees this process, during which a full roll of product switches places with an empty roll, and the sheet of product is cut and transferred onto the empty roll before the entire process begins again. After the transfer, the operator must perform the "Tag, Lock, Clear, and Try" (TLCT) safety procedure, also known as the "Lockout" procedure.

In December 2012 Lewis volunteered to work a second consecutive 8-hour shift following his regularly scheduled shift. During that second shift he fell asleep several times. Upon awakening the second time, he prematurely performed a step in the windup operation, firing a hot knife into a full roll of Tyvek before the rolls had switched places, resulting in a substantial loss of the Respondent's product. Based on this event, the area management conducted a site review and prepared a site review report with the recommendation to "suspend with intent to discharge." Later that month, the Respondent verbally discharged Lewis and provided the Union with a Site Review Presentation dated December 17, 2012. In it, the Respondent listed its reasons for discharging Lewis in two main bullet points and one indented sub-bullet point:

- 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 use of the Development Procedure. Repeat violations of this standard (casual dozing) could eventually result in discharge through continued unsatisfactory performance.

The two main bullet points reproduced language from two categories of conduct described in the SAM D-5 for which an employee could be discharged. The indented sub-bullet point referred to "SP-2316- Line 2 Windup Operation," the standard practice/procedure for operating the equipment that Lewis handled.

Underneath the bullet-pointed reasons for his discharge, Lewis's Site Review Presentation compared the standard steps in the roll doffing cycle to the actual chronology of events leading to Lewis's error, demonstrating that Lewis had performed a step in the roll doffing process out of sequence. The final section of the Site Review Presentation summarized Lewis's other performance issues in 2012, showing his progression through the following developmental procedure steps: Informal Reprimand, Special Contact, Pre-Problem Contact, and placing him in Problem Contact, the final stage before discharge. The report concluded by recommending that Lewis be suspended with the intent to discharge.

On January 8, 2013, the Union filed a formal grievance over Lewis's discharge, to the effect that Lewis made an error by falling asleep while in the process of doffing. The Respondent denied the grievance on January 11. The Union notified the Respondent's labor relations manager, Bruce Harris, that it intended to arbitrate Lewis's grievance. In connection with its intention to arbitrate, on February 27, 2013, the Union requested information relating to flagrant safety violations and sleeping violations by bargaining unit employees. The judge found that the Respondent unlawfully delayed and failed to produce responses to these requests.³

³ We adopt the judge's conclusions, in the absence of exceptions, that the Respondent violated the Act by unreasonably delaying and failing to provide complete information responding to the Union's information request pars. 6, 7, and the portion of par. 11(b) pertaining to bargaining unit employees. Board's Rules and Regulations Sec. 102.48. In the absence of exceptions, we also adopt the judge's rejection of the Respondent's affirmative defense that the Board, the Regional Director, and the administrative law judge had no authority to

proceed in this case because the Board lacked a quorum, but on different grounds. After the judge issued her decision, the Supreme Court found that the Board lacked a quorum at the time the complaint issued because the President's recess appointments were not valid. *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). This ruling, however, did not affect the Board's authority in the manner claimed by the Respondent. The authority of the General Counsel to investigate unfair labor practice charges, and to issue and prosecute unfair labor practice complaints, is derived directly from the language of the National Labor Relations Act, not from any 'power delegated' by the Board. Accordingly, the presence or absence of a valid Board quorum has no bearing on the General Counsel's prosecutorial authority. See *Pallet Companies, Inc.*, 361 NLRB 339, 339 (2014), *enfd.* 634 Fed.Appx. 800 (D.C. Cir. 2015). Moreover, on July 18, 2014, a fully confirmed five-member Board ratified all administrative and personnel decisions made from January 4, 2012 to August 5, 2013, and expressly authorized Judge Dawson's appointment. As the Board stated in its Minute of Board Action (available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3302/7-18-14.pdf>), it took this action in an effort to resolve any continuing uncertainty regarding various actions taken during the time the Board lacked a quorum. See also *Stahl Specialty Co.*, Case 17-CA-088639, 2016 WL 1566615 (NLRB April 15, 2016) ("In our view, this [July 18, 2014] ratification resolves any uncertainty regarding Judge Dawson's appointment as an administrative law judge"). We note, however, that on March 21, 2017, the Supreme Court held in *NLRB v. Southwest General, Inc., d/b/a Southwest Ambulance*, 137 S.Ct. 929 (2017) that, under the Federal Vacancies Reform Act of 1998, Acting General Counsel Lafe Solomon's authority to take action as Acting General Counsel ceased on January 5, 2011, after the President nominated him to be General Counsel. *Id.* at 944. We need not consider this issue because the Respondent never questioned the Acting General Counsel's authority under the FVRA or timely raised the issue with the Board. See *SW General, Inc. v. NLRB*, 796 F.3d 67, 83 (D.C. Cir. 2015), *affd.* 137 S.Ct. 929. However, even if the Respondent had raised the issue, events subsequent to the issuance of the complaint on June 27, 2013, rendered moot any potential argument that Solomon's lack of authority after his nomination precludes further litigation in this matter. Specifically, on May 25, 2016, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification in this case that states, in relevant part,

I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.

My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by *SW General* are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. [*SW General, Inc. v. NLRB*, 796 F.3d 67, 78 (D.C. Cir. 2015)] (citing 5 U.S.C. § 3348(e)(1)).

For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

In view of the independent decision of General Counsel Griffin to continue prosecution of this matter, we would reject as moot any potential challenge to the actions taken by Solomon as Acting General Counsel after his nomination on January 5, 2011.

The issue currently before us, however, involves paragraph 11 of the Union's requests for information, which asked for "[a]ll documents relating to the safety violations, including site incident reports, site reviews, and other like investigative and/or disciplinary records," committed by five named supervisors. Paragraph 11(a) requested "the discipline, if any, and the written record of such, administered to each of these supervisors for the actions in question." Paragraph 11(b) requested the written policy, if any, applicable to supervisors regarding TLCTs.

The Respondent refused to produce the requested information relating to the supervisors, stating that it was irrelevant because the Union did not represent exempt employees. The Union explained that it needed the information in order to evaluate how the named supervisors were treated in comparison with Lewis, because employees had observed them committing serious safety violations, and the Union was aware that the supervisors were not terminated, despite being subject to the same safety rules as bargaining unit employees. By letter of March 28, 2013, the Respondent supplemented its previous response to the Union's request paragraph 11 without providing any documents, stating that "the Union does not represent these employees and the case of relevancy has not been made convincingly by the Union."

The judge found that the Respondent's failure to produce information pertaining to supervisors in response to paragraph 11 did not violate Section 8(a)(5) and (1) because the General Counsel failed to show that Lewis was terminated for safety violations, and thus, the Union did not meet its burden to show that the requested information was relevant to Lewis's discharge. The judge determined that Lewis was discharged, not because of safety concerns, but because of (1) continued performance problems; and (2) sleeping on the job. She further reasoned that "[m]y finding [as to why Lewis was discharged] is especially germane to the Union's burden to establish the relevancy of supervisory information requests." The General Counsel excepts, claiming that the judge improperly assessed the actual reasons for Lewis's discharge instead of determining whether the Union had established that the requested information was relevant. He further asserts that the Union established the relevance of the requested information, based on its need for comparative data on supervisors disciplined for violating safety policies in order to evaluate Lewis's grievance and decide whether to proceed with arbitration. For the reasons that follow, we agree with the General Counsel that the requested information is relevant and should be produced, and we reject our dissenting colleague's contrary view.

Discussion

An employer is obligated under the Act to supply information requested by the union that is potentially relevant and would be of use to the union in fulfilling its responsibilities as the employees' bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Postal Service*, 332 NLRB 635, 635 (2000). Information pertaining to employees within the bargaining unit is presumptively relevant. Where the information requested is not presumptively relevant, it is the union's burden to demonstrate relevance. In determining relevance, the Board uses a "liberal, discovery-type standard" that requires only that the requested information have "some bearing upon" the issue between the parties and be "of probable use to the labor organization in carrying out its statutory responsibilities." *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014); *Postal Service*, 332 NLRB at 636. This broad discovery standard protects the obligations of a bargaining representative. *Acme Industrial*, supra at 437–438. Generally, information that aids any stage of the arbitral process is relevant and should be provided. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). The goal of such information exchange is "to encourage resolution of disputes, short of arbitration hearings, briefs, and decision so that the arbitration system is not 'woefully overburdened.'" *Id.* (citing *Acme Industrial*, supra). And should arbitration be invoked, it will be facilitated "by permitting a union access to a broad scope of potentially useful information." *Shoppers Food Warehouse*, 315 NLRB 258, 260 (1994).

The Union's burden to show the relevance of information requests pertaining to employees outside the bargaining unit is "not exceptionally heavy." *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). It requires demonstrating a reasonable belief supported by objective evidence that the requested information is relevant, unless the relevance of the information should have been apparent to the Respondent under the circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007); *Shoppers Food Warehouse*, 315 NLRB at 259. Potential or probable relevance is sufficient as long as it is based on more than a mere suspicion. *Postal Service*, 332 NLRB at 636; *Postal Service*, 310 NLRB 391, 391 (1993) (requiring "a logical foundation and a factual basis" for information requests relating to persons outside the bargaining unit); cf. *Postal Service*, 310 NLRB 701, 702–703 (1993). The Board does not pass on the merits of the union's claim that the employer breached the collective-bargaining agreement or committed an unfair labor practice, and the information that triggered the union's request may be based on hearsay and need not be

accurate or ultimately reliable. *Shoppers Food Warehouse*, 315 NLRB at 259–260; *Reiss Viking*, 312 NLRB 622, 625 (1993).

A.

As a threshold matter, before applying our liberal discovery-type standard, we find that the judge improperly considered the merits of Lewis's grievance by determining the Respondent's true reason for Lewis's discharge instead of analyzing whether the Union had demonstrated the relevance of its information requests based on the information available to it at the time. It is axiomatic that the Board does not evaluate the merits of the union's contractual claim in determining relevance. *Acme Industrial Co.*, 385 U.S. at 437–438. Likewise, we have held that "[i]t is neither necessary nor proper to address the merits of the parties' conflicting contentions of the reason or reasons concerning [the employee's] discharge. The reason for [his] discharge is a matter to be resolved in a grievance, if it is pursued, or arbitration." *Southern California Gas Co.*, 346 NLRB 449, 455 (2006). For example, the Board may not speculate on an employer's potential defenses in an arbitration proceeding. *Pennsylvania Power Co.*, 301 NLRB at 1105. And even an employer's promise that it will not raise a particular defense at an arbitration proceeding does not render irrelevant a union's request for information relating to that defense. *Conrock Co.* 263 NLRB 1293, 1294 (1982), *enfd. mem.* 735 F.2d 1371 (9th Cir. 1984).

Here, although the judge found that there was "some relevant dispute" on the reason for Lewis's discharge, she accepted Labor Relations Manager Harris's testimony that because the Site Review Presentation did not specifically refer to the SAM, Lewis was not discharged for a flagrant or other safety violation or TLCT infraction. Based on that testimony and her review of the Site Review Presentation, the judge concluded that the Respondent discharged Lewis because of his continued progressive discipline and the final sleeping incident, and not for safety reasons. She found the Union's claim that it never knew the reasons for Lewis's discharge to be inconsistent with the Site Review Presentation itself.

We disagree with the judge's finding (and the view of our dissenting colleague) that the Site Review Presentation clearly shows that a safety violation did not contribute to Lewis's discharge. The Site Review Presentation summarizes an investigation from which the Union was excluded, and refers to several possible reasons for discharge, each of which has some bearing on safety. Moreover, there is no evidence that Harris or anyone else in management explained to the Union the Respondent's reasons for Lewis's discharge, or discussed its interpretation of the Site Review Presentation. By accepting the

Respondent's position, the judge effectively foreclosed the Union's opportunity to challenge the Respondent's stated reasons, or to test their legitimacy. See, e.g., *Southern California Gas Co.*, 346 NLRB at 455 (union is entitled to challenge the employer's reasons for discharging employee); *Postal Service*, 337 NLRB 820, 822 (2002) (finding union's information request relevant and necessary for the union to determine legitimacy of Respondent's actions). This is an important part of the Union's duty to fairly represent bargaining unit employees. Cf. *Newport News Shipbuilding & Dry Dock Co.*, 236 NLRB 1470, 1471 (1978) (union violated Sec. 8(b)(1)(A) by accepting employee's discharge based almost solely on the employer's explanation and failing to respond to employee's request for appeal), enfd. in relevant part, 631 F.2d 263, 269 (4th Cir. 1980); *Service Employees Local 579 (Beverly Manor Convalescent Center)*, 229 NLRB 692, 695–696 (1977) (finding union breached its duty of fair representation by failing to inquire into the validity of the employer's stated reason for discharge and willingly accepting employer's evaluation of employee). Regardless of how the employer frames the issue, “a union has the right and the responsibility to frame the issues and advance whatever contentions it believes may lead to the successful resolution of a grievance.” *Pennsylvania Power Co.*, 301 NLRB at 1105.

Accordingly, we find that the judge erred in placing the burden on the Union to prove “that Lewis was discharged for violating a safety policy, including the TLCT procedure,” instead of evaluating the Union's information request based on the information the Union was given, and the reasonableness of the Union's belief that this information was relevant, as analyzed below.

B.

We find that the Union has met its burden to show that its information request paragraph 11 satisfied the Board's relevance standard. The issue is whether the Union had a reasonable belief supported by objective evidence that information relating to the safety violations and discipline issued to five supervisors was relevant, and whether that information would be of use in deciding whether to arbitrate Lewis's discharge. The judge did not make this analysis, contradicted her own findings of fact, and, as discussed above, improperly addressed the merits by substituting her view of the reasons for Lewis's discharge.

We find that the Site Review Presentation, on its face, is sufficiently related to safety concerns and that the Union therefore had a reasonable basis for its information request. The judge's conclusion that “the site review does not include or even reference a flagrant or other safety violation, or TLCT infraction, as a reason for ter-

mination” contradicts her initial finding that the site review process which Lewis underwent is used for serious safety and misconduct violations, including those involving TLCT. The Site Review Presentation indicates that Lewis performed the “Try” step in the TLCT process prematurely. We disagree with the judge, however, that the premature performance of the TLCT procedure means that TLCT was not implicated. The SP-2316—Line 2 Windup Operation includes the TLCT procedure, and performing part of TLCT prematurely would reasonably be construed as a violation of the “Lockout” procedure, which is listed as an example of a flagrant safety violation in the SAM D-5. The judge found that the standard practice/procedure for the windup operation “implicitly involves safety,” but concluded to the contrary that Lewis was not terminated for a safety violation, crediting Harris' testimony that a TLCT violation or flagrant or other safety violation would have been referenced on the site review. Further inconsistencies include the judge's numerous findings that establish a relationship between Lewis's discharge and the Respondent's safety policies:

First, the judge found that although SAM D-5 and the D-7 do not apply to supervisors, “there is no dispute that the Spruance Plant supervisors must still adhere to all of the Respondent's safety policies [sic] 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).”⁴ Second, SAM D-5, quoted verbatim as a reason for Lewis's discharge, describes “casual dozing” as a “performance/safety problem” (emphasis added). Third, the judge rejected Labor Relations Manager Harris's opinion that falling asleep at or near moving machinery would not pose a safety threat.

The Union had a reasonable belief supported by objective evidence that the information it requested pertaining to supervisors was relevant. It had objective evidence from meetings on safety incidents, Serious Site Incident reports, publicized by computer throughout the plant, and from employee witnesses, that supervisors had violated the Respondent's safety policies without being discharged. It is undisputed that the supervisors named in the Union's information requests had performed bargain-

⁴ In light of her finding that supervisors are subject to all of the safety policies set forth in SAM D-5, we find that the judge erroneously distinguished cases in which the Board found relevant requests for information concerning supervisors who violated the same rule or policy applicable to unit employees. See, e.g., *E.I. du Pont & Co.*, 346 NLRB 553, 553 (2006), enfd. 489 F.3d 1310 (D.C. Cir. 2007); *Postal Service*, 332 NLRB 635, 646 (2000); *Postal Service*, 309 NLRB 309, 312 (1992); *Postal Service*, 289 NLRB 942 (1988), enfd. 888 F.2d 1568 (11th Cir. 1989).

ing unit work during strike preparation training in July or August 2012. Accordingly, they were subject to exactly the same rules as bargaining unit employees, in addition to the safety standards generally applicable to supervisors.

The Union explained to the Respondent that it needed the information pursuant to the parties' past practice of presenting comparison cases in arbitrations. Like the judge, we reject the Respondent's argument that it only uses discharges pursuant to progressive discipline in comparison cases. The fact that supervisors may be disciplined differently than bargaining unit members does not make the Union's information request irrelevant, if both supervisors and unit employees are subject to the same rules. The Board has rejected an employer's defense, similar to the Respondent's arguments here, that its supervisors were "judged by different criteria and, therefore are not similarly situated for purposes of discipline," and that they "did not have comparably poor past discipline records." *Postal Service*, 301 NLRB 709, 712 (1991), *enfd. mem.* 980 F.2d 724 (3d Cir. 1992). The Board found that such differences may be brought to the arbitrator's attention, and that the requested information "need not necessarily be dispositive of the issues between the parties, it need only have some bearing on it." *Id.* Thus, a lack of progressive discipline for supervisors does not preclude finding that the Union's information request No. 11 "has some bearing on the determination of whether [the] employee[] ha[s] been treated harshly, unjustly, or disparately," and would be of assistance to the Union in determining whether, and how best to represent Lewis in arbitration, if at all. *Postal Service*, 289 NLRB 942, 943 (1988), *enfd.* 888 F.2d 1568 (11th Cir. 1989); see also *Holiday Inn on the Bay*, 317 NLRB 479, 481 (1995); *Pfizer, Inc.*, 268 NLRB 916, 919 (1984) ("the evenhanded application of work rules for discipline purposes is a fundamental principle of industrial justice"), *enfd.* 763 F.2d 887 (7th Cir. 1985). We find that the Union met its burden to demonstrate that the information it requested was relevant and necessary to evaluate Lewis's case.

Conclusion

In refraining from reviewing the merits of Lewis's case, we do not pass judgment on the employee's conduct or work record, but act in aid of the arbitral process, which is the cornerstone of industrial peace. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). Based on the Site Review Presentation, and the entire record herein, we find a "probability that the desired information was relevant, and that it would be of use to the [U]nion in carrying out its statutory duties and responsibilities." *Acme Industrial Co.*, 385 U.S. at 437.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraphs 3 and 4 and delete paragraph 5 of the administrative law judge's Conclusions of Law.

"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 to the Union the relevant information requested in paragraphs 6, 7, and 11 of its February 27, 2013 information request.

"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 to the Union the relevant information requested in paragraphs 6, 7, and 11 of its February 27, 2013 information request."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, we shall order the Respondent to cease and desist from refusing to bargain collectively and in good faith with the Union by delaying and refusing to provide the information it needs to represent unit employees. We shall order the Respondent to timely and completely supply the Union with all of the information responding to the Union's February 27, 2013 requests paragraphs 6, 7 and 11, that is necessary for the Union to perform its responsibilities as the bargaining representative for unit employees.

ORDER

The National Labor Relations Board orders that the Respondent, E.I. Du Pont de Nemours and Company, Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Amphill Rayon Workers Union, Inc., Local 992, International Brotherhood of Du Pont Workers (the Union) as the exclusive collective-bargaining representative of the employees described in Article I Section 1 of the collective-bargaining agreement between the Respondent and the Union effective from September 1, 2012 until September 1, 2015, by failing and refusing to fully furnish the Union with all of the information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) Refusing to fully furnish to the Union all of the information requested in paragraphs 6, 7, and 11 of the Union's February 27, 2013 information request relating to the termination of James Lewis.

(c) Delaying and refusing to promptly provide all of the information requested in paragraphs 6, 7, and 11 of the Union's February 27, 2013 information request relating to the termination of James Lewis.

(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.

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

(a) Furnish to the Union in a timely and complete manner all of the information requested in paragraphs 6, 7, and 11 of the Union's February 27, 2013 information request relating to the termination of James Lewis.

(b) Within 14 days after service by the Region, post at its Spruance facility in Richmond, Virginia, copies of the attached notice marked "Appendix."⁵ 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 days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, 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, defaced, or covered by any other material. If 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.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 5 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.

(d) Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 27, 2018

Mark Gaston Pearce,

Member

⁵ 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."

Lauren McFerran,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting in part.

The issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to comply with the Union's request for information regarding alleged safety violations by supervisors. The Union sought the information in connection with its grievance over the discharge of unit employee James Lewis. Because the requested information concerns nonunit employees, it is not presumptively relevant; instead, the burden is on the Union to demonstrate a reasonable belief supported by objective evidence that the information was relevant to the Union's role as bargaining representative. *Disneyland Park*, 350 NLRB 1256, 1257-1258 (2007); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). Contrary to my colleagues, I agree with the judge that the Union failed to carry that burden, and therefore I would dismiss the allegation.¹

As an initial matter, my colleagues argue that the judge erred in determining the reason for Lewis's discharge (and concluding that it was not for safety violations) rather than analyzing whether the Union demonstrated relevance based on what it knew at the time of the request. In my view, the judge would lack an adequate factual basis for assessing relevance without first determining whether a violation of the Respondent's safety policies played a role in Lewis's termination. Nevertheless, I need not decide whether the judge erred in this respect. Even analyzing relevance based on the information known to the Union at the time of the request, the record fails to show the relevance of supervisory safety violations.

The grievance filed on Lewis's behalf—the very foundation of the information request—made no mention of any alleged safety violation. Rather, it merely put forward mitigating factors for Lewis's falling asleep and requested lenience, while conceding that Lewis was already on Problem Contact status—the step just before

¹ I join my colleagues in adopting the judge's conclusions, in the absence of exceptions, that the Respondent unlawfully delayed in providing and failed to provide requested information regarding unit employees. I also join my colleagues in rejecting the Respondent's challenges to the authority of the Board, the Regional Director, and the administrative law judge.

discharge in the progressive discipline process—at the time. Most critically, the Respondent’s Site Review Presentation gave the Union clear notice that Lewis was not discharged for a safety violation, but for his continued performance problems; under “Discharge Reasons,” it cited his “[f]ailure to meet standards of performance on a continuing and satisfactory basis,” followed by “the act of sleeping during work time.” The Site Review did not list safety violations as a reason for the discharge, and the judge specifically credited Labor Relations Manager Bruce Harris’s testimony that when an employee is disciplined for a flagrant safety violation, it is specifically referenced as such on the Site Review. The absence of a reference to safety, together with the specific references to performance standards and sleeping, clearly would have indicated to the Union that the latter were the reasons for the discharge. Under these circumstances, the Union could not have possessed a “reasonable belief based on objective evidence” that the requested information regarding supervisory safety violations was relevant. I therefore dissent.

Dated, Washington, D.C. August 27, 2018

William J. Emanuel, Member

(SEAL) 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 Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of Du Pont Workers (the Union) as the exclusive collective-bargaining representative of the employees described in Article I Section 1 of the collective-

bargaining agreement between the Respondent and the Union effective from September 1, 2012 until September 1, 2015, by delaying and failing and refusing to fully furnish the Union with information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT refuse to fully furnish to the Union all of the information requested in paragraphs 6, 7, and 11 of the Union’s February 27, 2013 information request relating to the termination of James Lewis.

WE WILL NOT delay and refuse to promptly provide to the Union all of the information requested in paragraphs 6, 7, and 11 of the Union’s February 27, 2013 information request relating to the termination of James Lewis.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely and complete manner all of the information requested in paragraphs 6, 7, and 11 of the Union’s February 27, 2013 information request relating to the termination of James Lewis.

E.I. DU PONT DE NEMOURS AND COMPANY

The Board’s decision can be found at www.nlrb.gov/case/05-CA-101359 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half St. S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



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, Amptill 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 unlawfulness. 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 (Sпруance 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 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

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.)

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

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.)

B. Site Administration Manual Policies

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:

- 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.
- 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. 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).

The development procedure (similar to progressive discipline) for bargaining unit employees is set forth in the Re-

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.

spondent's SAM D-7, and reads in pertinent part:

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 policies 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 Procedures 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

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

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 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:

- 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.
- 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 use of the Development Procedure. Repeat violations of this standard (casual dozing) could eventually result in discharge through continued unsatisfactory performance.

(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.)

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 ma-

chine 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.)

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 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 disci-

pline/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 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.

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

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).

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:

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

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.)

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.

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 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.

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 [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.

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 un-

disputed 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 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.)

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

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.)

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

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.

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.)

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

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 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.)

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 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] 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 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 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 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 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).

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) .

III. DISCUSSION AND ANALYSIS⁹A. *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). 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 152 (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

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 953 (2013); *ORNI 8, LLC*, 359 NLRB No. 87 (2013) (not reported in Board volumes). Accordingly, I reject this affirmative defense.

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.

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).

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.

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

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 (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 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 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)

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 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

The General Counsel asserts that the Union 's request for in-

formation 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 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).

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.

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.

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.
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.
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.
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.

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

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).

in good faith with the Amthill 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 is necessary for the Union to perform its responsibilities as the bargaining representative for unit employees.

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

ORDER

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

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with Amthill 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.

(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.

(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.

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.

(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.

(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 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 electroni-

cally, 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, 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.

(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.

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

Dated, Washington, D.C. February 20, 2014

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 Amthill 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 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.

WE WILL furnish Amthill 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.

E.I. DU PONT DE NEMOURS AND COMPANY

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.

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."

The Administrative Law Judge's decision can be found at <https://www.nlrb.gov/case/05-CA-101359> or by using the QR

code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

