

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

DUPONT SPECIALTY PRODUCTS USA, LLC (AS A
SUCCESSOR TO E. I. DU PONT DE NEMOURS
AND COMPANY),

and

Case 5-CA-222622

AMPTHILL RAYON WORKERS, INC., LOCAL 992,
INTERNATIONAL BROTHERHOOD OF DUPONT
WORKERS

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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INTRODUCTION

Respondent's Exceptions reiterate its baseless legal arguments that the Administrative Law Judge (ALJ) thoroughly addressed and rejected in his decision, which cites to the credible testimony and relevant evidence presented at trial. Respondent attacks the ALJ's credibility determinations as "demonizing" and "discrediting" its witnesses when any fair reading of the transcript reveals that Respondent's witnesses repeatedly made misleading, if not patently false, statements in direct contradiction to the documentary evidence. That evidence explicitly shows that Respondent's decision to outsource the emergency services at its Spruance facility was motivated not by purported safety concerns as Respondent repeatedly and emphatically states in its brief, but by labor costs.

As explained below, the judge's decision is fully supported by the record evidence and is consistent with well-established Board precedent, while Respondent's exceptions are contrary to both. The General Counsel respectfully urges the Board to overrule Respondent's exceptions, and to adopt the recommended decision and order of the administrative law judge.

I. UNCHALLENGED FINDINGS AND CONCLUSIONS THAT RESPONDENT HAS WAIVED

Under Section 102.46(b)(2) of the Rules and Regulations of the National Labor Relations Board, any exception to a ruling, finding, conclusion, or recommendation not specifically urged is deemed waived. The following findings and conclusions of the judge are among those not specifically challenged by Respondent:

- a) "For many years, at least since 1974...Dupont maintained an emergency response team (ERT) at the Spruance plant composed largely of bargaining-unit employees from the Union." (ALJD 3:23-25)
- b) "The parties agree that no governing laws or regulations require that DuPont maintain an ERT. Nor do any of Dupont's internal policies. Until...September 1, 2018, DuPont's ERT served as a first-line responder for the entire Spruance facility. This included the separately operated Zytel and Mylar plants onsite as well as the plant

utilities operation that since February 20, 2018, has been run by a company called Veolia. The ERT was staffed by bargaining unit employees—mostly from the ARWI, and about six to eight from the IBEW unit—and also by a few ‘exempt’ nonunit employees who volunteered to train for and participate in the fire brigade and MERT units.” (ALJD 4:14-24)

- c) “Employees were paid for their time training, for completing certifications, and for responding to calls. Pay was based on their regular salary. Because it was in addition to their regular work at the plant—which itself might include overtime pay—much of the emergency services work was paid at overtime rates. Each individual’s daily or weekly entitlement to overtime pay for ERT work was based on his or her overall hours. For some employees, the ERT provided a lucrative source of additional hours and overtime pay over the course of the years.” (ALJD 5:28-34)
- d) “Completion of all the training required for new or prospective ERT members could take up to a year of monthly course work and practical training until they were ready. Through a combination of overtime in their regular production or maintenance job, and overtime performed on ERT, ERT employees were some of the highest paid employees at the plant.” (ALJD 5:36-40)
- e) “The provisions of the ERT program and changes to it were routinely negotiated with the ARWI executive committee. In one instance, in 2007, the parties entered into a settlement agreement after a dispute over a proposed decrease in training hours for the fire brigade. After months of dispute, the Union agreed: that the parties have reached the point of impasse after 18 meetings with respect to the bargaining concerning the Emergence Response Team (ERT) that has been ongoing since December 2007, and the Union agrees that it will not object to the Company implementing the ERT training hours proposal [as attached].” (ALJD 5:42-50)
- f) “Monthly training schedules were developed by DuPont and then approved by the Union’s executive committee. In recent years, there had been extensive bargaining over changes made to ERT overtime policy. In 2016, a new fire captain, Terry DeGuentz, pushed for adoption of more strenuous qualification requirements. A change from local training standards to a national ‘Pro-Board’ certification for ERT firefighters was discussed and bargained with the Union. However, when employees had difficulty passing the training, at some point in 2017, management bargained with the Union a limit of three chances for an applicant to take the Pro-Board test for firefighter. At one point, in response to staffing concerns, management and the Union even discussed the possibility of requiring employees to apply for the fire brigade. Ongoing staffing difficulties led to further ERT bargaining. In the Spring of 2017, after negotiations in which DuPont feared that a bargaining impasse would be likely (GC Exh. 15 at 12), there were agreements reached between the Union and DuPont to permit the use, in prescribed circumstances, of Chesterfield County firefighters to fill out the roster of the ERT when insufficient employee members could be induced to sign up for particular shifts. In response to persistent Union demands to create an ERT on the permanent day shift, in 2017, DuPont agreed to establish a daytime fire brigade, but the details were not worked out before the subcontracting in this case rendered the issue moot.” (ALJD 6:13-31)

- g) “Sometime in the spring of 2018, DuPont made the decision that beginning September 1, 2018, it would subcontract the Spruance plant emergency services work to a company called FDM. This decision was made without disclosing the matter to the unions until mid-June.” (ALJD 7:23-25)
- h) “But the evidence shows that the matter [the decision to subcontract emergency services] was presented up the ladder—to Lukhard’s supervisor, Yanoschak, to ‘somebody in corporate’ named Kimberly Richardson, and to L.G. Tackett, who was interim plant manager but referred to in documentation as the Global Operations Manager of Safety and Construction. Once a Spruance plant manager was named, Tackett was the individual to whom the Spruance plant manager reported. Based on internal DuPont documents, other DuPont managers were involved in the decision. On April 24, Yanoschak sent an email to Tackett seeking his approval to move forward with the contracting out plan. Tackett responded to this request for approval by asking for a summary of the proposal that he could share with other managers: ‘Cheryl, can you put me a couple-page summary on this I can share with Rose and Brent. Perhaps I can set a call up and you can share.’ DuPont Human Resources Manager Andre Holmes, then chief bargainer for DuPont at Spruance, later wrote an email on July 11, 2018, in which he declared that the subcontracting decision had been approved by Rose Lee, VP of Safety and Construction, and by Tackett.” (ALJD 7:39-8:8)
- i) “Lukhard admitted speaking with Richardson. However he denied speaking about the subcontracting to the ‘Sruance Labor Team.’ I note that Yanoschak’s email is the first suggestion that DuPont viewed the subcontracting as part of a collective-bargaining strategy, with implementation planned for the expiration of the current labor agreement, either in response to a strike or the completion of bargaining.” (ALJD 8, n. 7)
- j) “At Yanoschak’s direction, in mid-2018—well after the subcontracting decision had been made and announced—Lukhard started documenting ‘serious issues,’ many related to staffing, that the ERT was having. This document (R. Exh. 37) listed five incidents discovered or researched by Lukhard in May and June 2018, where an ERT team member was late or failed to show up for a training or shift.” (ALJD 8, n. 8)
- k) “A March 15, 2018 five-slide power point for a Spruance staff meeting—each page of which was marked ‘confidential’—set out a proposal for two options for contracted emergency services. (GC Exh. 12.) Option 1 provided for 9 firefighters each working 3-person 24-hour shifts, with 3 DuPont exempt employees performing the roles of shift commanders to the FDM staff. Option 2 provided for 12 firefighters working 3-person 12 hour shifts, with 4 DuPont exempt employees performing the roles of shift commanders to the FDM staff. Slide 3 of this power point was titled ‘Summary of Costs.’ It stated: Summary of Costs • Current Costs =\$2.0MM • Training • Staffing & Confined Space Overtime • Fire Inspector Position • Immediate cost reduction from elimination of Pro-Board Training and Testing =\$350M spent over past 2 years • Contract Option 1 (24hr)=\$980M Savings= \$1.0MM Annually* • Contract Option 2 (12hr)=\$1.3MM Savings =\$675M Annually *Note: There is a one-time cost associated with Option 1 to provide living quarters for 24-hr personnel = \$175M.”(ALJD 9:24-43)

- l) “The next page of the power point presentation (slide 4) listed the “Soft/Added Benefits” of the contracting out. This page listed the elimination of “Fatigue Risk Management implementation issues,” the “rededication” and “focus[]” of DuPont hourly employees to their area assignments, “Continuous training . . . mostly on-site during normal work hours,” faster response times, and “enhanced . . . rescue planning support.” A final slide (slide 5) lists “concerns & risks,” noting “potential walkout of current members when discussion of contracting starts,” and also a concern with “contract staffing turnover,” which it is also noted “should be mitigated if we can offer [a] 24-hours on/48-hours off shift schedule.” The above cost projections were restated in an updated power point dated April 24, 2018, 10 created by DuPont. (GC Exh. 13.), and perhaps by Lukhard. See, Tr. at 524. The updated power point was similar to the earlier March 15 power point, but reflected DuPont’s decision to go with Option 1 for contracted emergency services, entailing the 24-hour shifts. As to costs it stated: Summary of Costs • Current Costs = \$2.0MM 15 • Training • Staffing & Confined Space Overtime • Fire Inspector Position • Future State Option = \$1.0MM Savings= \$1.0MM Annually • One-time costs associated with the transition: • On-site living quarters for 24-hr personnel = \$175-200M capital • Contingency Plan (Strike or Walk Out) = \$75M/month in cost • 75-90 days to get contract in place, complete hiring and provide initial training. Will then have ‘carrying’ cost each month that DuPont staffing remains in place when contract team is set up and ready to go.” (ALJD 9:45-10:28)
- m) “The April 24 version—also sent with a warning to ‘maintain confidentiality’-- reflected that DuPont had chosen to use 12 total contracted employees—9 firefighters each working 3-person 24 hour shifts, with 3 DuPont exempt employees as shift commanders. The power point restated that there would be cost savings of \$1 million annually by moving to the contracted emergency services, and also noted two “one-time costs associated with the transition”: first, a cost of \$175-200,000 to create on-site living quarters for the contract employees working 24 hour shifts, and second, a \$75,000 a month cost for the summer of 2018 to ready the contract employees in the event of a “strike or walk out” by unit employees before September 1, 2018. An email accompanying the March 15 and April 24 power point was sent by Yanoschak to then HR Manager and chief bargainer Holmes, DuPont Program Manager Darrin Meenach (who also had collective-bargaining and labor agreement implementation responsibilities at Spruance), labor consultant Valerie Jacobs, and Mary Anne Sparks, a DuPont labor relations analyst. In the email, Yanoschak instructed the group to keep the power point presentations confidential and not to share their contents with anyone other than Jacobs, Lukhard, Yanoschak, Tackett, and John Lee (unidentified in the record), and Sparks.” (10:30-11:2)
- n) “In it [April 27, 2018 email exchange on which Lukhard and Yanoschak were copied], Tackett approved a ‘cost sourcing variance request’ requested by Lukhard, but prepared by DuPont contract administrator Keith Jenkins writing under Lukhard’s name. The document, which appears to present justification for failing to seek competitive bids for the contract with FDM to staff the fire and emergency services, states: Variance Impact on Requesting Business (benefits or negatives as a result of this variance): Comments From Requestor: One month time frame for bidding, contract issue, and site training to support this effort. There is no other supplier that

supplies this type of service from a local basis. Site will recognize a significant cost savings in overtime as a result of this effort.” (ALJD 11:5-19)

- o) “The documentary evidence suggests that the contract with FDM was finalized in early June, with a three-year contract signed for a total of \$4 million. The only change in operation from earlier drafts was that initially the shift commanders would be FDM personnel, meaning that all four emergency services personnel on the shift would be FDM employees. There would be three of these four-person shifts, each composed of two fire fighters, one lieutenant, and one shift commander. However, DuPont made clear internally that ‘Within the first year we expect to transition the Shift Commander’s position to a DuPont Exempt position.’ The contract with FDM was written to permit DuPont to make that change at its sole election.” (ALJD 11:32:39)
- p) “According to the job descriptions written by Lukhard and on which basis the FDM employees were hired, the shift commanders (be they FDM or DuPont employees) were to take ‘first line direction from the Chief of Emergency Services,’ i.e., from Lukhard. They were also to ‘[c]onduct investigations, report findings, and make recommendations to the Chief for disciplinary actions.’ The firefighters and lieutenants were to perform projects and duties ‘assigned by the Shift Commander and/or Chief.’” (ALJD 11:41-12:2)
- q) “Lukhard wrote the job descriptions for the FDM positions. FDM did the hiring but Lukhard reviewed applicants’ ‘bios to make sure they met the expectation of the job descriptions.’ These employees were hired—or, at least, were identified and accepted employment—in the spring of 2018, perhaps in May or June.” (ALJD 12:5-8)
- r) “As mid-June approached, DuPont made plans to tell its employees and unions that it was going to subcontract the emergency services. On June 14, 2018, Yanoschak sent Meenach, Jacobs, Holmes, and Sparks an email with a draft ‘Q&A’ about the upcoming ERT contracting out. She indicated that this was to be finalized into a document that could be used in discussions with the unions in an upcoming meeting. Among the benefits of the contracting out of emergency services touted on the Q&A draft were faster response times, increased skill and capability, improved overall service, and Reduced cost of services—Significant reduction in overtime, training, and equipment and apparatus cost. The Q&A indicated that there were no other fire protection changes ‘being considered at this time. . . in addition to the Emergency Services changes.’” (ALJD 12:14-28)
- s) “I find that based on the record evidence—her [Valerie Jacob’s] attendance at labor-relations meetings on behalf of DuPont, the hiring of her to assist with collective-bargaining, and her inclusion and participation in confidential correspondence deemed only for management, and no contrary evidence—that Jacobs is an agent of the Respondent under the Act.” (ALJD 12, n. 10)
- t) “DuPont maintains a hotline which employees can call to register complaints. In response to a complaint that a new manager was ‘offering jobs to his old partners that he used to work with in Chesterfield,’ Holmes responded on July 11, in a message that appears to assume that the new manager in question is Lukhard. Holmes’ message acknowledges that the subcontracting ‘will end many hours of overtime’ for employees ‘resulting in a loss of additional income[.]’” (ALJD 15:46-50)

- u) “By email dated August 10, 2018, Yanoschak sent an email to Lukhard, and other DuPont officials—that she told them to keep confidential—setting forth the ‘ongoing annual savings and not just 1-time’ savings associated with the subcontracting. Based on 2017, Yanoschak’s chart estimated annual overtime savings of \$732,936 by using the contractor. Notably, by August 20, a DuPont manager was openly expressing concern to other managers as to whether the contracting out should be justified in communications to employees as being based on cost advantages, fearing that such an admission would ‘create issues’ with the unfair labor practice charge pending against DuPont.” (ALJD 17:8-16)
- v) “As far as emergency services, they have operated as planned, with the contracted employees working 24-hour shifts. With the exception of a building to house the contracted employees during their 24 hour shifts, there is no new facility or building from which the FDM employees service the Spruance plant. They are onsite and respond as needed to calls relating to emergency services. Instead of having six personnel for every shift as there were under the employee-staffed model, there are now four during any shift, and the four are now cross-trained as EMTs and firefighters. The FDM contractors continue to rely on Chesterfield County for assistance in the ‘few times/year’ when they need to offensively enter an ILDH or handle a situation beyond the FDM capability. Lukhard testified that with the FDM contractors performing the emergency services it is ‘totally different because they are dedicated emergency services members,’ whose entire work is about preparing for, training, and being involved in emergency services. Lukhard cited that response time had dropped, with all ERT employees coming from a central location, but on cross examination he admitted that the advantage of all ERT members coming from a central location would vary depending on the part of the plant to which they were responding.” (ALJD 17:32-47)
- w) “I note that Lukhard’s figure of \$800,000 for the accommodations is...far in excess of the March 15 and April 24 power point reports which anticipated a one-time cost of \$175,000-\$200,000 to provide living quarters for FDM staff.” (ALJD 18, n. 11)
- x) “In this case, the Spruance plant emergency services work had for many decades been performed by bargaining unit (and some non-bargaining unit) DuPont employees. They were paid for the work and, indeed, it was a major source of overtime for those employees who sought, trained and qualified for ERT positions.” (ALJD 19:25-28)
- y) “As a result of DuPont’s decision to subcontract, this work and the training for it would no longer available to unit employees. However, the work continued to be done, onsite at the Respondent’s facility, utilizing the same equipment and resources, and even remaining under the control and direction of [] DuPont. By the contract with FDM, Chief Lukhard directly supervised the contract shift commanders and could assign work to the remaining FDM employees. Lukhard even wrote the job descriptions for the contract employees and had input into their hiring. Moreover, DuPont’s stated plan was to subsequently replace the contracted-FDM shift commanders with ‘exempt’ DuPont employees. Finally, it is notable that even after the subcontracting, DuPont—now using a contractor instead of employees—continued to ensure and take responsibility for emergency services throughout the entire Spruance plant (everywhere ‘within the fence line’) including the separately

operated Zytel and Mylar plants, and even at the utilities operation operated onsite by a company named Veolia since February 2018. Indeed, in January 2019, DuPont entered into an agreement with Veolia to continue to provide emergency services to utilities operations for the next 18 years. This is hardly a case, as Holmes tried to convince the Union, of DuPont ‘not want[ing] to be in the fire business.’” (ALJD 19:32-46)

- z) “Holmes testified that when he announced the subcontracting to the Union he had no knowledge of any cost savings associated with the subcontracting, and, therefore could not have addressed the issue of costs. But this was shown to be, and is found to be, unbelievable. In the days and also months before the meeting with the unions, Holmes was privy to DuPont documents that highlighted the anticipated overtime and training cost savings of a million dollars annually to be gleaned from the subcontracting.” (ALJD 24:2-7)
- aa) “For one thing, and dispositively, unlike the decision in *Oklahoma Fixture*, the decision to subcontract here did involve labor costs, as discussed above, both in terms of direct overtime cost savings and indirect costs of staffing and training.” (ALJD 25:43-45)

II. FACTS

A. Respondent’s Business

Respondent is a corporation with a plant in Richmond, Virginia and is in the business of manufacturing synthetic fibers and related products. (ALJD 2:25-33; GC Exh. 1-C at ¶2(a)) Chief Robert Lukhard (Lukhard) has been Respondent’s Chief of Emergency Services since July 2017. (ALJD 6:35-37) Andre Holmes (Holmes) was Respondent’s Human Resource Consultant until April 8, 2018,¹ and at the time of the hearing held the title of Labor Relations, Center of Excellence. (*Id.* 12:32-33; Tr. 236:7-17) Darrin Meenach (Meenach) is a Program Manager for Respondent’s Spruance facility. (ALJD 7:17-18; Tr. 310:21) Cheryl Yanoschak (Yanoschak) is Respondent’s Safety, Health & Environment Manager, and Chief Lukhard’s direct supervisor. (ALJD 6:51) Meenach, Holmes, and Yanoschak, by Respondent’s admission, are supervisors and agents within the meaning of Section 2(11) and (13) of the Act. (*Id.* at 1, n. 2)

¹ All dates occur in 2018 unless otherwise noted.

B. Respondent's Spruance Facility

For at least the last 45 years, and continuing today, Respondent produces three principal synthetic fibers at its Spruance facility: Kevlar, Tyvek, and Nomex. (*Id.* at 2:25-30) Respondent employs approximately 2,000 individuals at its Spruance facility, with roughly half in the Kevlar, Tyvek, and Nomex sections of the plant, and the other half employed as exempts, clerks, technical operators, and engineers. (Tr. 86:15-24) Employees are split into four rotating shifts, referred to as A, B, C, and D shifts, with an additional regular fixed day shift. (*Id.* at 89:4-24; ALJD 2:31-33)

C. The ARW Union

The Amthill Rayon Workers, Inc., Local 992, International Brotherhood of Dupont Workers (the ARW Union) has been the collective-bargaining representative of two separate bargaining units at the Spruance facility since about 1947: the production and maintenance (P&M) bargaining unit, made up of about 1,000 hourly employees, and the clerical, technical, and office workers (CTO) bargaining unit, made up of about 100 hourly employees. (*Id.* at 2:35-43); (GC Exh. 1-C at ¶5(a)-(c))

The collective-bargaining agreement (CBA) between the ARW Union and Respondent during the time period relevant to the Complaint was effective from September 1, 2012, to September 1, 2018. The parties negotiated a new collective bargaining agreement, effective from September 1, 2018, to August 31, 2022. (ALJD 2:45-3:6)²

Donny Irvin (Irvin) is an employee in the P&M bargaining unit. He has worked in various hourly positions at Respondent's Spruance facility for about 45 years. (Tr. 84:1-7) Irvin

² The 2012-2015 CBA was renewed annually by the parties until negotiations for the new CBA were completed in about September 2018. (Tr. 264:8-265:1)

has held the position of ARW Union treasurer, Chairman of the Executive Committee, and Chairman of the Grievance Committee for about 25 years. (*Id.* at 91:11-20; ALJD 3:6-7) The ARW Union's Executive Committee had regularly scheduled meetings twice a month with Respondent to bargain over issues related to the CBA, rules, and policies at the Spruance facility. (*Id.* at 3:4-6) The Grievance Committee processes all the third step grievances that arise between employees and management and then prepares them for arbitration. (Tr. 92:19-22) Irvin has also held the position of Chairman of the Contract Committee for about 10 years. (*Id.* at 92:1-3) The Contract Committee bargains new CBAs with Respondent, as well as modifications to or terminations of the CBA. (*Id.* at 92:23-93:1) Jay Palmore (Palmore) was the ARW Union President during the events relevant to the allegations in this case. (*Id.* at 93:9-10)

Respondent also employs electrical workers at the Spruance facility; the electrical employees are represented by a local union, affiliated with the International Brotherhood of Electrical Workers (IBEW). (*Id.* at 90:16-14)

D. Respondent's Emergency Response Team

At all times relevant to the Complaint, about 60 bargaining unit employees served as members of the ERT. (ALJD 4:25-27) Although employees volunteered to be part of the ERT, they had to successfully complete numerous trainings and obtain certain certifications in order to serve on the ERT. In addition to working their regularly scheduled shifts, members of the ERT responded to emergencies at the plant, including fires, explosions, and medical emergencies. (*Id.* at 3:27-36; Tr. 93:24-95:16; 111:13-112:1) While serving on the ERT, receiving trainings, and completing certifications required for the ERT, members were paid their regular hourly rate, or their overtime rate if their ERT work brought their work hours into overtime. Because the ERT members had numerous opportunities to work overtime to fill staffing shortages on the ERT,

some earned as much as \$30,000 to \$40,000 in overtime pay a year. As a result, ERT members were some of the highest paid employees at the Spruance facility. (ALJD 5:38-40; Tr. 147:12-148:16) ERT members were also subject to discipline if they did not perform their duties correctly or did not complete the required trainings. (ALJD 5:28-40)

E. The Parties' History of Bargaining the ERT

The parties have a long history of bargaining all aspects of the ERT. For example, the ARW Union and management bargained about the qualifying certifications and trainings required to become a member of the ERT. (Tr. 105:4-17; 106:11-107:20; 211:20-25; 230:18-231:5) In one instance, beginning in April 2007, the parties held 18 bargaining sessions about ERT training before reaching impasse. Respondent then unilaterally implemented its training schedule but later reached a settlement agreement with the ARW Union outlining the parties' agreement on trainings for ERT members. (ALJD 5:42-6:10; Tr. 126:9-128:19; GC Exh. 7) Each year, the parties also bargained to develop the monthly training schedule for ERT members. (ALJD 6:12-14; GC Exh. 3)

In July 2009, the parties bargained about an overtime policy for ERT members to fill staffing shortages, and then returned to the bargaining table in April 2014 to tweak that policy. (Tr. 120:17-122:34; GC Exh. 4; Tr. 122:25-124:14; GC Exh. 5) In 2017, the parties bargained again about the use of supplemental staffing for the ERT and forcing ERT members to work overtime when additional staff was needed. That bargaining resulted in an MOU signed by the parties on April 13, 2018. (Tr. 124:15-126:8; GC Exh. 6)

F. Respondent Announces its Unilateral Decision to Subcontract the ERT

i. June 18, 2018

Holmes, Meenach, and Valerie Jacobs, a consultant hired by Respondent (Jacobs), met with IBEW President Craig Irvin and ARW Union President Palmore to “inform both unions...that we had made the decision to outsource our emergency services.” (Tr. 238:24-241:13) Palmore asked if Respondent planned to bargain the decision and said that he wanted Respondent to meet with the ARW Union’s Executive Committee. Holmes did not provide any additional detail about the decision to outsource the ERT; Palmore again insisted that Respondent meet with the ARW Union’s Executive Committee. (ALJD 12:30-43; Tr. 241:15-242:7)

ii. June 19, 2018

Soon after Respondent’s meeting with Palmore and Craig Irvin, Holmes sent out an invitation by email requesting an Executive Committee meeting for June 19 at 11:00 a.m. (*Id.* at 242:8-243:16; R. Exh. 9)

Just after 9:00 a.m. on June 19, Respondent emailed an Employee Information Bulletin (EIB) to all employees at the Spruance facility announcing its intention to eliminate the employee-staffed ERT and outsource the emergency services work to a subcontractor. (ALJD 13:44-50) Before Irvin saw the EIB, he attended the meeting Holmes set up with the ARW Union’s Executive Committee scheduled for 11:00 a.m.

Irvin and several other members of the ARW Union’s Executive Committee attended the meeting on behalf of the ARW Union, and Craig Irvin attended for IBEW. Holmes, Meenach, Yanoschak, and Jacobs attended on Respondent’s behalf. (*Id.* at 13:39-42) At the meeting, Holmes announced that Respondent planned to outsource the ERT and that bargaining unit members would no longer serve on the team. Holmes told the assembled group that the decision

to subcontract the ERT was management's, but Respondent would bargain the effects of outsourcing the emergency services. (*Id.* at 14:2-9)

When asked, Holmes cited the cost of running the ERT as the sole justification for outsourcing the program. Holmes told the assembled group that the employee-staffed ERT cost Respondent \$2.1 million the previous year alone, and outsourcing it would save Respondent money. Irvin asked Holmes if he planned to bargain about the decision to outsource the ERT. Holmes responded that he was not there to bargain, only to tell the ARW Union what Respondent was going to do. Irvin pressed Holmes on the bargaining question, stating that the ERT had been bargained since its inception. Holmes repeated that he was only there to inform the ARW Union of Respondent's decision. (ALJD 14:10-37; Tr. 129:24-130:21; 134:10-17; 203:10-21); (*see also* GC Exh. 8) (Irvin's contemporaneous notes from the June 19 meeting) None of the members of management present at the meeting took notes. (Tr. 301:1-14) According to Irvin, no one from management mentioned any motivation for outsourcing the ERT other than the cost of the program. (*Id.* at 130:22-131:3; 171:20-172:14; 215:1-15; 216:3-9; 216:15-217:7)³

iii. July 20, 2018

A month later, on July 20, Holmes held another meeting with the ARW Union's Executive Committee and leaders of the IBEW. Holmes, Jacobs, and Meenach attended the meeting for Respondent. Irvin attended with several ARW Union Executive Committee members. Once the attendees were assembled, Holmes addressed the group, stating that he wanted to discuss the transition between the employee-staffed ERT and the subcontracted ERT. Irvin asked Holmes if Respondent was bargaining. Holmes replied that the meeting was not a

³ The ALJ credited Irvin's testimony about the June 19 meeting. (ALJD 15:11-39)

bargaining session. Jacobs added that management was at the meeting to bargain the effects of Respondent's outsourcing decision. Irvin again asked Respondent to bargain about the decision to outsource the ERT; Jacobs said they would only bargain the effects, and asked why the ARW Union would not work with management to ensure a smooth transition. Holmes asked a representative for the IBEW for their position; the IBEW representative responded that it took the same position as the ARW Union. No one from management mentioned staffing, safety concerns, or a change in Respondent's business during the meeting. (ALJD 16:15-43; Tr. 138:16-141:12)

Holmes followed up the meeting with a letter to the ARW Union on July 22 reiterating its decision to outsource the ERT on September 1, and noting that "On July 20th, you refused to negotiate" in reference to the ARW Union's refusal to bargain the effects after Respondent refused to bargain about its decision to outsource the ERT. (ALJD 16:45-17:6; Tr. 141:13-144:23; GC Exh. 10)

iv. Subcontracting Completed on September 1, 2018

On September 1, the employee-staffed ERT ceased operations, and the subcontracted ERT began working at the Spruance facility. (ALJD 17:28) As a result, the former ERT members saw a significant decline in the amount of overtime work and earnings, which Respondent acknowledged was a direct consequence of its subcontracting decision. (Tr. 253:15-17) (Holmes: "We understood that there would be a loss of overtime for our employees and that it would affect our employees.") Other than the move to subcontract the ERT, there were no other changes to Respondent's operation: it continues to produce Kevlar, Tyvek, and Nomex, as it has for about the last 50 years. (ALJD 17:28-30; Tr. 145:10-146:15)

ARGUMENT

III. THE ALJ'S CREDIBILITY DETERMINATIONS ARE OVERWHELMINGLY SUPPORTED BY THE EVIDENCE. (Exceptions No. 6, 8, 9, 15-18, 20-25, 29, 43-47, 51-53, 55, 56)

Respondent excepts to the ALJ's failure to credit the testimony of Respondent's witnesses Chief Lukhard, Holmes, and Meenach. Because the ALJ's credibility determinations are overwhelmingly supported by the evidence, Respondent's exceptions should be overruled.

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that those resolutions are incorrect. *Overnite Transportation Company*, 336 NLRB 387, 389 (2001) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)). Where, as here, the evidence bolsters the ALJ's finding that witnesses' testimony is not worthy of credence, the Board will uphold the ALJ's credibility findings. *Id.*

Respondent first excepts to the ALJ's failure to credit Chief Lukhard's testimony "regarding his reasoning to recommend the elimination" of the employee-staffed ERT. (R. Brief at 20) At trial, Lukhard testified that in March or April 2018, he made a recommendation to management that Respondent outsource the ERT, which set the subcontracting of the employee-staffed emergency services at the Spruance facility in motion. (Tr. 491:12-19) Specifically, and critically to its case, Respondent excepts to the ALJ's finding that Lukhard made that recommendation in order to reduce labor costs, and not because of his alleged safety concerns. However, as the ALJ's decision articulates, Lukhard's testimony was contradicted by the "substantial evidence of labor cost motivation in the decision to subcontract," and therefore could not be credited. (ALJD at 23:4-6; *see also id.* at 9:14-17) ("Notwithstanding Lukhard's testimony as to his own motivations, the documentary evidence makes clear that in the spring of

2018, as DuPont finalized its plans (in secret from the Union) for subcontracting the emergency services work, the associated cost savings were not an insignificant consideration.”)

Lukhard testified that his recommendation “had nothing to do with money from my perspective, because I didn't even know what the cost involved was going to be when I first worked -- started working on the recommendation.” (Tr. 487:12-24) However, the documentary evidence shows that as early as April 2018, Lukhard had Keith Jenkins, Respondent’s Contract Administrator, prepare a source cost variance request addressed to management on Lukhard’s behalf, listing Lukhard as the “Name of Requestor.” The cost variance lists the type of request as “Fire and Emergency Services” and the purchase amount of \$1 million. Under “Comments from Requestor,” the request notes that Respondent would realize “significant cost savings in overtime” as a result of subcontracting the ERT. (*Id.* at 496:16-498:4; GC Exh. 20)

The documentary evidence also indicates that Lukhard was very much “in the loop” on management’s “confidential” discussions about anticipated cost savings. For example, Respondent created a PowerPoint presentation dated March 15, 2018, containing a slide that detailed the existing cost of the employee-staffed ERT, and anticipated savings of between \$675,000 to \$1 million annually if Respondent transitioned to a subcontracted ERT. (GC Exh. 12 at 4) On April 24, Yanoschak emailed the PowerPoint to Holmes and Meenach with the subject line “Confidential!! Please do not distribute or share beyond the individuals already ‘in the loop’ – For your personal use only” (GC Exh. 12 at 1) In the body of that email, Yanoschak reiterated the importance of “maintain[ing] confidentiality of the information,” noting that it should not be discussed with anyone outside a list of six members of management, including Lukhard. (*Id.*)

Respondent created an additional PowerPoint dated April 24, 2018, with updated information on anticipated cost savings to be realized from outsourcing the ERT. (GC Exh. 13 at 3)

Significantly, Respondent also began to omit any mention of labor costs or costs savings from its documents once the unfair labor practice (ULP) charge in this case was filed on June 21. Additional evidence indicates that the timing of this change was no coincidence: in an August 20 email from Respondent's labor relations analyst Mary Anne Sparks, Sparks detailed her concerns that that mentioning "reduced costs of service" in an informational bulletin for employees might "creat[e] issues" for the "current ULP on this issue." (ALJD 23:8-28) (citing GC Exh. 18 at 2) Lukhard's presentations to employees and management reflected Respondent's concern about mentioning labor cost savings in documents for wider audiences than the few "in the loop" members of management. (*See* Tr. 481:2-482:19); (R. Exh. 65) (Oct. 24, 2018 PowerPoint prepared by Lukhard citing reasons for subcontracting the ERT, which notably does not include any reference to cost)

At trial, Respondent also presented Lukhard's "lengthy but rote" testimony about the "dangerous mix of chemicals and processes at play in the plant as a basis for his desire to subcontract." (ALJD 25:10-11) However, as the ALJ noted, that motive "is completely absent from any contemporaneous or even post-implementation documentation touting the benefits or rationale for the contacting out[.]" (*Id.* at 25:13-17)

Further damaging to Lukhard's credibility was the fact that the only documentation of Lukhard's supposed safety concerns appeared to be contrived for litigation. Lukhard "document[ed] several critical issues or concerns that occurred" between May 29 and June 8 because "as more of these incidents were occurring, [Yanoschak] directed me to start documenting some of the more serious issues that were occurring." (Tr. 456:24-457:21; R. Exh.

37) However, on cross-examination, Lukhard acknowledged that he only began to document incidents at the plant after he had already made the recommendation to subcontract the ERT. Some of the alleged incidents Lukhard cited even occurred after Respondent had chosen the subcontractor and completed negotiations for the new subcontracted ERT. (Tr. 514:1-9; R. Exh. 37)

Finally, even if Lukhard's "rote and led testimony" about his safety concerns were credible, the ALJ correctly noted that the record is devoid of evidence that he presented any these concerns to his superiors, or that his concerns figured into Respondent's decision in any way to subcontract, especially considering that the same safety concerns cited by Lukhard had existed for "decades and decades." (ALJD 25:47-26:14) ("The credibility of the claim is not enhanced by the fact that its acceptance requires accepting that safety concerns that had comfortably existed with an employee ERT for decades and decades, suddenly are perceived by DuPont as an existential threat to the enterprise. There is simply no evidence to support this fantastic claim, which is wholly undocumented as a concern by DuPont at the time the decision was being made.")

The ALJ properly refused to credit Lukhard's "self-serving, uncorroborated, and unverified" testimony about his motivation for recommending Respondent subcontract the ERT. Respondent's own documents provided "substantial evidence" that Respondent's true motivation to subcontract was to save on labor costs.

The ALJ's decision not to credit Holmes' and Meenach's testimony about Respondent's motivation for subcontracting the ERT is also fully supported by the evidence. Again, Respondent's witnesses repeatedly and emphatically insisted that they were unaware of the cost of the ERT, or potential savings Respondent could realize through subcontracting the

ERT, until after the subcontracting decision was announced to the ARW Union on June 19. As a result, Respondent asserts, labor costs could not have had any bearing on Respondent's decision to subcontract the ERT. However, Respondent's assertions are contradicted by its own email communications and informational materials.

In his testimony, Holmes stated that when Irvin asked him about any cost savings associated with the subcontracting decision, Holmes responded that Respondent did not know any cost information because they had not yet done those calculations:

Q. BY MR. BARGER: Going back to the meeting on June 19th, what, if anything, did the Union say or ask at that meeting about the cost of the transition?

A. In that meeting, Mr. Irvin asked us what -- how much money we were saving. And --

Q. What, if anything, did you tell him?

A. At that time, we told him we didn't know. We hadn't crunched numbers to see what the savings were around. The decision was basically to improve the site's capability to respond to emergencies.

Q. And when -- and who was it that said that at the June 19th meeting about the numbers?

A. I want to say --

Q. If you recall.

A. I want to say Darrin Meenach or Cheryl Yanoschak said that.

Q. To your knowledge, was that true at the time?

A. It was true at the time.

Q. Was it true for you at the time?

A. Yes.

(Tr. 251:21-252:15)

Later in his testimony, Holmes reiterated he was "[o]ver 100 percent confident" that costs were not discussed on June 19. (Tr. 254:4-12) Holmes asserted a third time that no costs were discussed. (Tr. 22-25) Lest there be any doubt, Holmes testified a fourth time that he did not mention costs at the June 19 meeting, and that he knows he did not because Respondent had no information about the costs of the employee-staffed ERT, or any potential savings Respondent would realize by using contractors at that time. (Tr. 278:7-17)

However, on cross-examination, Holmes admitted that he received an email from Yanoschak on April 24—approximately two months before announcing the subcontracting decision to the ARW Union on June 19—containing the March 15 PowerPoint presentation showing an estimated cost savings of \$1 million annually by switching to a subcontracted ERT. (*Id.* at 276:8-280:18; GC Exh. 12-13) Holmes acknowledged that he received the email on cross-examination:

Q. BY MS. VAUGHN: I'm going to show you what's been marked for identification as General Counsel's Exhibit 12. Please take a moment to review it. Just look up when you're done. Do you recognize this document?

A. Yes, ma'am.

Q. This is an email sent from Cheryl Yanoschak to you and Darrin Meenach. Right?

A. It is sent to myself, yes.

Q. And that -- this email was sent on April 24, 2018. Correct?

A. Yes, ma'am.

Q. Approximately 2 months before you notified the Union about the decision to subcontract.

A. Correct.

Q. And attached to this email message is a PowerPoint dated March 15, 2018. Correct?

A. That's correct.

Q. And if you turn to page 3 of this PowerPoint, titled Summary of Cost. Do you see that?

A. I do see that.

Q. You see where it says current costs are \$2 million?

A. Yes, ma'am.

Q. This is in reference to the ERT. Correct?

A. Yes, it is.

Q. And then the next -- the third bullet down and the fourth bullet down show two different contract options. Do you see that?

A. I do see that.

Q. And those are contract options in reference to contracting out the ERT. Correct?

A. Yes, ma'am.

Q. Next to that in green it shows the savings that the Company would have if they were to contract under either Option 1 or Option 2. Do you see that?

A. I do see that.

Q. Of these two options, do you know which one if any the Company eventually took -- chose? The Company chose Option 1; isn't that right?

A. We have 24-hour coverage, yes. I guess that's what it said.

(Tr. 278:22-280:11; GC Exh. 12-13)

Holmes also admitted that he received another email from Yanoschak on June 14, five days prior to Respondent's June 19 meeting with the ARW Union, with an attached draft of a Question & Answer (Q&A) document. According to Yanoschak's email, the draft Q&A document intended to "capture the thoughts and details that will probably come up" during Respondent's June 18 and 19 meetings with the ARW Union to announce the ERT subcontracting decision. The first question in the Q&A is "Why contract Emergency Services?" The draft answers the question: "Contracting emergency services will provide the following benefits:...Reduced cost of services – Significant reduction in overtime, training, and equipment and apparatus cost." (Tr. 286:25-288:22; GC Exh. 14)

The ALJ similarly discredited Meenach's testimony because his repeated assertions were flatly contradicted by Respondent's documentary evidence. Meenach testified that Respondent's decision "was not about cost," because he did not actually know what the costs associated with the employee-staffed ERT or the costs of the outsourcing decision were. (Tr. 324:22-325:19) But not only had Respondent made those calculations before June 19, Meenach admitted that he received an email prior to the June 19 meeting showing both the cost of the employee-staffed ERT and the cost savings associated with moving to a subcontracted model:

Q. [BY MS. VAUGHN:] If you could turn to page 2 of this email [GC Exh. 17], number 8, do you see where it says Financials?

A. Yes, I do.

Q. And you see where she wrote 1.7 million overtime cost, staffing and compliance space support.

A. Yes.

Q. And then training cost, is that 450 million?

A. That's typically -- that's 450,000.

Q. That's what?

A. That's 450,000.

- Q. Okay, thank you. And then cost of contract services, 1.1 million. Correct?
A. That's what it says, yes.

(*Id.* at 324:22-327:17; GC Exh. 17)

Holmes' and Meenach's insistence that they knew nothing about the ERT's labor costs, and therefore could not have cited costs on June 19, cannot be credited where the documentary evidence clearly shows those assertions are false.

Finally, the fact that Yanoshak is the Environmental Health and Safety Manager and was present at the June 19 meeting does nothing to contradict Irvin's testimony that Respondent cited costs as the motivation for outsourcing the ERT. Regardless of her title, Yanoshak both authored and received numerous emails discussing cost savings Respondent would realize by outsourcing the ERT. (*See* GC Exhs. 12, 14, 16-21)

Respondent has failed to cite to a single piece of persuasive evidence to show that the ALJ's credibility resolutions are incorrect. Instead, Respondent's recitation of its witnesses' testimony only reinforces the ALJ's finding that "the plethora of evidence demonstrating the importance of the overtime and training cost savings to the contracting out decision is only heightened by DuPont's effort to hide it and deny it." (ALJD 24:14-16)

IV. THE ALJ'S DECISION TO EXCLUDE RESPONDENT'S EXPERT WAS SUPPORTED BY THE EVIDENCE AND WITHIN HIS DISCRETION AS THE TRIAL JUDGE. (Exception No. 73)

Respondent contends that the ALJ's exclusion of its expert witness Michael Hildebrand was an abuse of discretion because the "regulatory and other factors upon which Mr. Hildebrand was expected to testify clearly related to the Company's decision to eliminate the volunteer ERT;" issues which, according to Respondent, "are real in substance and material to the proceeding." (R. Brief at 24-25) However, Hildebrand's opinion was based on his visit to the Spruance facility almost a year *after* Respondent made its decision to outsource the ERT, and

therefore had absolutely no bearing on Respondent's decision. Accordingly, the judge properly found this testimony was not relevant.

Whether to permit expert testimony is a question that is committed to the discretion of the trial judge. *California Gas Transport, Inc.*, 355 NLRB 465, 466 (2010). Under the Federal Rules of Evidence, an expert witness may testify if “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue[.]” FRE 702(a).

Here, Respondent’s proffered expert could not aid the ALJ to understand the evidence or determine facts in issue because the ultimate issue in this case is whether Respondent had a duty to bargain over its decision to subcontract the ERT; a decision in which the expert admittedly played no part. In fact, Hildebrand’s inspection of the plant, which purportedly informed his testimony, occurred almost a year *after* Respondent made the decision to subcontract the ERT. Respondent’s expert would offer nothing more than an after-the-fact assessment of the dangers present at the Spruance facility, all of which were in existence at the facility for decades, and none of which had any bearing on Respondent’s obligation to bargain with the ARW Union about its decision to outsource the ERT.⁴

The “complicated regulatory framework” and the hazards inherent in the ERT work are not in dispute. Hildebrand’s testimony on those issues does not have any bearing on Respondent’s obligation to bargain with the ARW Union.

⁴ Further, as noted by the ALJ, Respondent’s witness Chief Lukhard testified at length about the chemicals and dangers at the plant, as well as different worst-case scenarios. In doing so, Chief Lukhard “essentially act[ed] as an expert,” and allowing the expert witness as Respondent proposed and offered in its offer of proof “would be redundant, cumulative, and burdensome on the record.” (ALJD 402:4-403:3)

V. THE ALJ’S DECISION TO REFUSE RESPONDENT’S REQUEST TO PRESENT DUPLICATIVE AND marginally RELEVANT EVIDENCE UNDER SEAL WAS WITHIN HIS DISCRETION AS THE TRIAL JUDGE. (Exceptions Nos. 73, 74, 79)

Respondent also excepts to the ALJ’s decision to refuse to allow Respondent to present “siting revalidation” of the Spruance facility containing “worst-case scenario modelling of catastrophic operational failures” under seal. (R. Brief at 16-17). The ALJ’s ruling should be upheld because the proffered exhibit was duplicative, and to the extent it contained information not already in the record, that additional information’s “marginal relevance,” was outweighed by the burden of sealing the courtroom.

“Litigation is to be conducted in public unless there is some compelling reason not to . . . [c]losed proceedings breed suspicion of prejudice and arbitrariness, which in turn spans disrespect for [the] law.” *United States v. Carr*, 2012 WL 3262821, at *6 (N.D. Ill. 2012) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980)); *NLRB v. CEMEX, Inc.*, 2009 WL 5184695, at *2 (D. Ariz. 2009) (“The right to inspect and copy judicial records is generally ‘justified by the interest of citizens in keeping a watchful eye on the workings of public agencies’ and ‘understanding the judicial process.’”) (citing *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir.2006)); *Zenith Radio Corp. v. Matsushita Electric Industrial Indus. Co., Ltd.*, 529 F. Supp. 866, 896 (E.D. Pa. 1981) (public access to court documents “assures a well-informed public opinion, permits public monitoring of the courts, and promotes confidence in the fairness and justice of the court system.”) The party seeking protection bears the burden of showing specific prejudice or harm will result if no protection is granted. *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002).

Here, as an initial matter, Respondent acknowledged a summary of the proffered exhibit was already in the record. (*See* Tr. 408:10-23) (Respondent’s counsel referring to the R. Exh. 25

(EPA document) as a “short summary” of the siting revalidation Respondent sought to admit under seal); (Tr. 398:11-402:2 and 404:12-406:2) (“JUDGE GOLDMAN: So is the difference between [the siting revalidation] and the previous [EPA] document [R. Exh. 25] that this goes into specific scenarios? LUKHARD: Yes, sir. Yes, sir. Much more in-depth.”)

Respondent also elicited extensive testimony from Lukhard about the siting validation, and the concerns it raised for him, including “the scenarios contained in the siting revalidation [that] influenced” Lukhard’s decision to recommend subcontracting the ERT. (*Id.* at 417:24-418:21; 419:17-420:24)

Respondent has failed to articulate how it was prejudiced by the ALJ’s decision. Nor is there a basis for such an assertion: a summary of the siting revalidation is already in the record, and Lukhard testified about at length about how the contents of that revalidation allegedly influenced his recommendation to subcontract the ERT. The ALJ acted within his discretion as the trial judge in determining that the burden of sealing the document outweighed any marginal relevance the document may have had to Respondent’s defense.

VI. THE ALJ’S CONCLUSION THAT RESPONDENT’S DECISION TO OUTSOURCE THE ERT WAS *FIBREBOARD* SUBCONTRACTING IS FULLY SUPPORTED BY THE RECORD EVIDENCE. (Exceptions No. 1-5, 7, 10-12, 14-47, 57, 69-72, 75-78)

Based on the record evidence and credible testimony, the ALJ found that Respondent’s decision to outsource the ERT was *Fibreboard* subcontracting, and that its subcontracting decision was therefore subject to the duty to bargain. (AJLD at 20:4-5) Respondent’s exception to this finding is meritless.

An employer’s decision to unilaterally subcontract out unit work violates Section 8(a)(5) where the employer’s decision is motivated by labor costs, and not by reasons “which lie at the core of entrepreneurial control.” *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 223 (1964); *Mid-*

State Ready Mix (Torrington Industries, Inc.), 307 NLRB 809, 810 (1992). An employer’s “replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment” is a mandatory subject of bargaining. *Fibreboard Corp.*, 379 U.S. at 215; compare to *First National Maintenance*, 452 U.S. 666 (1981) (finding that an employer’s termination of a maintenance contract with an outside business, ceasing all operations there, was not a mandatory subject of bargaining because the decision involved “a change in the scope and direction of the enterprise... akin to the decision whether to be in business at all”). “Thus, an employer who unilaterally subcontracts unit work without first bargaining with its employees’ representative about its decision, as well as the effect such contracting will have on unit employees, frustrates collective bargaining, and thereby violates Section 8(a)(5).” *Public Service Co. of Colorado*, 312 NLRB 459, 460 (1990); see also *Torrington Industries*, 307 NLRB at 811 (finding that an employer’s decision to subcontract the work of employees unaccompanied by any substantial commitment of capital or change in the scope of the business was not the type of decision at the core of entrepreneurial control, and was therefore subject to mandatory bargaining); *Mi Pueblo Foods*, 360 NLRB 1097, 1098 (2014) (employer’s unilateral decision to subcontract delivery work previously performed by unit employees was unlawful where the decision did not change any other aspect of the business, but just “substitut[ed] one group of drivers for another.”); *O.G.S Technologies, Inc.*, 356 NLRB 642, 645 (2011) (employer’s unilateral decision to subcontract unit work unlawful where operation changes did not amount to a “partial closing” or other “change in the scope and direction of the enterprise,” and employer continued to manufacture and sell the same product to customers).

A. Respondent Engaged in *Fibreboard* Subcontracting in order to Reduce the Labor Costs of Maintaining an ERT.

Respondent does not dispute the fact that it replaced bargaining unit employees with those of a subcontractor to serve on the ERT, or that it refused to bargain with the ARW Union about the decision. Respondent also does not except to the judge's finding that bargaining unit employees' work on the ERT affected their hours, wages, and terms and conditions of employment. (ALJD 5:28-34) ("Employees were paid for their time training, for completing certifications, and for responding to calls. Pay was based on their regular salary. Because it was in addition to their regular work at the plant—which itself might include overtime pay—much of the emergency services work was paid at overtime rates. Each individual's daily or weekly entitlement to overtime pay for ERT work was based on his or her overall hours. For some employees, the ERT provided a lucrative source of additional hours and overtime pay over the course of the years."); (*id.* at 5:36-40) ("Completion of all the training required for new or prospective ERT members could take up to a year of monthly course work and practical training until they were ready. Through a combination of overtime in their regular production or maintenance job, and overtime performed on ERT, ERT employees were some of the highest paid employees at the plant."); (Tr. 147:8-148:16) (employees earned significant overtime pay by working on the ERT); (*id.* at 105:4-109:8) (employees required to attend trainings both during and outside of regular work hours); (*id.* at 116:4-120:5) (employees disciplined for inadequate performance in ERT duties)

In its defense, Respondent claims its decision was exempt from bargaining because it was not motivated by a desire to reduce labor costs. Respondent's defense is not credible, however, in light of substantial evidence introduced at trial indicating that labor costs were, in fact, a motivating factor—if not *the* motivating factor—in its decision. Evidence introduced at trial

also indicates that Respondent only pivoted to its current defenses once the ARW Union filed the ULP charge in this case.

i. Respondent's assertions about labor costs are contradicted by substantial evidence.

At trial, Respondent's witnesses testified that they were unaware of the cost of the ERT, or potential savings Respondent could realize through subcontracting the ERT, until after the subcontracting decision was announced to the ARW Union on June 19. However, as discussed above, *supra* pp.14-21, the evidence shows that months before it announced its subcontracting decision to the ARW Union, Respondent was already fully aware of the costs of running the employee-staffed ERT, and the cost savings it would see if Respondent changed to a subcontractor for ERT services. In fact, Respondent cited those cost savings multiple times in internal communications as early as March 2018.

The ALJ credited Irvin's testimony about the June 19 meeting where, in response to Irvin's question about the subcontracting decision, Holmes stated that the cost of the employee-staffed ERT was too expensive. Holmes continued that it cost Respondent about \$2.1 million the previous year; and that Respondent would see significant cost savings by subcontracting out unit work. Irvin's contemporaneous notes from that meeting corroborate his testimony. (ALJD 14:16-15:39; Tr. 131:11-132:5; GC Exh. 8) ("*Item #1 ERT elimination of all – outsource/2.1 million/reduce plt cost – what is the cost?/refusing to bargain*")

Holmes, whose testimony the ALJ properly discredited, then testified to the contrary, repeatedly stating that he was "over 100 percent confident" that he did not discuss cost information with the ARW Union on June 19, and could not have done so because he had no information about costs of the ERT at that time. However, as discussed *supra* pp. 17-20, Holmes admitted that he received two separate emails from Yanoschak before the June 19 meeting with

the ARW Union in which Yanoschak shared information detailing Respondent's anticipated cost savings once it subcontracted the ERT. (Tr. 276:8-280:18); (GC Exh. 12) (April 24, 2018 email from Yanoschak to Holmes with attached PowerPoint showing estimated cost savings of \$1 million by switching to a subcontracted ERT); (Tr. 286:25-288:22); (GC Exh. 14) (June 14, 2018 email from Yanoschak to Holmes with attached Q&A document stating "Contracting emergency services will provide the following benefits:...Reduced cost of services – Significant reduction in overtime, training, and equipment and apparatus cost.")

The ALJ properly discredited Meenach's testimony that prior to June 19, he was unaware of the cost of the employee-staffed ERT, or any cost savings associated with the subcontracting of the ERT. Meenach's testimony is also contradicted by the evidence: not only had Respondent made those calculations before June 19, Meenach admitted that he received an email prior to the June 19 meeting showing both the cost of the employee-staffed ERT and the cost savings associated with moving to a subcontracted model. (Tr. 324:22-327:17); (GC Exh. 17); (*see also supra* pp. 20-21)

Chief Lukhard's testimony about his motivation for recommending management outsource the ERT in the spring of 2018 is also contradicted by the evidence. Lukhard stated that the recommendation "had nothing to do with money from my perspective, because I didnt even know what the cost involved was going to be when I first worked -- started working on the recommendation." (Tr. 487:12-24) Yet Lukhard was well-aware that subcontracting the ERT would result in lowering Respondent's labor costs. As discussed above, *supra* pp. 14-17, Respondent's Contract Administrator prepared a source cost variance on Lukhard's behalf in April 2018, noting that Respondent would realize "significant cost savings in overtime" as a result of subcontracting the ERT. (ALJD 11:5-

19); (Tr. at 496:16-498:4); (GC Exh. 20)

Respondent's own emails also show its concerns about reducing labor costs. In emails dated May 30 through June 4 between Kevin T. Manring, Respondent's Senior Buyer/Sourcing Operations Team Lead, and other employees, including Lukhard, regarding the bid Respondent received from FDM Safety Services (FDM), the eventual subcontractor of ERT services for Respondent, Manring discusses Respondent's planned payment to FDM of \$4 million over the course of three years to provide emergency services. (ALJD 11:32-39); Tr. 478:14-22; R. Exh. 67) It strains credulity to believe that, as Respondent claims, it moved towards finalizing a \$4 million contract in early June when it had not calculated any potential cost savings associated with subcontracting ERT services until after June 19.

Respondent's own evidence and witnesses' testimony demonstrate that Respondent's decision to subcontract was motivated by a desire to reduce labor costs.

ii. Respondent's shifting reasons for subcontracting the ERT are further evidence that its decision was based on labor costs.

Significantly, soon after the unfair labor practice charge was filed in this case on June 21, Respondent pivoted from acknowledging in multiple internal communications and memoranda that its subcontracting decision was motivated by labor costs, to instead citing ERT staffing problems and safety concerns as its sole motivations. The ALJ properly found these shifting explanations were additional evidence of Respondent's intent to conceal its true motive. (ALJD 25:47-26:20) *See Whitewood Oriental Maintenance Co.*, 292 NLRB 1159, 1166 (1989) ("Having found that the [r]espondents have advanced shifting reasons to explain the substitution of subcontractors and having concluded that these reasons are false, it may be inferred that another, concealed motive for this action exists... We find that

the motive was to evade any obligation to recognize and bargain with...the employees chosen representative.”); *Shattuck Denn Mining Corp., (Iron King Branch) v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (“If [the trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal- an unlawful motive- at least where, as in this case, the surrounding facts tend to reinforce that inference.”).

Here, the judge did not have to search hard for Respondent’s shifting reasons. Sparks’ August 20 email, discussed *supra* p. 16, comes right out with it – Respondent sanitized its subcontracting rationale by deleting any reference to labor costs in the hope it could hide from its obligation to bargain with the ARW Union. (ALJD 23:8-28); (Tr. 330:6-334:25; 389:22-390:11); (GC Exh. 18) (Sparks’ email stating “I am still on the fence on including ‘reduced cost of service’. I am thinking that once we have the final version, I would like to run this by our legal team as there is a current ULP on this issue and we want to make sure we are not creating issues.”); (*see also* Tr. 481:2-482:19); (R. Exh. 65) (Oct. 24, 2018 PowerPoint prepared by Lukhard citing reasons for subcontracting the ERT, which notably does not include any reference to cost)

In pivoting from its motive to save on labor costs, Respondent instead cites to concerns about staffing the employee ERT and safety hazards at the site. However, there is no dispute that the parties had bargained about staffing the ERT multiple times over more than a decade.⁵ (ALJD 5:42-50); (Tr. 126:14-128:19); (*see also* GC Exhs. 4-7) (agreements

⁵ Respondent did not except to the ALJ’s finding that the “provisions of the ERT program and changes to it were routinely negotiated with the ARWI executive committee. In one instance, in 2007, the parties entered into a settlement agreement after a dispute over a proposed decrease in training hours for the fire brigade. After months of dispute, the Union agreed: that the parties have reached the point of impasse after 18 meetings with respect to the bargaining concerning

between Respondent and the ARW Union regarding staffing and training for the ERT from 2008, 2009, 2014, and 2017) In addition, despite Respondent's alleged concerns, staffing levels in 2018 were consistent with regulatory requirements, and ironically, for most shifts, staffing levels were more than double that of the currently subcontracted ERT. (Tr. 519:20-521:15) (Lukhard acknowledging that prior to subcontracting, the ERT was staffed by between nine and 11 employees at any given time; the subcontracted ERT is now staffed by only four individuals at one time)

Respondent's claims that it was motivated by concerns regarding "safety and sustainability" are also contradicted by the evidence. Respondent failed to identify a single aspect of its work at the site that had not been in existence for the last four decades, or any serious emergency situation at the plant that the employee-led ERT had not responded to or handled appropriately. Further, the only documentation provided by Respondent to demonstrate its purported "concerns" was created in mid-2018, well after the subcontracting decision made been made and announced. (ALJD 8, n. 8; R. Exh. 27).

iii. The costs Respondent claims it incurred to subcontract the ERT provide further evidence that Respondent's decision was motivated by labor costs.

In an attempt to deflect from the evidence indicating Respondent's true motivation was a desire to save on labor costs, Respondent elicited testimony at trial regarding its investment in infrastructure in order to switch to the subcontracted ERT. (Tr. 467:11-468:13) Lukhard testified that Respondent spent approximately \$800,000 to build a

the Emergence Response Team (ERT) that has been ongoing since December 2007, and the Union agrees that it will not object to the Company implementing the ERT training hours proposal [as attached]." (ALJD 5:42-50) Respondent also did not except to the ALJ's finding that the parties bargained extensively in recent years over training schedules, changes to the ERT overtime policy, qualification requirements, use of Chesterfield County firefighters to fill out the roster of the ERT when insufficient employee members were available, and the establishment of a daytime fire brigade. (ALJD 6:13-31)

separate facility for the subcontractors, “get[] it approved to go on-site, get[] all the permits, the design, running electrical water, sewer, all those utilities to it and getting it properly outfitted on the site,” as well as on some new equipment. (*Id.* at 468:5-11)⁶ Notably, the \$800,000 in expenses that Lukhard cited in his testimony is exactly the amount of the cost savings Respondent expected to realize by subcontracting the ERT, as shown by Respondent’s witnesses’ testimony and evidence. Holmes quoted \$2.1 million as the cost of the employee-staffed ERT, (*id.* at 321:11-15), and the cost of contracting out the ERT as \$4 million over three years, or about \$1.3 million per year (*id.* at 518:10-519:3; R. Exh. 67), resulting in a cost savings of approximately \$800,000 by subcontracting the ERT. Respondent contends that because it spent \$800,000 in infrastructure costs, the subcontracting actually resulted in no cost savings for Respondent, and therefore it could not have been motivated by labor costs when it subcontracted the ERT.

However, on cross-examination, Lukhard admitted that the \$800,000 constituted a one-time, upfront infrastructure cost, and did not represent a recurring, annual expense.⁷ (Tr. 514:10-25) This also tracks with the savings that Respondent anticipated it would realize from the change to subcontracted ERT. Yanoschak’s August 10 email to Lukhard

⁶ Respondent did not except to the ALJ’s finding that the \$800,000 figure cited by Lukhard for the accommodations was “far in excess of the March 15 and April 24 PowerPoint reports which anticipated a one-time cost of \$175,000--\$200,000 to provide living quarters for FDM staff.” (ALJD 18, n. 11)

⁷ Lukhard also testified to several long-term infrastructure improvements totaling a cost of about \$20 million over the next five years, including a communications system and fire suppression system. (Tr. 467:9-468:4; 526:25-527:8) However, none of the testimony at trial indicated that these infrastructure improvements were required by the subcontracting of the ERT, or that these improvements would not or could not have been made with an employee-staffed ERT. (ALJD 18:7-9) (noting that none of the expenditures cited by Lukhard were “documented in any fashion and, with the exception of the accommodation for the new contractors, none of this was shown or even claimed to be in any way dependent on, tied to, or linked to the contracting out.”)

listing the “savings associated with the change to contract Emergency Services” noted explicitly that “[t]hese are ongoing annual savings and not just 1-time.” (GC Exh. 21) (emphasis added) The attachment to Yanoschak’s email, titled “Cost Estimate Using 2017 Hours on Overtime Roster” shows an annual savings of \$732,936 as a result of the Respondent’s decision to subcontract the ERT. (*Id.*) Incredibly, Respondent continues to assert that any anticipated savings as a result of its subcontracting decision “were eclipsed by additional investments.” (R. Brief at 31, n. 11) Respondent’s insistence on this narrative, in the face of the credible evidence and its own witness’ testimony, only provides further evidence that its purported justifications for its subcontracting decision are a pretext for its true motivation: a desire to reduce its labor costs. Respondent’s exceptions to this finding should be denied.

VII. THE RECORD EVIDENCE DISPROVES RESPONDENT’S CLAIM THAT ITS DECISION TO OUTSOURCE THE ERT WAS A “CORE ENTREPRENEURIAL DECISION NOT SUBJECT TO BARGAINING” UNDER *FIRST NATIONAL MAINTENANCE CORP.* (Exceptions Nos. 36-42)

Respondent argues that the ALJ erred in finding that “there is simply nothing about [Respondent’s] decision [to subcontract the ERT] that constitutes ‘a change in the scope and direction of the enterprise’... ‘or lie[s] at the core of entrepreneurial control.’” (ALJD at 20:35-38) In its brief, Respondent claims that it was relieved of any obligation to bargain because its decision to cease operating the employee-staffed ERT was part of Respondent’s “restructuring and breaking apart into different businesses;” a fundamental business decision constituting a change in the scope and direction of the business. (R. Brief at 27-28). Respondent’s exception is baseless.

Under *First National Maintenance*, the employer’s need for unencumbered decision-making must be balanced against the benefit that bargaining would lend to the collective-

bargaining process. 452 U.S. at 679 (bargaining is not required where a change in the scope and direction of the enterprise is “akin to the decision whether to be in business at all,” including the decision to “shut down part of its business purely for economic reasons.”); *see also Garwood-Detroit Truck Equipment, Inc.*, 274 NLRB 113, 115 (1985) (holding that a supplier, installer and servicer of truck parts was not required to bargain over its decision to restrict itself to supplying parts and subcontract all of the installation and service work where employer “wanted to get out of the garage business, per se, and more or less, go towards a parts distribution type situation” and the employer was “unable to meet its financial obligations.”); *Bob’s Big Boy Family Restaurants*, 264 NLRB 1369, 1370-72 (1982) (employer’s decision to outsource shrimp processing did not constitute a partial closing but a subcontracting decision that required bargaining where the nature and direction of the business was not substantially altered by the subcontract because the only difference in its business was that the processing work was performed by third-party employees instead of bargaining unit employees)

Respondent has failed to demonstrate that the subcontracting decision was a “core entrepreneurial decision” or a “change in the scope and direction of the business.” As the judge stated in his decision:

DuPont did not eliminate the function of emergency services from that basket of services, production, and support, that is performed as part of the operation at the plant. The work was not relocated to another part of the country or a different plant. Another company has not come in and paid DuPont to use DuPont’s emergency equipment, its land, and utilities. It is not even the case that the emergency services work is now performed by a new entity located elsewhere that only comes to the Spruance plant episodically to handle emergencies as they arise. Rather, DuPont now provides the emergency services with a contracted 12-person fulltime crew—which remains under DuPont’ Fire Chief Lukhard’s ultimate control—rather than with a group of part-time DuPont employees. This is *Fibreboard* subcontracting.

(ALJD 20:40-49)

Moreover, both before and after the decision to subcontract the ERT, Respondent has been in the business of manufacturing three specialty products: Kevlar, Tyvek, and Nomex. Emergency services were and continue to be part of Respondent's work in manufacturing those specialty fibers. "The change in the employment arrangement for the individuals performing emergency services did not impinge on the nature, purpose, or scope of the enterprise." (ALJD 21:4-6)

Respondent also claims that its decision to outsource the ERT involves a change in the scope and direction of the enterprise because it is "the new DuPont," a "new company as of June 1st, 2019" which is a "complete change in the direction of the business." (Tr. 49:12-16; R. Brief at 14) However, as the judge acknowledged, Respondent failed to produce any evidence of a change in the scope or direction of the business. (ALJD 27, n. 18) Instead, Respondent continues to produce the same synthetic fibers it has been in the business of producing for decades, with the same chemicals it has used on site for that same period of time. Other than a change in its webpage showing a new logo and referencing a "new DuPont," the record is completely devoid of any evidence to support Respondent's claims that its business has changed in scope or direction, or how this alleged change in 2019 is relevant to its subcontracting decision in 2018. (Tr. 266:7-269:12; R. Exh. 50)

VIII. THE ALJ DID NOT ERR IN FINDING RESPONDENT FAILED TO ESTABLISH AN AFFIRMATIVE DEFENSE UNDER *OKLAHOMA FIXTURE*. (Exceptions Nos. 49, 50, 54, 58)

Respondent excepts to the ALJ's finding that Respondent's "decision to contract out the ERT here cannot be molded into a 'core entrepreneurial' endeavor that was part of a 'corporate strategy fundamental to preservation of the enterprise,' as was the case in *Oklahoma Fixture*." (ALJD 25:39-41, citing *Oklahoma Fixture*, 314 NLRB 958, 960 (1994)) In its brief, Respondent argues that "environmental safety and health reasons for the decision [were] fundamental to

preservation of the enterprise” and that Respondent “was looking to cease providing ancillary support services and focus on core competencies and get out of the business of emergency response.” (R. Brief 30) However, as the ALJ found, the credible evidence and testimony shows that the decision to subcontract the ERT “dispositively” involved labor costs, “both in terms of direct overtime cost savings and indirect costs of staffing and training.” (ALJD 25:43-45) Respondent’s attempts to establish an affirmative defense under *Oklahoma Fixture* are instead transparent, after-the-fact justifications that attempt to disguise Respondent’s true motivation: to save money on labor costs.

In *Oklahoma Fixture, Co.*, the Board held that an employer may not be obligated to bargain about subcontracting unit work where that decision is based on “core entrepreneurial concerns.” 314 NLRB at 960. In that case, the employer, a manufacturer of department store display cases, subcontracted the electrical work to a third-party contractor for five years. Seeking more control over the performance of the work and the direction of overtime, the employer decided to directly hire its own electricians. A little over a year later, according to the employer’s the credited testimony, the employer decided once again to subcontract the electrical work because of concerns about about legal liability, the risk of losing its principal customer and of losing virtually all of the its revenue in the event of electrical damage, an inability to oversee the wiring work, and the desire for a subcontractor who was insured to do the work. *Id.* at 958, 960. Citing the employer’s concerns, the Board found that the employer’s “decision to subcontract was based on core entrepreneurial concerns outside the scope of mandatory bargaining” because its decision was based on considerations of corporate strategy fundamental to the preservation of the enterprise, including concerns about legal liability and the risk of losing potentially all of its revenue. *Id.*

Unlike the unanticipated consequences stemming from an unsuccessful, short-term change in employment necessitating a return to subcontracting in *Oklahoma Fixture*, here Respondent turned to subcontracting in order save money on the work it had previously been paying bargaining-unit employees to do for close to half a century. There is no evidence of any changes in the use of chemicals and hazardous materials at the Spruance facility, and no evidence to indicate that the employee-staffed ERT had suddenly become ill-equipped or unable to handle emergencies that arose in the plant.

In an attempt to illustrate the dangers present at the Spruance facility which necessitated subcontractors to staff the ERT, Respondent elicited extensive, laborious testimony from Chief Lukhard listing the various chemicals used at the Spruance facility, and how the hazards of those chemicals informed his recommendation that Respondent outsource the ERT. (Tr. 369:23-395:2) (describing dangers of PPD, sulfuric acid, Dowtherm A, adipic acid chloroform, TCL and ICL, and the storage, transportation, and use of those chemicals)

However, fatal to their *Oklahoma Fixture* defense, Lukhard also acknowledged that each of those chemicals have been in storage, in use, and/or been transported at the Spruance facility on a long-term basis, all long before he began working as Chief of Emergency Services. (*Id.* at 499:2-502:13-15); (*see also id.* at 421:17-18) (Chief Lukhard acknowledging that “the hazards haven’t changed in many years and a lot of the chemicals are the same” at the Spruance facility) When pressed, Lukhard acknowledged that he was, in fact, unaware of any changes at all in regard to the functioning of the plant. (*Id.* at 500:25-501:24)

The evidence also indicates that Respondent created its alleged concerns about the employee-staffed ERT’s capabilities after-the-fact in order to justify its failure to bargain over its subcontracting decision. Lukhard acknowledged that he began to document “critical issues or

concerns” about the ERT’s capabilities only *after* he had already made the recommendation to subcontract the ERT. (Tr. 456:24-457:21; R. Exh. 37) In fact, some of the alleged incidents Lukhard documented occurred after Respondent had already chosen the subcontractor and completed negotiations for the new ERT. (*Id.*; Tr. 514:1-9)

In short, Respondent failed to establish that its subcontracting decision was “fundamental to the scope of the enterprise.” Instead, the evidence indicates that Respondent rushed to create an after-the-fact justification for its unlawful decision based on conditions that had existed at the Spruance facility for decades.

IX. THE ALJ CORRECTLY FOUND THAT *DUBUQUE PACKING* IS NOT APPLICABLE TO THIS CASE. (Exception No. 48)

Respondent also argues that the ALJ erred in finding that it did not establish an affirmative defense under *Dubuque Packing*, 303 NLRB 386, 391 (1991), *enfd. in relevant part* 1 F.3d 24, 31-33 (D.C. Cir. 1993). (R. Brief at 32) However, Respondent’s brief fails to address the ALJ’s actual finding, which was that Respondent’s defense under *Dubuque Packing* fails because the “Board has never applied *Dubuque Packing* decisions, such as that here, that manifestly are not work relocation decisions.” (ALJD 24, n. 16) The issue in this case involves a unilateral work change, not relocated work. Under the Board precedent cited in the ALJD, Respondent’s reliance on *Dubuque Packing* is misplaced, and the ALJ’s finding that Respondent failed to establish this affirmative defense should be upheld.

Even if the Board were to find that *Dubuque Packing* applies to unilateral work changes that do not involve relocated work, Respondent’s defense still fails because Respondent failed to establish either of *Dubuque Packing*’s alternative defenses. Under *Dubuque Packing*, an employer can avoid the obligation to bargain a unilateral subcontracting decision by showing that: (1) labor costs were not a factor in its decision; or (2) even if labor costs were a factor, the

union could not have offered sufficient labor cost concessions to alter its work relocation decision. 303 NLRB at 391.

First, as discussed at length, *supra* pp. 14-21, the evidence indicates that labor costs were a motivating factor—if not *the* motivating factor—in Respondent’s decision to outsource the ERT. And second, Board law and the record in this case defeat Respondent’s claims that the ARW Union could not have offered any concession that would have changed Respondent’s decision. For example, the parties had initial discussions about how to improve staffing numbers on the ERT. The ARW Union was willing to discuss the possibility of requiring unit employees to serve on the brigade (Tr. 213:11-22), and Respondent’s managers discussed providing bonuses to ERT members based on years of service (*id.* at 248:11-249:8). Although Respondent cited to ongoing safety concerns that allegedly eclipsed any concessions the ARW Union may have offered, it failed to produce any credible evidence of the employee-staffed ERT’s inability to safely and effectively deal with on-site emergencies. *See supra* pp. 30-31; *see also Rigid Pak Corp.*, 366 NLRB No. 137, slip op. at 5 (2018) (rejecting employer’s claims that bargaining would have been futile, noting that “[a]lthough we cannot say whether the [u]nion and [employer] would have reached a successful agreement, it was necessary that the [u]nion timely be provided this opportunity [to bargain.]”); *Gunderson Rail Services, LLC*, 364 NLRB No. 30, slip op. at 2 (2016) (noting that “the Respondent could not claim to know what solutions the give-and-take of bargaining might have generated” and that the parties could have discussed the possibility of keeping a smaller operation); *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1032 (1994) (“An employer must offer something more than a self-serving assertion that there was nothing the bargaining agent of its unionized employees could do to change its mind.”).

X. RESPONDENT’S REMAINING AFFIRMATIVE DEFENSES SHOULD BE SUMMARILY DISMISSED. (Exceptions Nos. 59-66, 68)

A. The ARW Union Did Not Waive its Right to Bargain over Respondent’s Decision to Subcontract the ERT under *MV Transportation*.

Respondent argues that the Board’s decision in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019)—adopting “contract coverage” as the standard for determining whether a collective-bargaining agreement operates as a waiver of a party’s right to demand bargaining over a particular subject—supports its argument that its subcontracting decision fell within the “compass or scope of the language in the [CBA] that granted the [r]espondent the right to act unilaterally.” (R. Brief at 37) Respondent cites to the following section of the CBA as authorizing its unilateral actions:

Supervision will not perform production or maintenance work ordinarily done by employees covered by this Agreement, except they may perform such work in the interest of safety or in the preservation of COMPANY property or in the performance of duties such as instruction, training, work during emergencies or for the purposes of investigation, inspection, experimentation and obtaining information when production or equipment difficulties are encountered.”

(*Id.*; R. Exh. 1, Art. 9, §9) (emphasis in the original)

Respondent’s contract coverage defense fails on the merits. As an initial matter, in *MV Transportation*, the employer relied on a broad management rights clause granting it the right to unilaterally determine “staffing size, to decide and assign all schedules, work hours, work shifts, machines, tools, equipment and property...to hire, promote assign, transfer, demote, discipline and discharge for just cause; and to adopt and enforce reasonable work rules,” and an equally broad section on discipline and discharge, allowing the employer to “issue, amend and revise policies, rules, and regulations...” 368 NLRB at 15-16. Here, in contrast, the relevant CBA, in effect from 2012 to 2018, did not contain a management rights clause.

Further, as explained above, Respondent failed to show any legitimate concerns about the safety or preservation of Respondent's property with the employee-staffed ERT, nor did it establish that any emergency was in effect when Respondent chose to outsource the ERT. *See supra* pp. 30-31. Respondent's claim that an emergency was in effect, or that action was necessary in the interest of safety or preservation of property under Article Nine of the CBA, is particularly incredible given that Respondent made its subcontracting decision in March or April, announced it to the ARW Union in June, and then waited to implement it until September 1. The ALJ noted this incongruous claim, stating:

[T]here is zero evidence that subcontracting of the ERT constituted an emergency—indeed, one puzzles over how a subcontracting decision conceived of in March and April, announced in June, and implemented in September, could be characterized as an emergency. As referenced above, its claim that safety motivated the subcontract is belied by the complete absence of contemporaneous reference to that motivation at the time of the planning, announcement, or implementation of the subcontracting.

(ALJD 28, n. 19)

Respondent's claim that "emergency" circumstances arose in March or April, necessitating subcontracting six months later is simply not worthy of credence.

B. The ARW Union Did Not Waive Its Right to Bargain over Respondent's Subcontracting Decision through Past Practice.

Respondent also presented the specious argument that the ARW Union's failure to object to Respondent's decision to sell off its on-site wastewater treatment plant and powerhouse to a separate company, Veolia, in July 2017, somehow constituted a waiver of the ARW Union's right to bargain over the subcontracting of the ERT. (R. Brief at 39-40) However, Respondent's decision to sell the plant and powerhouse were akin to a partial plant closing, where the entirety of the operation is taken over by a third party. *See O.G.S Technologies, Inc.*, 356 NLRB at 645 and *Bob's Big Boy Family Restaurants*, 264 NLRB at 1370-72. Unlike

the wastewater treatment plant and powerhouse, which have been sold off and taken over by a third party, the staff of the ERT has been replaced by employees of a subcontractor. Simply put, the ERT continues to function for all intents and purposes as it has for more than fifty years; the only difference now is the individuals who are doing the work. This is precisely the kind of decision the Board has found to be “particularly suitable for resolution within the collective bargaining framework.” *Id.* at 1370 (citing *Fibreboard Paper Products Co.*, 379 U.S. at 213-214; *First National Maintenance*, 452 U.S. at 679).⁸

C. The ARW Union Did Not Waive its Right to Bargain the Effects of Respondent’s Outsourcing Decision.

Finally, Respondent’s meritless argument that the ARW Union waived its right to effects bargaining should be summarily dismissed. Board precedent is clear that a union does not waive its right to bargain the effects of an employer’s decision when the unlawful change is announced as a *fait accompli*. See *Comau, Inc.*, 364 NLRB No. 48, slip op. at 2 (2016) (employer’s announcement of shutdown and transfer of operations was a *fait accompli* that precluded meaningful effects bargaining, and union did not waive its right to bargain effects as a result); *National Car Rental System, Inc.*, 252 NLRB 159, 163 (1980) (“Had Respondent not announced the closing and terminations as a *fait accompli*, it is clear the Union could have offered various proposals, such as transferring the unit employees to Edison. Respondent’s announcement, however, precluded such a request and clearly indicated that any attempt at bargaining would have been futile...Accordingly, we find that the Union did not waive its right to effects bargaining, and that Respondent violated Section 8(a)(1) and (5) of the Act by depriving it of the

⁸ Further, there was never a finding that Respondent was or was not obligated to bargain over the sale. Even if Respondent *was* obligated to bargain over the sale, that the ARW Union chose for whatever reason not to demand bargaining in that situation has no bearing on Respondent’s obligation to bargain here.

opportunity to do so.”) Here, Respondent acknowledges that it refused to bargain about the decision to subcontract the ERT. Under those circumstances, effects bargaining would not have been meaningful, and under Board precedent, the ARW Union did not waive its right to effects bargaining once the unilateral subcontracting decision was announced.

CONCLUSION

Based on the foregoing, there is abundant evidence to support the findings in the judge’s decision. The credible testimony and relevant evidence establish that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees. It is respectfully urged that the Board overrule Respondent’s exceptions, and adopt the judge’s recommended decision and order.

Dated at Baltimore, Maryland on January 22, 2020, and respectfully submitted by:

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CERTIFICATE OF SERVICE

The undersigned Counsel for the General Counsel hereby certified that she caused a true and correct copy of the foregoing GENERAL COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION to be served by email and United States mail on the following parties of record on this __22nd__ day of January, 2020:

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