

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

In the Matter of:

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

Case: 05-CA-222622

Respondent,

And

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

Charging Party.

**Reply Brief in Further Support of  
Respondent DuPont Specialty Products USA, LLC's  
Exceptions to the Administrative Law Judge's Decision**

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Dated: February 5, 2020

## I. Introduction

The General Counsel's answering brief largely parrots the ALJ's analysis, which was addressed fully in Respondent's brief in support of its exceptions. Only a few points warrant reply.<sup>1</sup>

As an initial matter, DuPont is not a provider of emergency response services. It is a manufacturer. Emergency response is not DuPont's business. Moreover, no bargaining unit positions were eliminated, and no Union members were laid off as a result of the Company's decision to eliminate the volunteer emergency response program (hereinafter referenced as "the volunteer ERT") at issue. As indicated in the opening brief, the reasons for the cessation of the program are simple: the mismanagement of industrial emergency incident response on site could have catastrophic consequences and a significant negative impact on public health and safety.

At the hearing in this matter, DuPont's Safety Competency Consultant and Chief of Emergency Services, Robert Lukhard, a veteran fire fighter with more than three decades of experience, and an instructor with the Virginia Department of Fire Programs, testified that he made the recommendation to eliminate operation of the ERT at issue "because of safety and sustainability." Tr. 525:4-16.<sup>2</sup> The testimony regarding Chief Lukhard's concerns and motivations was not refuted, even on cross examination. In sharp contrast, the sole witness for the Union, Donny Irvin, stopped serving as a member of the volunteer fire brigade, **twenty years**

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<sup>1</sup> There are inaccuracies in the Unchallenged Finding portion of the General Counsel's brief. For example, the General Counsel contends that DuPont did not except to the findings at item aa, but see Exception No. 49.

<sup>2</sup> "Tr." refers to the transcript of the trial proceedings. General Counsel's Exhibits received in evidence are referenced as "GC Ex.\_" and DuPont's Exhibits received in evidence are referenced as "DuPont Ex.\_."

**ago.** Tr. 117: 8 - 10.<sup>3</sup> Thus, the only evidence presented at the hearing regarding the performance of the volunteer ERT was the testimony of Chief Lukhard. Conversely, the only witness for the Union has not served as a member of the ERT in the current century.

The ALJ's ruling, however, wholly rejects the uncontroverted and credible testimony of Chief Lukhard and the admissions of the Union concerning the potential hazards of the site, and Chief Lukhard's stated reasons as to why he recommended elimination of the program. Tr. 341:11 – 379:19; 390:16- 528:7. The Union, however, conceded that hazardous materials are used in bulk quantity at Spruance, and that different manufacturing areas utilize different chemicals and contain different potential hazards. Tr. 98: 17 - 21.

At the hearing, Chief Lukhard testified that his concerns regarding the existence of hazardous chemicals at Spruance influenced his decision to eliminate the volunteer ERT. Tr. 396: 21 - 24 (“Judge Goldman: ... the existence of these chemicals influenced your decision on the subcontracting or contributed to it I guess. Is that fair? A. That's correct.”). Chief Lukhard also had concerns about possible off-site implications in the event of a catastrophic release of these substances, which could, under some consequence analysis scenarios, result in the potential release of up to 506, 653 pounds of chloroform, affecting a residential population of 9,312, and a surrounding area of 1.4 miles which includes residences, schools and parks. Tr. 400: 2 - 401: 3 - 5 (“So if you have a catastrophic release of chloroform from one of our extracting columns it could cause – it could have an impact in the community of up to 1.4 miles”); DuPont Ex. 25.

At the hearing in this matter, the ALJ also prevented DuPont from introducing expert testimony regarding the regulatory framework and standards of care which govern emergency

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<sup>3</sup>Thus, the General Counsel failed to put forth any competent evidence regarding the adequacy of the performance of the volunteer ERT **for the past two decades** in their case in chief. See Tr. 99: 5 - 7 (Q: “When did you stop being a member? A: 1999”); Tr. 117: 8 – 10.

response and prevented the Company from introducing its risks analysis and the catastrophic failure modeling that drove the decision to eliminate the volunteer ERT. These procedural infirmities violate the Company's due process rights and require reversal.

In addition, the Union and the Company previously bargained over the Company's utilization of non-Union personnel, and agreed that the Company may use non-Union workers in these circumstances. Article IX, Section 9 of the predecessor collective bargaining agreement provides: "Supervision ... 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." Ex. 1, Article XI (emphasis added.)<sup>4</sup>

Under the contract coverage test adopted recently in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), since the "contract language covers the act in question, the agreement ... authorized the employer to make the disputed change unilaterally, and [the Company] has not violated Section 8(a)(5)." *Id.* at 11. And, even if the contract did not cover this situation (which it does), under *First National Maintenance, Oklahoma Fixture*, and the other authority discussed in the opening brief, the Company acted lawfully.

## **II. The ALJ's Credibility Determinations are Not Supported by the Evidence**

### **1. The ALJ Abused His Discretion by making Arbitrary Credibility determinations**

At the hearing, Mr. Irvin denied that the Company raised concerns about the safety of employees and the community at the meeting with Union leadership that occurred on June 19,

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<sup>4</sup> Stated differently, the Company bargained for the right to do emergency response work when it negotiated the 2012 and 2018 CBAs as the same provisions are also found in the 2018 CBA. See Ex 2, Section 8 at 32.

2018. Tr. 216: 7 - 9; Tr. 200: 15 - 25 (“Q. Do you recall ... you said words to the effect that management only mentioned costs as a reason for the change at the June 19th meeting. Do you remember your testimony with words to that effect yesterday? A. Yes.”); Tr. 215: 1 - 215: 5 (“Q. Going back to June 19th, isn’t it correct to say -- isn’t it correct that Mr. Holmes at the June 19th meeting said words to the effect that one of the reasons they shifted to the contractors was a concern for safety on the site? A. No.”)

However, Mr. Irvin’s version of events cannot be credited. Mr. Holmes testified on behalf of DuPont that he was “[o]ver 100 percent confident” that he *did* talk about “safety, staffing, etc.” on June 19<sup>th</sup>. Tr. 254:13-17. Mr. Holmes also denied discussing costs on June 19, 2019. Tr. 260:1 (“On June 19, I discussed no costs.”) Likewise, Mr. Meenach also testified that the Company did not discuss costs on June 19<sup>th</sup>. Tr. 320:6-17. Mr. Meenach further testified that the decision was not about costs. Tr. 318:1-10 (“So we made it clear that it wasn’t about cost. It was about making sure we had the right staffing levels and the right safety at the plant site. The comment was made that if you really wanted to save money, you would just get rid of all the ERT responders of all regards on the plant site and you would just call for mutual aid from either Chesterfield County or City of Richmond. We said that’s not the case. It’s not about the cost. We could do that, but that’s not the plan. We need to have safe, professional emergency responders on the plant site.”)

Nor does it make sense that Cheryl Yanochak, who is Spruance’s Environmental Health and Safety Manager and responsible for all site safety, would attend the meeting and prepare talking points to not discuss those topics. *See* Tr. 243: 20 - 244: 6; GC Ex. 14. Cost were only a line item in that Q & A document among many other issues that predominated. GC Ex. 14. Mr. Irvin admitted that Ms. Yanoshak attended the meeting, and that her responsibilities include

safety, health and environmental. Tr. 201: 7 - 25. *See also* GC 18 at 00001747 (Draft Management Information Bulletin (“MIB”) indicating anticipated benefits such as “faster response times through a dedicated response team,” “increased skill and capabilities” and “enhanced service.”)

While the General Counsel relies upon a series of e-mails upon which the bargaining team members were copied, those e-mails were generated after Chief Lukhard made his recommendation to the Company. Nor does the fact that cost projections existed render the testimony of Mr. Holmes or Mr. Meenach, who testified consistently with one another, incredible.

Indeed, the only witness for the General Counsel and the Charging Party, Donny Irvin admitted that the volunteer ERT wrestled with significant staffing challenges. (“Q. From your personal knowledge there were times when the fire brigade had trouble filling spots because some of the company applicants couldn’t pass the training test? Correct? A: Correct.” Tr. 211: 1-5.) Mr. Irvin likewise admitted that the ERT was confronted with attrition due to the retirement of qualified volunteers. Tr. 209:15-18. (“Isn’t it accurate to say that over the course of time, some of the people that had been on the fire brigade retired out of DuPont. Correct? A. Correct.”) Mr. Irvin further conceded that there were numerous vacancies. (“But I do know we had a lot of vacancies, I’ll say a lot being five. I think it was on B Shift.”) Tr. 212:6-8. Documents introduced during the hearing further documented the enormous staffing shortages that made the volunteer ERT untenable. *See, e.g.,* DuPont 69 (noting existence of **twenty-two (22)** fire fighter vacancies.)

Moreover, as the Union itself admitted, if the Company was driven by a desire to save costs, it could have eliminated the program all together and relied upon outside responders in the event

of an emergency.

- Q. Do you recall you saying words to the effect, well, if the Company really wanted to save money, you wouldn't staff any of it. You would just call Chesterfield County when you had a fire.
- A. I think that's probably a fair statement.  
JUDGE GOLDMAN: That you said?  
THE WITNESS: Yes. Tr. 202: 19 - 25.

*See also* Tr 252: 20 - 24 (“Q: What, if anything, did Mr. Irvin say about whether the Company was saving money? A. Well Mr. Irvin had mentioned if you guys really wanted to save money, just – you could just give it – do away with the fire services and use Chesterfield Fire Department.”)

**2. The Decision to Cease providing volunteer emergency response services is a core entrepreneurial decision not subject to bargaining.**

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court held that decisions involving a change in the “scope and direction of the enterprise” are not subject to a bargaining obligation. In *First National Maintenance*, the question was whether the employer, which provided maintenance services to other businesses, was obligated to bargain over its decision to relinquish one of its maintenance contracts, which resulted in the layoff of some of its employees. Like the closing found permissible in *First National*, DuPont’s decision to eliminate the ERT is “akin to the decision whether to be in business at all,” and part of “a change in the scope and direction of the enterprise” and therefore DuPont had no duty to bargain over it. *Id.* at 677, 686-688.

Similarly, in *Oklahoma Fixture Co.*, 314 NLRB 958, 959 (1994), the Board held that an employer was not required to bargain over electrical subcontracting work because the employer “was concerned about legal liability and the risk of losing virtually all [its] revenue in the event of electrical damage ... resulting from an improperly wired fixture.” *Id.* at 960.

Like the decision in *Oklahoma Fixture*, DuPont’s elimination of the volunteer ERT “involved considerations of corporate strategy **fundamental to preservation of the enterprise.**” Accordingly, it lies outside the scope of mandatory bargaining and Respondent’s alleged failure to bargain over it did not violate Section 8(a)(5) and (1) of the Act.<sup>5</sup>

Moreover, the decision at issue also involved a change in the scope and direction of the enterprise. As discussed in the opening brief, the Company is restructuring, rebranding and elevating its commitments to safety, the environment and sustainable progress and focusing on core competencies, and indeed **is now a different corporate entity all together:** DuPont Specialty Products USA, LLC. Tr 183: 7- 10; DuPont Ex. 50.

**a. The Company’s decision was based on environmental safety and health concerns and fears that the present program could not be sustained, not labor costs.**

Similarly, under the first *Dubuque* affirmative defense, an employer may rebut the General Counsel’s *prima facie* case by showing “that labor costs (direct and/ or indirect) were not a factor in the decision.” As detailed above, the Company’s decision to cease operations of the Volunteer ERT was driven not by labor costs, but environmental health and safety concerns.

Chief Lukhard testified that costs did not drive his recommendation:

It 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.** It had everything to do with the inability to staff appropriately, the inability to recruit qualified experienced members, and the inability -- and the concern with the hazards on the site and the potential emergencies that could occur and not having qualified folks and not

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<sup>5</sup> While the General Counsel contends that DuPont failed to demonstrate changes to its manufacturing facility, its expert witness was expected to testify regarding the changes to applicable regulations and the standard of care for industrial emergency response. The testimony of DuPont’s proffered expert witness, Michael Hildebrand, CSP, CFPS, CHMM, was clearly relevant to its affirmative defenses and for the reasons stated on the record and in its proffer. Tr. 189:14- 197:6. That testimony however, was excluded pursuant to the General Counsel’s relevancy objection. Tr. 185: 18-188: 1.

seeing any answer, quick answer to the lack of sustainability of the system. Tr. 485:15-24.

Thus, although the Company may have later anticipated some labor costs savings as part of the transition to contract emergency services, credible evidence and testimony demonstrated that the Company contracted out emergency services for reasons unrelated to labor costs. Ongoing investment in the program in terms of infrastructure and capital improvements has also eclipsed any anticipated savings. Tr. 467:14 -23 “So the Company is investing significantly in emergency response and fire protection from -- we’re in a current upgrade to our emergency communications and fire alarm system, which is going to be a 4-year project, \$11 million to upgrade the Honeywell fire alarm and emergency communications system. We are also upgrading many of the properties or buildings on-site to supply them with sprinkler system. We have a long-range plan to get every building on the site to have sprinkler protection. That’s about a \$10 million investment over the next 5 to 7 years.”

**b. The Union could not have offered concessions that would have Changed the Company’s Decision**

Lastly, since the Company’s concerns dealt with safety, efficacy and sustainability of the enterprise, no labor cost concession would have impacted the Company’s decision to outsource the work. Thus, the Respondent has met its burden of proving direct and indirect labor costs were not a factor in its decision or that, even if they were, the Union could not have offered labor cost concessions of a magnitude that could have altered the Company’s decision.

**3. The Issue of Safety is Covered by the CBA.**

Finally, the applicable collective bargaining agreement expressly relegated to management the prerogative to take necessary actions in the interest of safety or in the preservation of Company property.

Article IX, Section 9 of the predecessor collective bargaining agreement provides:

Supervision ... *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. **Ex. 1**, Article XI (emphasis added.)<sup>6</sup>

In *MV Transportation, Inc.*, 368 NLRB No. 66, the Board expressly adopted the “contract coverage” standard urged in Respondent’s Post – Trial Brief at 20; 29-31.

Applying the contract coverage test here supports the conclusion that the changes in the present case fall with the “compass or scope of the language in the Agreement that granted the Respondent the right to act unilaterally.” *See id.* at 16. Under that test, the Union and the Company plainly bargained over safety work and who can perform that work. Having so bargained, the Union cannot now see to re-bargain that issue.

Lastly, the recommended remedy of reinstatement of the *status quo* is not only ill advised, but it also has the potential to force the Company into a posture of regulatory non-compliance. Accordingly, the Board should reverse the ALJ’s findings as set forth herein and in DuPont’s Exceptions to the Administrative Law Judge’s Decision and dismiss the Complaint in its entirety. Alternatively, the Board should order that the matter be retried before a new ALJ, or, in the alternative, order the ALJ to reopen the record for the limited purpose of receiving additional evidence and testimony, including expert testimony.

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<sup>6</sup> In other words, the Company bargained for the right to do emergency response work when it negotiated the 2012 and 2018 CBAs as the same provisions are also found in the 2018 CBA. Ex 2, Section 8 at 32. The ALJ, however, improperly narrows and misreads this language to incorporate an exigency requirement not on the face of the document. ALJD pp. 28 – 29, fn 19.

### III. Conclusion

For all of these reasons, and on the Record as a whole, the ALJ's findings and conclusions set forth in DuPont's Exceptions should be reversed and the Board should issue a decision as set forth in the briefs and herein.

Respectfully Submitted,

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**Certificate of Service**

Pursuant to Section 102.31(b) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, the undersigned certifies that the foregoing Reply Brief in Further Support of Exceptions to the Administrative Law Judge's Decision was served via electronic mail on this 5<sup>th</sup> day of February, 2020 upon the following:

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