Nos. 20-3179, 20-3480

In the United States Court of Appeals
FOR THE THIRD CIRCUIT

DUPONT SPECIALTY PRODUCTS USA, LLC

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

On Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board

APPENDIX OF PETITIONER
VOLUME II, PAGES APPX72 TO APPX117

Theresa A. Queen
David G. Barger
GREENBERG TRAURIG LLP
1750 Tysons Boulevard, Suite 1000
McLean, VA 22102
(703) 903-7516

David R. Broderdorf
Michael E. Kenneally
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000

Justin F. Keith
GREENBERG TRAURIG LLP
One International Place, Suite 2000
Boston, MA 02110
(617) 310-6000

Robert M. Goldich
GREENBERG TRAURIG LLP
1717 Arch Street, Suite 400
Philadelphia, PA 19103
(215) 988-7800

Counsel for DuPont Specialty Products USA, LLC

TABLE OF CONTENTS

Page

Volume I, Pages Appx1 to Appx71

Decision and Order, Dated July 8, 2020, as Amended August 12, 2020 ..... Appx1

Decision and Recommended Order, Dated October 11, 2019 ..... Appx22

Appendix: Notice to Employees Appx60

Order Denying Motion for Reconsideration, Dated October 14, 2020 ..... Appx62

Petition for Review, Filed October 23, 2020 (No. 20-3179, ECF 1-1) Appx63

Exhibit A: Decision and Order, Dated July 8, 2020, reproduced at Appx1-21

Exhibit B: Order Denying Motion for Reconsideration, Dated October 14, 2020, reproduced at Appx62

Cross-Application for Enforcement of an Order of the National Labor Relations Board, Filed December 8, 2020 ..... Appx68

Attachment: Decision and Order, Dated July 8, 2020, reproduced at Appx1-21

Volume II, Pages Appx72 to Appx117

Brief in Support of Respondent DuPont Specialty Products USA, LLC's Exceptions to the Administrative Law Judge's Decision, Dated: December 9, 2019 ..... Appx72

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), Respondent, And AMPTHILL RAYON WORKERS, INC., LOCAL 992, INTERNATIONALBROTHERHOOD OF DUPONT WORKERS Charging Party.	Case: 05-CA-222622

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

Theresa A. Queen (Virginia Bar No. 44462)
David G. Barger (Virginia Bar No. 21652)
1750 Tysons Boulevard, Suite 1000
McLean, VA 22102
Tel: (703) 903-7516
Fax: (703) 749-1301
queent@gtlaw.com
bargerd@gtlaw.com

Counsel for Respondent DuPont Specialty Products USA, LLC (as a successor to E. I. du Pont de Nemours and Company)

Dated: December 9, 2019

TABLE OF CONTENTS

I. Introduction 1

II. Procedural History and Allegations in the Complaint 5

III. Judge Goldman's Findings of Fact 7

1. Overview of DuPont's Spruance Operations and the ERT 7
2. Problems with the ERT 11

IV. Argument 15

1. The ALJ's evidentiary rulings and credibility determinations were arbitrary and denied the Company Due Process of Law and the Company is entitled to a New Trial Before a Different ALJ. 15

a. The ALJ Abused His Discretion by Refusing to allow the Company to Present Evidence Under Seal 15
b. The ALJ Abused His Discretion by making Arbitrary Credibility determinations 20

2. The ALJ's Refusal to Allow Expert Testimony on the Standard of Care Constituted an Abuse of Discretion 22
3. DuPont's Elmination of the Volunteer ERT Does Not Violate the Act 25
A. The Decision to Cease providing volunteer emergency response services is a core entrepreneurial decision not subject to bargaining.. 26
B. The Company did not violate the Act under Dubuque Packing 31

1. The Company's decision involves a change in the scope and direction of the enterprise 32
2. 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 32
3. The Union could not have offered concessions that would have Changed the Company's Decision 35

C. The Issue of Safety is Covered by the CBA. 36

V. Conclusion 41

TABLE OF AUTHORITIES

Cases

ArcelorMittal Ind. Harbor LLC v. Amex Nooter, LLC,
No. 2:15-CV-195-PRC, 2017 U.S. Dist. LEXIS 213122 (N.D. Ind. Dec. 29, 2017) 23

Arcoren v. United States,
929 F.2d 1235 (8th Cir.), *cert. denied*, 502 U.S. 913, 116 L. Ed. 2d 255, 112 S. Ct. 312 (1991) 22

Arrow Auto. Indus., Inc. v. N.L.R.B,
853 F.2d 223 (4th Cir. 1988) 28, 31

Baptist Hosp. of E. Tennessee & Office & Prof'l Employees Int'l Union, Local 2001,
351 NLRB 71 (2007) 39

Calusinski v. Kruger,
24 F.3d 931 (7th Cir. 1994) 23

Dorsey Trailers, Inc. v. N.L.R.B,
233 F.3d 831 (4th Cir. 2000) 28

Dubuque Packing II,
303 NLRB 386 (1991) 26, 32

El Paso Electric,
355 NLRB 428 (2010) 31

El Paso Electric Co.,
357 NLRB 2323 (2012) 34

Enloe Medical Center v. NLRB, 433 F.3d 834 (D.C. Cir. 2005) 41

First National Maintenance Corp. v. NLRB,
452 U.S. 666 (1981) 26, 27, 28

Fox v. Dannenberg,
906 F.2d 1253 (8th Cir. 1990) 22

Gar Wood-Detroit Truck Equipment,
274 NLRB 113 (1985) 30

Glen Falls Bldg. & Const. Trades Council,
325 NLRB 1084 (1998) 16, 23

Haley v. Gross,
86 F.3d 630 (7th Cir. 1996) 23

Kamakana v. City & Cty. of Honolulu,
447 F.3d 1172 (9th Cir. 2006) 19

Mercy Health Partners,
358 NLRB 566 (2012) 34

MV Transportation, Inc.,
368 NLRB No. 66 (2019) 4, 37

Noffsinger v. Valspar Corp.,
No. 09 C 916, 2012 U.S. Dist. LEXIS 34865, 2012 WL 895496 (N.D. Ill. Mar. 15, 2012) 23

Oklahoma Fixture Co.,
314 NLRB 958 (1994) 26, 29, 30

Ozark Auto. Distributors, Inc. v. Nat'l Labor Relations Bd.,
779 F.3d 576 (D.C. Cir. 2015) 15, 16

Pye v. Longy School of Music,
759 F. Supp. 2d. 153 (D. Mass. 2011) 28

Richman v. Sheahan,
415 F. Supp. 2d 929 (N.D. Ill. 2006) 23

Sylla-Sawdon v. Uniroyal Goodrich Tire Co.,
47F.3d 277, 283 (8th Cir.), *cert. denied*, 516 U.S. 822, 116 S. Ct. 84, 133 L. Ed. 2d 42 (1995) 22

Statutes

29 U.S.C. § 151 *et seq.* ..... passim

Other Authorities

29 C.F.R. § 102.39 16

29 CFR 1910.120 (a)(1)(v) 8

29 CFR 1910.151(b) 8

Fed.R.Evid. 401 16

I. Introduction

Respondent DuPont Specialty Products ("Respondent" or "DuPont") respectfully submits this Brief in support of its Exceptions to the Decision and Recommended Order of the Administrative Law Judge, David I. Goldman (the "ALJ").

The facts surrounding this case are straightforward. DuPont operates its largest facility in North America ("Spruance") on the banks of the James River near the City of Richmond, Virginia in Chesterfield, Virginia. At issue in this case is the Respondent's decision to get out of the difficult—and indisputably non-core—business of trying to use volunteers to staff, operate and maintain an onsite industrial fire brigade. Given the severe staffing shortages and where many of those volunteers were unable to meet the qualifications required to safely perform the work, the decision was well- founded. The reasons for the cessation of the volunteer emergency response program (hereinafter referenced as "the volunteer ERT") 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.

Contrary to the findings of the ALJ, the evidence put forth at the hearing established that this is not a true subcontracting case. No bargaining unit positions were eliminated, and no Union members were laid off. Prior to making its decision regarding the fire brigade, the Company, to no avail, made repeated efforts to engage the Union and solve the endemic staffing problems.

Finally, upon the recommendation of a newly-hired, career firefighting professional with over thirty-four years of experience, the Company decided to cease operation of the volunteer ERT and eliminate the program in favor of a full- time, professional third-party dedicated, and experienced emergency responders.[1] This change better supports site operations, guarantees optimal staffing, safer operations and ensures compliance with governing regulatory requirements. Utilizing dedicated and experienced professionals provides better protection for employees, the public, the surrounding community, the site and the environment. It is part of the Company's commitment, to safety, the environment and sustainable progress and a matter fundamental to the preservation of the organization.

DuPont excepts to the ALJ's decision on several grounds. As an initial matter, the ALJ resolved issues of credibility in an arbitrary and results-oriented manner, which denied the Respondent due process of law. Although the ALJ found that the "[t]he chemicals and production processes involved in the plant's production carry a

---

[1] Rather than replacing existing jobs, the Company created new previously unfilled roles. The emergency response team had *zero* employees. Instead, the Company obtained emergency response services by using a system of rotating, part-time volunteers. Prior to contracting with FDM, no full-time, dedicated, career, emergency responders existed on site. FDM offers a specialized and highly trained, professional work force who now offer the company full time, round-the-clock emergency and hazardous material support. Tr. 469: 9 - 470: 11; Tr. 471: 14 - 24; DuPont Exs. 42, 43, 44, 46. The Company was not obligated to bargain with the Union over the decision to cease operations of a volunteer emergency response program and outsource the emergency response work. DuPont is not a provider of emergency response services: it is a manufacturer who elected to eliminate a voluntarily undertaken ancillary support program, staffed by volunteers.

potential for risk of employee and ***even community injury***," ALJD at 3 :11-12 (emphasis added), the ALJ, nonetheless, disregarded uncontroverted testimony as to the Company's motivations for the cessation of the volunteer ERT. Tr. 341:11-379:19; 390:16- 528:7.

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 "because of safety and sustainability." Tr. 525:4-16.[2] The testimony regarding Chief Lukhard's concerns and motivations was not refuted, even on cross examination. Conversely, the only witness for the Union, Donny Irvin, stopped serving as a member of the volunteer fire brigade, **twenty years ago**. Tr. 117: 8 - 10.[3]

The ALJ also demonized and discredited the Company's *two* bargaining representatives who testified consistently that the Company did not raise costs at the basis for its decision at the meeting with Union leadership on June 19, 2019, when such testimony was supported by documentary evidence. At that meeting with the Union leadership, Company witnesses testified that they discussed "safety,

---

[2] "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._ ."

[3]Accordingly, 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.

staffing, etc." as the reasons for the change. Tr. 254: 14 - 17; GC Ex. 14 at 0000849 - 50 (Draft Q & A); Tr. 247: 11 – 20.

The ALJ further abused his discretion through multiple evidentiary rulings and when he refused to allow expert testimony concerning the standard of care for industrial emergency response and the complex regulatory framework, which governs the incident response work at issue in the current matter on "relevance" grounds. Simply put, the ALJ erred when he found that DuPont's decision to cease operations of a volunteer emergency response team violated the Act.

Moreover, 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.)[4]

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

[4] Stated different, 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.

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 below, the Company acted lawfully.

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.

II. Procedural History and Allegations in the Complaint

The Charging Party, the Ampthill Rayon Workers Association, Inc., Local 992 (hereinafter, the "Charging Party," "the ARWI" or "the Union") filed its initial unfair labor practice charge on June 18, 2018 arising out of the Company's elimination of the volunteer emergency response team.[5] The General Counsel issued the Complaint on November 28, 2018, alleging violations of Sections 8(a)(1) and (5) of the Act. The Company timely responded to the Complaint on December

[5] The International Brotherhood of Electrical Workers ("IBEW"), whose members also volunteered for the ERT, did not file an unfair labor charge regarding this outsourcing, even though their members were among the top earners on the brigade. *See* Tr. 257:11 ("The top earners were the IBEW members"); Tr. 449: 10 - 17.

12, 2018. DuPont filed an Amended Answer asserting additional affirmative defenses on May 31, 2019.

The case was tried before the Honorable David I. Goldman, Administrative Law Judge, over three consecutive days from June 3 to June 6, 2019 in Richmond, Virginia. The General Counsel called only one witness, the Treasurer of the ARWI, Donny Irvin.[6] DuPont called three fact witnesses: Andre Holmes, Human Resources Consultant; Darrin Meenach, Spruance's Program Manager for Learning and Development and Robert Lukhard, Spruance's Safety, Health, Environment ("SHE") Competency Consultant.

At trial, DuPont also sought to adduce the testimony of its proffered expert witness, Michael Hildebrand, CSP, CFPS, CHMM, which the Company contended was 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. DuPont's Request for Special Permission to Appeal that issue was denied by the Board, who indicated that the ruling could be appropriately addressed at a later stage. Order dated July 17, 2019.

---

[6] It bears repeating, that the *only* witness for the Union, Donny Irvin, stopped serving as a member of the volunteer fire brigade in 1999. Tr. 99: 5 - 7 (Q: "When did you stop being a member? A: 1999"); Tr. 117: 8 – 10. Accordingly, the only competent evidence presented at the hearing regarding the performance of the volunteer ERT put forth at the hearing was the testimony of Chief Lukhard. In the event this flimsy factual foundation is found sufficient, DuPont seeks to reopen the record for further cross – examination of Mr. Irvin regarding the performance of the ERT during his tenure.

III. Judge Goldman's Findings of Fact

Some of the facts of this case are set forth in the Findings of the ALJ. However, troublingly, a majority of the unrefuted testimony adduced by the Company is not set forth in the opinion. In addition, the Company was precluded from adducing expert testimony and introducing key evidence central to its defenses.

1. Overview of DuPont's Spruance Operations and the ERT

DuPont is a manufacturer with a diverse array of specialty products. Tr. 84: 17 -19. The ALJ noted that:

"DuPont has operated the Spruance plant, located along the southern border of the city of Richmond, in Chesterfield County, Virginia, since 1929. The site is comprised of over 500 acres and currently includes some production by other or related companies.**"** ALJD, p. 2: 25–28. "In total there are approximately 2000 employees at the plant, but a significant number are non-bargaining unit "exempts," i.e., clerks, technical operators, and engineers." ALJD p. 2:41-43. "[T]he plant is in production 24 hours a day, seven days a week." ALJD p. 2:32-33. Spruance is the size of a small city, comprised of multiple numbered streets. Tr. 84: 12 - 14; GC Ex. 2 (Site Photographs of Spruance).

"The Spruance Plant ERT was composed of a fire brigade, hazmat team, and a medical emergency response team (MERT)." ALJD 3:27-28. "The ERT's function was to respond to emergency calls at the site, including conditions caused by adverse weather, gas releases, smoke alarms, fires, spills, rescues, medical first aid, and other emergencies." ALJD 3:31-33. Other site emergencies can potentially

include medical emergencies, bomb threats, workplace violence *etc.* Tr. 349: 16 - 23, DuPont Ex. 21.

"The chemicals and production processes involved in the plant's production carry a potential for risk of employee and even community injury. The risk of fire, explosion, or exposure to toxic chemicals is taken seriously by all involved with the operation of the plant. Over the years there have been incidents that led to groups of employees having to, at least, be evaluated at the hospital."" ALJD p. 3:11-15. "DuPont maintains an extensive array of safety-related and emergency-related protocols and procedures, including beginning each meeting, no matter the subject, with some reference to a safety issue. This is called a "safety contact."' ALJD p. 3:18-20. Safety is a core value and constant priority at DuPont. Tr. 345: 4 - 8 ("DuPont takes safety very seriously…. They have a very strong safety culture…"); DuPont Ex. 19. (DuPont Position Statement on Safety, Health, and Environment.)

"[N]o governing laws or regulations require that DuPont maintain an ERT. Nor do any of DuPont's internal policies" ALJD p. 4:14-15.[7] Rather, the maintenance of

---

[7] While the OSHA Hazardous Waste Operations and Emergency Response Standard ("the HAZWOPER Standard") regulates training for those engaged in certain types of activities, including emergency response for releases of, or substantial threats of releases of, hazardous substances, there is no regulatory requirement that the Company maintain an ERT given the proximity of local emergency response services to the site. *See* "Hazardous Waste Operations and Emergency Response" standard (HAZWOPER), 29 CFR 1910.120 (a)(1)(v). OSHA does not require that trained first aid personnel are employees of the company. Emergency treatment services through an ambulance service or a fire department are acceptable alternatives, if they are within reasonable proximity of the worksite, and can respond to an emergency quickly enough to be effective. 29 CFR 1910.151(b).

the ERT at Spruance is undertaken voluntarily and consistent with industry best practice. Tr. 347: 17 - 23.

"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 2018, has been run by a company called Veolia." ALJD p. 4:17-20. GC Exhibit 14 also demonstrated that the ERT handled a total of 657 calls in 2017 down from 721 in 2016. ALJD p. 4, fn 4

> What is the breakdown of the calls that Emergency Service's responds to?
>
> Data for the past 2 years is as follows:

	2016	2017
Total Calls	721	657
Confined Space Permits	568 (79%)	479 (73%)
Investigations	24 (3%)	57 (9%)
Medical	46 (6%)	55 (8%)
Fire Alarms	49 (7%)	33 (5%)
Fire	12 (2%)	18 (3%)
Miscellaneous	16 (2%)	10 (1%)
HazMat	5 (1%)	5 (1%)

> *Id.*

"[The ERT-member employees worked their regular production, maintenance, or other jobs at the facility, and responded to a possible medical or fire emergency when they were at work and an alarm or other call went out for their services." ALJD p. 5:7-9. Participation in the volunteer ERT was also just that—completely voluntary. Tr. 213: 10 - 14. ("Q: You … didn't have to do it if you didn't want. A. Correct.")

Industrial fires are uniquely hazardous events. Tr. 352: 18 - 353: 24; Tr. 352: 19 - 353: 2. ("They usually involve far more toxic chemicals that are used in process, so

they're in motion, so they're flowing. … many of these toxic chemicals are flammable chemicals or combustible chemicals or products that we used, are used in process so they're heated. So they're above their flash point which makes them more dangerous….”). Several of the chemical constituents used in bulk quantities during product manufacture at Spruance are toxic materials. Others are corrosive, acidic or caustic. Many, thus, potentially carry risks for employees, the first responders themselves, the surrounding community and the environment in the event of an accidental release or catastrophic failure. Tr. 349: 16 – 350: 1; DuPont Exs. 21, 23, 24, 25. A multitude of potentially hazardous substances are also routinely transported through the Spruance site. Tr. at 378: 9 - 15 (“We have lots of chemicals transported on and off the site in many different types of vessels and containers, not only rail cars but trucks, 55-gallon drums, totes of all different configurations. So there is constant movement in and off the site, 24/7, of toxic and flammable and combustible materials by pipeline, by over-the-road vehicle, and then small containers as well.”)

The existence of these chemicals on site and concerns regarding their potential hazards influenced Chief Lukhard's 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.

2. Problems with the ERT

In recent years, DuPont experienced significant difficulties staffing the necessary positions on the fire brigade at Spruance and attracting interested and acceptable candidates. Tr. 124: 23 - 24 ("This particular time in 2017, we were having difficulty getting staffing"); Tr. 209: 10-18. *See also* DuPont Ex. 69 (noting **twenty-two** fire fighter vacancies); Tr. 437: 2 - 444: 15; DuPont Ex. 33 at 00037; Tr. 444: 8 – 14. Recruiting new members for the volunteer ERT was difficult at best, and the Company struggled to maintain adequate staffing for the ERT. Tr. 421: 3 - 8; DuPont Exs. 28, 33, 69.

Because staffing of the volunteer ERT had reached critically low levels, the Union and Management negotiated a forced over-time policy in an attempt to address the endemic staffing shortages. Tr. 213: 15 - 19; GC. Ex. 6; Tr: 307: 7 - 17. Further, even those volunteers recruited had a difficult time succeeding in the role and passing the required trainings. Tr. 429: 7 - 11; Tr. 432: 19 - 433: 13; DuPont Ex. 29, 30, 31; Tr. 426: 18 - 21 ("… we were having issues with candidates that could not successfully pass some of the training, whether that be practical skills or the written testing associated with it.") The qualification process for new volunteers to obtain the required certifications also took "about a year." Tr. 430: 4 - 9.

Particular problems arose staffing the critical officer roles (Captain/Shift Commander). Tr. 422: 8 - 11; Tr. 444: 12 - 14 ("So D shift was also without a captain or a shift commander starting somewhere around the October time frame of '17 and forward.") Indeed, in 2015, a release of one of the hazardous materials used on site, Dowtherm A, resulted in approximately 22 people, including first responders, being sent to the hospital for evaluation. Tr. at 357: 10 - 13: Tr. 322: 16 - 323: 3. A fire also occurred in the Tyvek ® facility at Spruance in or about 2015. Tr. 322: 6 - 12.

Ultimately, due to concerns over the adequateness of staffing, training lack of experience, and problems with program administration, Cheif Lukhard made the recommendation to cease operation of the volunteer ERT. He had developed the opinion that the current system was simply not sustainable and was concerned with the safety implications of an unsustainable system. Tr. 460: 12 - 462:4; Tr. 485: 15 - 24; Tr. 482: 6 - 20; DuPont Ex. 65.

As Spruance's Safety Health and Environment Competency Consultant, Chief Lukhard does not have profit and loss responsibility. Tr. 465: 22 - 25; DuPont Exs. 47 and 48. Chief Lukhard further did not know what the costs involved would be when he began working on the recommendation. Tr. 485: 15 - 18. The total requisition for the three-year contract reached $ 4 million dollars. Tr. 518: 17 - 518: 3: DuPont Ex. 67.

Establishing the full-time dedicated emergency responders also required additional capital investments in infrastructure for living quarters of approximately

$800,000. Tr. 468: 7 - 13. Additional investments also took place in the form of equipment and machinery. Tr. 467: 24 - 468: 6.

The qualifications and experience levels of the dedicated professionals are nearly across the board superior to the majority of the volunteer ERT candidates (almost none of whom met the five-year experience benchmark set for the contractors.) Tr. 469: 9 - 470: 11; DuPont Exs. 42, 43, 44, 46. The employees of the Contractor, FDM, have advanced skills and capabilities. FDM's employees are trained as firefighters, EMTs, confined space rescuers and hazmat technicians. Tr. 471: 14 - 24; DuPont Ex. 46.

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.") The changes on site, including the decision to outsource the ERT, are also attributable to a change in the direction of the Company. DuPont has recently unveiled a new global brand identity.

Currently, the Company's website welcomes visitors with "Welcome to the new DuPont." DuPont Ex. 50. DowDuPont successfully completed the spin-off of its Materials Science division, Dow, on April 1, 2019. *Id.* The Company separated its Agriculture and Specialty Products divisions into independent publicly traded companies in June 2019. *Id* Thus, the changes at Spruance are part of the separation of the Specialty Products division and its transformation into a stand-alone company, DuPont Specialty Products USA, LLC. *Id.; see also,* Tr. 183: 1 - 19.

As s part and parcel of this initiative, at Spruance, the Industrial Utilities, *i.e.*, the Waste Water Treatment Plant and Electricity Plant/ Powerhouse were also recently outsourced and sold to Veolia, an industrial utilities company. Tr. 269: 18 - 270: 5. The Union was given notice of the operations closures caused by the divestiture of the site industrial utilities. Tr. 270: 1 - 7. Significantly, the Union did not claim that it was entitled to bargain over the *decision* to close any of the above operations, except for the ERT Team, which also provides emergency response services to those sites now leased by Veolia. Tr. 271: 21 - 272: 6.

"The ARWI and DuPont have negotiated numerous collective-bargaining agreements over the years covering the terms and conditions of bargaining unit employees. A September 2012 agreement covering the production, maintenance, service and technical wage roll employees was renewed in 2015 (the 2015 Agreement). A new agreement for this unit was negotiated during the summer of 2018, and went in to effect on September 1, 2018 (the 2018 Agreement)" ALJD p. 2:45-3:1. DuPont announced its decision to eliminate the volunteer ERT program to

the IBEW and ARWI leadership in a meeting that occurred on June 18, 2018 with implementation anticipated to occur in September of 2018. Tr. 238: 24 - 239: 9; GC Ex. 9. At the meeting with the Union the Company discussed "safety, staffing, etc." as the reasons for the change. Tr. 254: 14 - 17; GC Ex. 14 at 0000849 - 50 (Draft Q & A): Tr. 247: 11 - 20. In the meeting on the 19th, Mr. Irvin (the ARWI representative) asked the Company how much money it was saving (due to the outsourcing), and the Company communicated it did not know. Tr. 251: 21 - 252: 5; Tr. 202: 15 - 18. Mr. Irvin responded with words to the effect that if the Company really "wanted to save money" … it would "do away with the fire services and use Chesterfield Fire Department." Tr. 202: 19 - 22; Tr. 252: 20 - 24; Tr. 318: 3 - 7 ("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.")

The volunteer ERT ceased operation on September 1, 2018. Tr. 526: 7 - 12.

IV. Argument

1. The ALJ's evidentiary rulings and credibility determinations were arbitrary and denied the Company Due Process of Law and the Company is entitled to a New Trial Before a Different ALJ.

a. The ALJ Abused His Discretion by Refusing to allow the Company to Present Evidence Under Seal

"There are sometimes errors at a trial that deprive a litigant of the opportunity to present his version of the case. These are also ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment." *Ozark Auto. Distributors, Inc. v. Nat'l Labor Relations Bd.*, 779 F.3d 576, 586 (D.C. Cir. 2015). It

is well established that the Board will reverse a judge's evidentiary rulings or order a rehearing only when the party urging such measures demonstrates that the judge's ruling was not only erroneous, but also prejudicial to substantive rights. *Glen Falls Bldg. & Const. Trades Council*, 325 NLRB 1084, 1086 (1998).

In unfair labor practice hearings, the Board follows the Federal Rules of Evidence "so far as practicable," 29 U.S.C. § 160(b); 29 C.F.R. § 102.39; *Ozark Auto. Distributors, Inc. v. Nat'l Labor Relations Bd.,* 779 F.3d 576, 583–84 (D.C. Cir. 2015). Relevant evidence Rule 401 tells us, is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401.

At the hearing in this matter, DuPont also sought to develop a factual record and adduce testimony regarding analysis of the potential off - site implications and worst-case scenario modelling of catastrophic operational failures that could be mitigated by effective emergency response, but necessarily, sought to do so under seal. The Company also sought to protect its proprietary information by introducing evidence of the hazards of the specific chemicals at issue under seal. Tr. 359:15-360:7. The documents and information the Company sought to introduce at the hearing were clearly relevant to the subject matter and supported the Company's version of the events. *Ozark,* 779 F.3d at 585. However, the ALJ simply refused to allow or consider pertinent, critical evidence regarding the Company's decision-making and refused to allow counsel to present evidence under

seal. Tr. 403:12-420:25; RX 26 (not presented.) Specifically, DuPont sought to introduce a document constituting a site risk analysis and catastrophic failure modeling, however, the ALJ refused to allow such testimony.

> Q. -- did you participate in a process known as the siting revalidation?
> A. Yes, ma'am.
> Q. Can you please -- did you rely on information that you learned during the siting revalidation -- that's compound, strike that. Did information you learned during the siting revalidation inform your decision to outsource the ERT?
> A. It did.
> Q. Can you describe for me what the siting revalidation is?
> A. So it's a document that we're required to do similar in stature to the EPA but a little different. This has actually got all the specific scenario, consequence analysis scenarios that are done. So there's quite a few. For each process that is -- that we have that has a hazardous chemical in it, we are -- our technical folks go through and actually look at the buildings on the site and the impact that those -- that a release of the chemical would have on those buildings, as well as off-site consequences and buildings off site and facilities off site.
> So it looks at toxic. It looks at flammability. It also looks at heat, as far as heat-produced scenarios. So it looks at many different types of process or scenarios that could occur. And they do worst-case scenarios. And especially with our what they refer to as HHP or high hazard processes, those would be the ones involving chloroform, DMAC, ICL, hydrochloric acid. Those are all part -- referred to as high hazard areas or high hazard process areas. As well as sulfuric acid and some of the others that we have run through.
> So this basically gives emergency services and emergency management a good idea if one of these toxic gases or other scenarios occurs, how it's going to impact the site, as well as if it has any off-site impacts. Several of these have off-site impacts. And we have neighbors to the north and to the south of us that are bulk fuel storage -- excuse me, bulk fuel storage facilities that are very close to our assets as well. So we could have impact onto them or their scenarios. And we actually do some scenarios for those -- for Kinder

> Morgan and Motiva, who are both fuel storage facilities. We actually have scenarios where if they have an incident how it could impact our site.
> JUDGE GOLDMAN: So is the difference between this and the previous document that this goes into specific scenarios?
> THE WITNESS: Yes, sir. Yes, sir. Much more in-depth. And the technical folks actually do very specific scenarios with each chemical, at where in each part of the process or storage, and actually do -- there's graphs and charts in here that show based on certain weather conditions how those would -- how those scenarios would play out, if you would.
> JUDGE GOLDMAN: And what -- let me see if I can ask this. What did you learn from this? How did that influence the subcontracting?
> THE WITNESS: Well, when I was in Chesterfield County before I came to the Spruance site, I knew that they had some of these chemicals in process. We do -- I generally knew that some of them were -- could be, have some off-site impacts. Until I was involved in this process I had no idea that the magnitude -- the amount of different chemicals we had and the magnitude of how far off-site, being 1.4 miles, and how those could impact elementary schools we have within just a -- within a mile of the station, parks, different residential areas, apartment complexes.
> JUDGE GOLDMAN: So it influenced your understanding or your belief, your understanding of the extent of the risk involved? Is that --
> THE WITNESS: Correct.
> JUDGE GOLDMAN: -- fair to say?
> THE WITNESS: Yes, sir. And with those risks the need to be able to respond very quickly to these types, to try to minimize the effects of it. So all of these scenarios that are in this book and the 1.4 mile consequence, and all that is if nothing is done. So that's the worst-case scenario. If no emergency response responds, if no techniques, water if that's appropriate, or foam or whatever, if nothing is done, that's the worst-case scenario. So a well-trained, efficient, and quick response can obviously change this impact significantly. Tr. 404:3 - 407:5.

A narrow range of documents is not subject to the right of public access at all because the records have "traditionally been kept secret for important policy

reasons. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (citations omitted.) In general, "compelling reasons" sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such "court files might have become a vehicle for improper purposes." *Id.* Here, the ALJ granted DuPont's Motion for Protective Order and agreed with counsel's proffered reasoning, namely, that the documens could make public the vulnerabilities of the plant. Tr. 407:25- 408:19. The ALJ stated "I'm not questioning the need to not let the public hear it….", Tr.416:17-416:18," if you are concerned that the exposure of these documents or testimony about them poses a proprietary problem, risk of a terrorist threat, or any other -- and I'm not really questioning the *bona fides* of that view…." Tr. 417:24-418:3. The ALJ, nonetheless, refused to seal the hearing room and allow such evidence and testimony to be taken under seal on the grounds that the relevance did not outweigh the burden on the agency.[8] In so doing the ALJ abused his discretion.

---

[8] As to the relevance of the sealed testimony, Counsel argued:

This document lays out the concerns of the Company chronologically. We hired Chief Lukhard. He participated in this process. He began the management of the ERT. And then realizing the magnitude of what he was dealing with and having observed their performance, he made a recommendation to outsource. He is a 35-year veteran. … We as a company have an obligation to the public, the people on our site. This document, these concerns, these hazards, that all inform the analysis that went into the decision here on that why we believe it is a core managerial item outside of the scope of collective bargaining. And we think we're entitled to lay that defense out so that you understand the Company's position with regard to its affirmative defense." Tr. 414:11-25.

b. The ALJ Abused His Discretion by making Arbitrary Credibility determinations

The ALJ's ruling wholly rejects the uncontroverted and credible testimony of Chief Lukhard regarding his reasoning to recommend elimination of the volunteer ERT. Tr. 341:11 – 379:19; 390:16- 528:7. However, although DuPont was deprived of its right to develop the factual record, the record that does exist shows that motivating factors for the decision to eliminate the volunteer emergency response team dealt with core managerial concerns fundamental to the preservation of the enterprise. The record is replete with evidence that DuPont's concerns regarding the safety of its site, the community and its commitment drove the decision to ousource the ERT. The materials used at Spruance include sulfuric acid, hydrochloric acid, adipic acid, and chloroform. DuPont Exs. 21, 23, 24, 25; Tr. 375: 2 - 6. ("Sulfuric acid is -- in the state that we use it on the site, it's very concentrated so it's obviously a very corrosive and toxic chemical that can obviously have very severe effects on the human body if you're exposed to it without the proper protection.") A pressurized pipeline of sulfuric acid runs underneath the Spruance site for use in one of the manufacturing processes. Tr. 367: 10 - 368:2; Tr. 378: 9 – 15. 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.").

The ALJ also failed to credit two of the Company's witnesses regarding the discussion with the Union over the elimination of the ERT. At the hearing, Mr. Irvin denied that the Company raised concerns about the safety of employees and

the community at the meeting on June 19, 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 simply 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 19th. 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 19th. Tr. 320:6-17. Mr. Meenach also 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.")

2. The ALJ's Refusal to Allow Expert Testimony on the Standard of Care Constituted an Abuse of Discretion

The ALJ further committed prejudicial error by refusing to allow the Company to adduce expert testimony regarding the standard of care and regulatory framework governing the industrial emergency response work –pivotal issues in the case. Despite acknowledging that "there is a lifetime of learning to be had about the subjects that the expert wants to testify about," the ALJ nevertheless concluded that: the expert would "not add to the relevant evidence in this case." Tr. 188:11 - 188:14.

However, "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony." *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47F.3d 277, 283 (8th Cir.), *cert. denied*, 516 U.S. 822, 116 S. Ct. 84, 133 L. Ed. 2d 42 (1995) (quoting *Fox v. Dannenberg*, 906 F.2d 1253, 1256 (8th Cir. 1990)). The rule clearly "is one of admissibility rather than exclusion." *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir.), *cert. denied*, 502 U.S. 913, 116 L. Ed. 2d 255, 112 S. Ct. 312

(1991).

"There is no doubt that under Rules 702 and 704 an expert may testify about applicable professional standards and the defendants' performance in light of those standards." *ArcelorMittal Ind. Harbor LLC v. Amex Nooter, LLC*, No. 2:15-CV-195-PRC, 2017 U.S. Dist. LEXIS 213122, at *17 (N.D. Ind. Dec. 29, 2017) (quoting *Noffsinger v. Valspar Corp.*, No. 09 C 916, 2012 U.S. Dist. LEXIS 34865, 2012 WL 895496, at *7 (N.D. Ill. Mar. 15, 2012) (quoting *Richman v. Sheahan*, 415 F. Supp. 2d 929, 945 (N.D. Ill. 2006) (citing *Calusinski v. Kruger*, 24 F.3d 931, 937 (7th Cir. 1994); *Haley v. Gross*, 86 F.3d 630, 645 (7th Cir. 1996))). For example, the Board has found that a judge committed prejudicial error where he refused relevant evidence and declined to hear expert testimony on what it defined as a "central issue" in the case. *See Glen Falls Bldg. & Const. Trades Council (Indeck Energy),* 325 NLRB 1084, 1086 (1998). [9]

Significantly, here, Counsel for the General Counsel did not object to Mr. Hildrebrand's qualifications or methodology or claim that he was not an expert in his field. Rather, the Counsel for the General Counsel objecting solely on the grounds of "relevance."

> The General Counsel and the Union oppose his testimony on the basis of relevance primarily. Or another way of

---

[9] And on remand at *Glen Falls Bldg. & Constr. Trades Council & Int'l Union of Bricklayers & Allied Craftsmen, Local Union No. 6 & Int'l Bhd. of Carpenters & Joiners of N. Am., Local Union No. 229 & Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, Local Union No. 40, & Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local Union No. 12 & Laborers,* No. E 3-CE-55R, 2000 WL 33664123 (Feb. 15, 2000).

> saying it I guess in the words of Federal Rule of Evidence 702 is that they contend that this expert's specialized knowledge will not help the trier of fact to understand the evidence or determine facts in issue. And after consideration, I agree with the General Counsel and the Union. I don't think the proffered testimony or the reasons given for it will serve to assist me on any facts at issue or otherwise necessary. Tr. 185:22 to 186:6.

However, the testimony of DuPont's expert witness, Mr. Hildebrand holds over 44 years of experience in hazardous material planning and emergency response. He is also the chief fire officer for the Hazardous Materials Training and Information Services in Columbia, Maryland and is a certified safety professional and a board-certified safety professional, as well as a certified fire protection specialist with the Fire Protection Specialists Certification Board and a certified hazardous material manager at the Institute of Hazardous Material Management. His opinions on incident response were clearly relevant to the issues in dispute, and supported the Company's version of events. Tr. 191:22 -192:4. Moreover, 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. In addition to an explanation of the complicated regulatory framework that governs industrial incident response, Mr. Hildebrand was expected to testify regarding the immutable factors that control:

> There are medical and physical parameters [of emergency response], clinical death that occurs in 3 minutes [after breathing stops], biological death occurs in 5 minutes after breathing stops. On average, instrumentation will fail in 5 minutes. He is expected to testify that critical structural steel will fail
> in 15 minutes.

> He will testify that that fire suppression activities can generate 1 million gallons of wastewater runoff in 9 minutes. He is also expected to testify about a difference between life or death, or a $1 million loss versus a $100 million loss comes down to 5 to 15 minutes.
> He is going to testify about his experience with hazard at Spruance, that he has visited the site and observed the conditions there. He is expected to testify regarding the flammable toxic and explosive corrosive substances that are used in the plant, including sulfuric acid. He is going to testify about some accidents he personally witnessed, chloroform -- I'll spare you the details, chloroform
> explosive dust, toluene, and in particular testify about the hazards of the adjoining petroleum facilities, Kinder Morgan and Motiva. He is also expected to testify regarding the hazards of electricity on the plant. He would testify if called that he has reviewed the EPA submissions and the catastrophic modeling from the plant. He is expected -- he was expected to listen to the testimony adduced and opine as to whether the challenges encountered by Chief Lukhard impacted the ability of the Spruance ERT to meet the standard of care. Tr. 195:24 to 197:1.

These issues, clearly, are real in substance and material to the proceeding. Although the judge indicated that the Mr. Hildebrand's testimony was cumulative of Chief Lukhard's testimony during the hearing, Chief Lukhard was an interested party to the matter and, therefore, not well-suited to the role of independent expert witness. In addition, Chief Lukhard testified that he was familiar with Mr. Hildebrand and his work and teachings and relied upon those in reaching his decision to outsource the ERT. Tr. 354:25-355:19. In these circumstances, and in the interest of developing a full record, the matter should be remanded.

3. DuPont's Elmination of the Volunteer ERT Does Not Violate the Act

First, the Company was under no obligation to bargain over that decision because that decision was a core entrepreneurial decision under *First National Maintenance*. The environmental safety and health reasons for the decision are also

fundamental to preservation of the enterprise and outside the scope of bargaining under *Oklahoma Fixture Co.,* 314 NLRB 958, 960 (1994).

Second, even if the Union could establish that labor costs were a factor in the decision to stop providing ERT Services, the Company's actions were also lawful under *Dubuque Packing II*, 303 NLRB 386 (1991).

Finally, even assuming *arguendo* that there was a bargaining obligation, the Union waived the right to bargain by failing to contest the outsourcing of the industrial utilities to Veolia and contractually under the terms of the applicable collective bargaining agreement and through their failure to include emergency response services in the CBA, which became effective on September 1, 2018 ("the 2018 CBA") and where the governing CBAs expressly authorize the Company's actions. DuPont Exs. 1 and 2.

A. 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. To answer the question, the Supreme Court identified three types of management decisions, each subject to a bargaining obligation to different degrees. First, "[s]ome management decisions, such as choice of

advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship" and are thus not mandatory subjects of bargaining. Second, "[o]ther management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively 'an aspect of the relationship' between employer and employee" and are thus mandatory subjects. Finally, there is a third type of management decision, one that has "a direct impact on employment," because it leads to job loss, but has "as its focus only the economic profitability" of the enterprise. 452 U.S. at 677.

Because the *First National Maintenance* employer's decision to terminate one part of its business affected employment but was motivated by considerations unrelated to the employment relationship, it fell into the third category of management decisions. Whether decisions within that category require mandatory collective bargaining, the Court reasoned, depends upon the extent to which "the subject proposed for discussion is amenable to resolution through the bargaining process." *Id.* at 678. Accordingly, bargaining over "management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining-process, outweighs the burden placed on the conduct of the business." *Id.* at 679. In brief, the Court, which characterized the employer's decision as "akin to the decision whether to be in business at all," found that it was "a change in the

scope and direction of the enterprise" and therefore that the employer had no duty to bargain over it. *Id.* at 677, 686-688.

The Fourth Circuit has also held that: "Where an employer closes down part of its operation ... the Court has made clear that bargaining over the decision is not required." *See Dorsey Trailers, Inc. v. N.L.R.B*, 233 F.3d 831, 844 (4th Cir. 2000) citing *Arrow Auto. Indus., Inc. v. N.L.R.B*, 853 F.2d 223, 228 (4th Cir. 1988). With regard to labor costs, the Supreme Court stated in *First National* that where "labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer *voluntarily* with the union to seek concessions that may make continuing the business profitable." 452 U.S. at 682, 101 S.Ct. at 2582–83 (emphasis added). DuPont's decision here fits squarely within *First National* and, thus, was not a *mandatory* subject of bargaining. *Id.*

Further, the Company, as part of a company-wide initiative, is restructuring and breaking apart into different businesses. DuPont 50. In order to implement these fundamental changes, the Company has determined to cease operating a volunteer ERT and instead contract that work out to dedicated professionals, who will also provide these services to the separately owned industrial utilities on the site. Tr. 269: 18 - 270:5.

This is a fundamental business decision and constitutes a change in the scope and direction of the business and the Company was under no obligation to bargain with the Union under *First National Maintenance*. *See also Pye v. Longy School of Music*, 759 F. Supp. 2d. 153 (D. Mass. 2011) (no duty to bargain where the

employer's actions involved a change in the scope and direction of the enterprise under *First National Maintenance*.).

Credible testimony further establishes that the decision to was based on core entrepreneurial concerns outside the scope of mandatory bargaining. Chief Lukhard, testified: "The recommendation came from me… because of safety and sustainability, as I've already testified, and the staffing issues." Tr. 525: 8 - 10.[10] Other witnesses for the Company also testified that safety and staffing considerations drove the change. Tr. 247: 25 - 248: 10. ("We did not have the appropriate staffing at the site. We had over a few years opened up to get volunteers to participate in the emergency services and we were unsuccessful at getting enough people to participate. And we had sent folks off to training that couldn't get qualified. Throughout that time we had employees that were signed up that couldn't -- they were afraid of heights. We had employees that were claustrophobic. So there was a number of reasons, things that happened to get us to where we landed on outsourcing the fire services or medical emergency services.")

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

---

[10] The Union concedes that hazardous materials are used in bulk quantity at Spruance, and that different manufacturing areas utilize different chemicals. "So each area, you know, Kevlar had sulfuric acid that was a hazard, whereas Nomex® would have DMAc which was the hazard. Tyvek® would have [redacted confidential business information] which was the hazard. Mylar® would have toluene which was the hazard. So every area had its own hazard…." Tr. 98: 17 - 21.

[its] revenue in the event of electrical damage ... resulting from an improperly wired fixture." *Id.* at 960.

The Board further observed that the decision "involved considerations of corporate strategy **fundamental to preservation of the enterprise."** The Board, accordingly, concluded that the subcontracting decision was outside the scope of mandatory bargaining and that the Respondent's failure to bargain over it did not violate Section 8(a)(5) and (1) of the Act. Accordingly, as was the case in *Oklahoma Fixture*, DuPont had no duty to bargain over the subcontracting decision here.

Likewise, in *Gar Wood-Detroit Truck Equipment*, 274 NLRB 113 (1985), the employer, which was losing money, was in the business of mounting/servicing equipment on trucks, but decided to get out of it. *Id.* at 113. The Board concluded the employer was not required to bargain over the decision to subcontract this work. Rather, the Board found

> … Respondent's decision to contract out the mounting and service work did not turn on labor costs---although labor costs were one component of the overhead costs the Respondent intended to reduce by the subcontracting---but rather turned on a significant change in the nature and direction of its business, *i.e.,* a decision to abandon its service and mounting operations. *Id.* at 115-116.

Similarly, here, DuPont was looking to cease providing ancillary support services and focus on core competencies and get out of the business of emergency response. Further, the fact the Company may achieve some cost savings, standing

alone, did not render it a mandatory subject of bargaining.[11] "Labor costs are inescapably a part of the economic picture of the enterprise, and management's consideration of them in basic business decisions does not render *First National Maintenance* inapplicable." *Arrow,* 853 F.2d at 228.

B. The Company did not violate the Act under *Dubuque Packing*.

Even if the Board concludes that the facts of this case do not fall within the *First National Maintenance* framework, the Company is not required to bargain over these business changes under *Dubuque.* In *El Paso Electric*, 355 NLRB 428 (2010), the Board reiterated the familiar *Dubuque Packing* test as follows:

> Under this test, the General Counsel must initially show that the decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. Satisfaction of that burden establishes a prima facie case that the relocation decision is a mandatory subject of bargaining. The employer may rebut the *prima facie* case by establishing that the work performed at the new location varies significantly from that performed at the old facility, that the work performed at the old facility is to be discontinued entirely rather than moved, or that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer an affirmative defense and "show by a preponderance of the evidence: (1) that labor costs (direct and/ or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost

[11] Rather, the ALJ supports his opinion by "cherry picking" from corporate documents that address potential costs savings, *see, e.g,* GC. 12, 13, 14, 16, 18, and ask the Board to ignore attendant, real-world circumstances and potential off – site implications of the decision and credible testimony regarding the non- labor costs reason for the change. The Company has never denied it anticipated savings as a result of the change, although those were eclipsed by additional investments, but rather, it maintains that the cost savings did not drive the decision.

> concessions that could have changed the employer's decision to relocate." *Dubuque Packing*, 303 NLRB at 391.

As set forth below, the Company can rebut the prima facie case and/or establish affirmative defenses under *Dubuque Packing*. Accordingly, the ALJ should be reversed.

1. <u>The Company's decision involves a change in the scope and direction of the enterprise.</u>

Moreover, the decision at issue involves a change in the scope and direction of the enterprise. As discussed above, 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.

2. <u>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.</u>

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 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.")

The only witness for the General Counsel and the Charging Party, Donny Irvin also 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.)

In *El Paso Electric Co.*, 357 NLRB 2323, 2324 (2012), the Board held that the employer's decision to close one of its call centers was not motivated by labor costs, but rather by the inadequacies of the physical location being closed. The ALJ characterized the facilities deficiencies, which included "poor ergonomic work stations, a non-ADA compliant bathroom, climate control, and fire code issue" as "indirect labor costs" under *Dubuque* and found that the employer violated the Act without bargain over the decision to close the call center. The Board reversed the ALJ, concluding that "these factors do not relate to efficiency and productivity, as the Board has defined indirect labor costs" and holding that the employer did not violate the Act when it closed the call center without bargaining with the union. *See also Mercy Health Partners*, 358 NLRB 566 (2012) (employer met the first *Dubuque* affirmative defense where it showed that its decision to consolidate patient preregistration services was not motivated by labor costs).

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.")

3. <u>The Union could not have offered concessions that would have Changed the Company's Decision</u>

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. Even if the Union had proposed staffing the ERT with bargaining unit members working at minimum wage, that proposal would have been unacceptable to the Company, because it was the quality of the work and safety considerations and not the costs that drove its decision. 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.

C. The Issue of Safety is Covered by the CBA.

In addition, the applicable collective bargaining agreement expressly relegated to management the prerogative to take necessary actions in 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.)[12]

In *NLRB v. USPS*, the Court wrote:

> "The union may exercise its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject." *Local Union No. 47, IBEW v. NLRB,* 288 U.S. App. D.C. 363, 927 F.2d 635, 640 (D.C. Cir. 1991*)* (citing *UMW Dist. 31 v. NLRB,* 279 U.S. App. D.C. 93, 879 F.2d 939, 944 (D.C. Cir. 1989*)*; *IBEW Local 1466 v. NLRB,* 254 U.S. App. D.C. 105, 795 F.2d 150, 155 (D.C. Cir. 1986)*)*. "To the extent that a bargain resolves any issue, it removes that issue *pro tanto* from the range of bargaining." *Connors v. Link Coal Co., 297 U.S. App. D.C. 273, 970 F.2d 902, 905 (D.C. Cir. 1992).* This court has referred to this inquiry as an analysis of whether an issue is "covered by" a collective bargaining agreement. *See id.*

---

[12] 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.

> *at 906*; *Dep't of Navy v. FLRA,* 295 U.S. App. D.C. 239, 962 F.2d 48, 57 (D.C. Cir. 1992).

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.

"Under contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." *Id.* at 2. "In other words … the Board will honor the parties' agreement, and in each case, it will be governed by the plain terms of the agreement." *Id.* The Board further held that the standard will apply retroactively in all pending unilateral- change cases "where the determination of whether the employer violated Section 8(a)(5) turns on whether contractual language granted the employer the right to make the change in dispute." *Id.* In adopting this test, the Board noted that "[w]here contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5)." *Id.* at 11.

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 bargaining, the Union cannot now see to re-bargain that issue.

Significantly, in *MV Transportation*, the Board found changes to safety policies were among those authorized by the contract at issue. *Id.* at 17. Moreover, *MV Transportation* holds that where an employer offers a "sound arguable basis" for its contractual interpretation and the General Counsel offers a conflicting interpretation, the Board will not seek to determine which interpretation is correct, but rather, "[u]nder those circumstances, the employer will not have violated the Act." *Id.* at 20.[13]

A union may also "waive" its right to bargain over a mandatory subject, but the "covered by" and "waiver" inquiries are analytically distinct:

> A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant. *Dep't of Navy,* 962 F.2d at 57 (emphasis in original) (interpreting Federal Service Labor-Management Relations Statute). As we explained at length in *Department of the Navy,* when employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations. *See id.* Unless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract. *See, e.g., United Auto Workers v. NLRB,* 246 U.S. App. D.C. 306, 765 F.2d 175, 179-80 (D.C. Cir. 1985); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683 (2d Cir. 1952). Thus, neither the Board nor

[13] Evidence of the ALJ's bias toward the Company can be found in the fact that the ALJ raises arguments against the Company, not raised by the General Counsel, namely that the Contract of Work (COW) Sections of the 2018 CBA apply to the outsourcing of the ERT. *See* ALJD p. 27-29.

> the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement. Quite the contrary, the courts are bound to enforce lawful labor agreements as written, *see, e.g., Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 454-55, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957).

Even if the oft-criticized clear and unmistakable waiver test applied by the ALJ governed, which the Company disputes, however, the result is the same. Under that test, an employer to a contractual agreement may unilaterally take certain actions that result in changes to the terms and conditions of employment if there has been a "clear and unmistakable" waiver of the Union's right to bargain over the changes. *Baptist Hosp. of E. Tennessee & Office & Prof'l Employees Int'l Union, Local 2001*, 351 NLRB 71, 72 (2007) (holding Union clearly and unmistakably waived bargaining over holiday scheduling change under the collective-bargaining agreement.)

Here, the 2012 CBA expressly allows management to perform work in the interest of safety or the preservation of Company property and during emergencies. Similarly, in Article X, Section 2, the Union recognized the technical nature of the Company's work and acknowledged "the Company's right to employ and retain individuals with technical training in such capacity as Management deems desirable." **Ex. 1**, Article X, Section 2. Moreover, as was stated above, the Union failed to request bargaining over the outsourcing of the industrial utilities on site, who receive services from the ERT. Accordingly, the Union first abandoned the right to further bargaining after bargaining the provisions of Article IV, Section 9, and also waived its right by failing to assert an obligation to bargain over the

decision to close the Waste Water Treatment Plant and Electrical Plants, outsourced utilities and recipients of the incident response services provided by the ERT and also by failing to raise the specific issue of the fire brigade during the 2018 CBA negotiations, opting instead to include language concerning the performance of safety work, which covers the fire brigade. *See* Tr. 225:9-12 (Q: The topic of the fire brigade was not bargained in the new agreement that became effective September 1, 2018. Correct? A: That's correct.")

Lastly, because the Union failed to engage in effects negotiations despite meaningful opportunity and multiple invitations to do so, it has relinquished its rights to effects bargaining. Mr. Irvin understood the invitation from Mr. Holmes to be an attempt at "effects bargaining." Tr. 220: 17-23. Mr. Irvin also admitted that at the July 20th meeting management once again attempted to bargain the effects of its decision to outsource the ERT. Tr. 223: 15 - 18. ("Q. At the July 20th meeting isn't it accurate that management also indicated that it once again wanted to do effects bargaining. A. Yes." Tr. 223: 15 - 18.)

Nor did Mr. Irvin deny, as Company witnesses testified, that that the topic of bonuses and a reward plan was broached by the Company as part of effects bargaining. ("It's possible. I just don't know the specifics.") Tr. 229: 10 - 16. The Union likewise does not deny that it was unwilling to engage in effects bargaining. Tr Tr. 224: 8 - 11 ("Q: Ultimately, I mean you communicated to management you weren't going to do effects bargaining [?] A. Correct. Q. And you left. A. Yes".) Finally, because the Company was not required to bargain with the Union over its

decision to outsource the ERT, it also had no obligation to bargain the effects of that decision. *See Enloe Medical Center v. NLRB*, 433 F.3d 834, 838-839, (D.C. Cir. 2005).

V. 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 herein.

Respectfully Submitted,

Attorneys for Respondent, DuPont Specialty Products USA, LLC as a successor to E.I. du Pont de Nemours and Company

/s/ Theresa A. Queen
Theresa A. Queen VSB No. 44462
GREENBERG TRAURIG, LLP

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), Respondent, And AMPTHILL RAYON WORKERS, INC., LOCAL 992, INTERNATIONALBROTHERHOOD OF DUPONT WORKERS Charging Party.	Case: 05-CA-222622

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 Brief in Support of Exceptions to the Administrative Law Judge's Decision was served via electronic mail on this 9th day of December 2019 upon the following:

Nancy Wilson, Acting Regional Director
National Labor Relations Board, Region 5
Bank of America Center – Tower II
100 South Charles St., Suite 600
Baltimore, MD 21201
nlrbregion5@nlrb.gov

Andrea Vaughn
Field Attorney
National Labor Relations Board, Region 5
Bank of America Center – Tower II
100 South Charles St., Suite 600
Baltimore, MD 21201
Andrea.Vaughn@nlrb.gov

Kenneth Henley, Esq.
Law Office of Kenneth Henley
Suite 704, 1400 S. Ocean Boulevard
Boca Raton, FL 33423-8533
Kenneth.Henley@gmail.com

/s/ Theresa A. Queen
Theresa A. Queen

CERTIFICATE OF SERVICE

I, David R. Broderdorf, counsel for Petitioner DuPont Specialty Products USA, LLC, certify that, on February 8, 2021, a copy of the foregoing Appendix of Petitioner (Volume II, Pages Appx72 to Appx117) was filed electronically through the appellate CM/ECF system with the Clerk of the Court. Pursuant to Local Appellate Rule 31.1, as amended by the April 29, 2013 order, four copies of the Appendix of Petitioner (Volume II, Pages Appx72 to Appx117) were sent to the Clerk of the Court for delivery. All counsel of record in this case are registered CM/ECF users.

Dated: February 8, 2021 s/ David R. Broderdorf