UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E. I. DUPONT DE NEMOURS AND COMPANY	)	
AND	)	Case No. 3-CA-27828
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION	)	

REPLY BRIEF IN FURTHER SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE JEFFREY D. WEDEKIND

The Answering Brief filed by Counsel for the Acting General Counsel ("General Counsel") suffers from the same fatal flaw that plagues Judge Wedekind's Decision: it fails to interpret the terms of the parties' 2009 Contract Extension MOA ("MOA") as an integrated whole, as required by well-established principles of contract construction. While acknowledging that the interpretation of the MOA is at the heart of the parties' dispute, the General Counsel fails – for obvious reasons – to include the full text of the MOA anywhere in his brief. Instead, he relies on snippets of the MOA, read in isolation, to support his argument that Judge Wedekind correctly determined that the MOA (and with it the parties' 1983 CBA) expired on April 30, 2010. As demonstrated below, the MOA, when read and interpreted as a whole, unambiguously shows that the parties' 1983 CBA did not expire on April 30, 2010, but was in full force and effect when DuPont made the unilateral changes at issue here. Accordingly, Judge Wedekind's Decision should be reversed and the Complaint in this case should be dismissed.

A. The Interpretation of the MOA Advanced by the General Counsel Cannot be Squared With Plain Language of the MOA

Like any contract, the MOA "must be read as a whole and interpreted so as to harmonize and give a reasonable meaning to all of its parts." *Statesman II Apartments, Inc. v. U.S.*, 66 Fed. Cl. 608, 616 (Fed.Cl. 2005). The full text of the MOA states:

> Memorandum of Agreement
>
> 1. It is in the best interests of the Niagara Plant and Union to have sufficient time to negotiate a new Collective Bargaining Agreement and both parties agree that more time is needed beyond the contract termination date of December 9, 2009.
>
> 2. The parties therefore agree to extend the terms of the Agreement through April 30, 2010. This agreement shall continue in full force and effect until terminated by either party with sixty (60) calendar days advance notice in writing except in no case will the COMPANY or the UNION strike or lockout prior to April 30, 2010.
>
> This means, for example, that if either party wanted to take action May 15, 2010, written notice would have to be provided to Management or the Union no later than March 15, 2010.
>
> 3. As part of this agreement, Management will stop training of exempt employees on hourly jobs once the current 11/16/09 training group has completed their training and will not continue training beyond that point. Training may commence upon notice of termination of the contract extension.

(Joint Exhibit 3) (emphasis added).

On its face, Section 1 of the MOA clearly indicates the parties' desire to extend the 1983 CBA to allow the parties sufficient time to negotiate a successor contract. It is equally clear, as Judge Wedekind found, that Section 2 extended the 1983 CBA until at least April 30, 2010, and prohibited either party from engaging in a strike or lockout prior to that date. The only issue is whether the MOA extended the 1983 CBA, along with the strike and lockout prohibition, beyond

April 30, 2010. Section 2 of the MOA, resolves that issue, particularly when read in conjunction with the other portions of the MOA.

As the General Counsel acknowledges, the crux of the textual dispute is the meaning of the phrase "this agreement" as set forth in the second sentence of Section 2, which states: "This agreement shall continue in full force and effect until terminated by either party with sixty (60) calendar days advance notice. . ." (GC Brief at 4). If, as DuPont contends, the term "this agreement" means the entire MOA, then the extension of the 1983 CBA must continue in force until and unless the 60-day termination notice is given. If the term, "this agreement" in Section 2 means something else, then, and only then, could the MOA reasonably be deemed to be ambiguous with respect to the intended termination date of the 1983 CBA.

The phrase "the Agreement" in the first sentence of Section 2 of the MOA refers – as all parties and the ALJ agree – to the 1983 CBA, and has a different meaning than the phrase "this agreement" used in the second sentence of Section 2. (ALJD at 11-12). As the General Counsel concedes, and Judge Wedekind correctly determined, the term "this agreement" in Section 2 cannot reasonably be construed to refer solely to the parties' no-strike/no-lockout commitment. (GC Brief at 5). The General Counsel argues, however, that neither Judge Wedekind nor the Board could conclude that the phrase "this agreement" – with a lower case "a" – in Section 2 referred to the entire MOA (including the extension of the CBA). (*Id.*). The General Counsel's argument, like the Judge's ultimate conclusion, is fatally flawed because it fails to harmonize the various portions of the MOA so as to read the document as an integrated whole and in context.

The term "this agreement" in Section 2 can only refer to the entire MOA because there was no other "agreement" to which it could have been referring. After execution of the MOA in November 2009, there were only two "agreements" in existence, the 1983 CBA (referenced as

"the Agreement" with a capital "A" in the MOA) and the 2009 Contract Extension MOA itself. Because the term "the Agreement" in the MOA referred to the 1983 CBA, the term "this agreement" could only refer to the single remaining contract – the MOA in its entirety. Accordingly, the MOA, read as a whole, can only be interpreted to mean that "this agreement" – the MOA, itself, including the extension of the 1983 CBA – would continue beyond April 30, 2010 unless and until either party gave the required 60-day advance written notice to terminate it.

Any conceivable doubt about the proper interpretation of the phrase "this agreement" as used in Section 2 is resolved by Section 3 of the MOA. Section 3 begins: "As part of this agreement, Management will stop training of exempt employees . . ." As in Section 2, the term "this agreement" in Section 3 can only mean the entire MOA, including both the continued extension of both 1983 CBA and the no-strike/no-lockout prohibition, because that is the only interpretation that makes any sense. There was no other "agreement." This second iteration of the phrase "this agreement" – with, again, a lower case "a" – can be read no other way, and is not ambiguous. Moreover, Section 3 states that the Company could begin contingency training (in anticipation of a possible strike or lockout) only "upon notice of termination of the contract extension." At the time the MOA was being negotiated, the one "contract" that could have been extended by the MOA was the 1983 CBA. As a result and pursuant to its plain language, the only logical reading of the 2009 Contract Extension MOA is that the 60-day written notice applied not only to the no-strike/no-lockout commitment, but also to the extension of the 1983 CBA beyond April 30, 2010.

If the 1983 CBA expired automatically on April 30, 2010, as Judge Wedekind erroneously concluded, there would have been no need to include language providing for "notice of termination of the contract extension" in the MOA. Not surprisingly, the General Counsel

makes no mention of the Judge's failure to harmonize the interpretation of Sections 2 and 3 of the MOA. In fact, the General Counsel brief does not even mention Section 3 of the MOA.

B. Judge Wedekind Failed to Understand the Intent Underlying the 2009 Contract Extension MOA

Judge Wedekind's failure to understand and correctly interpret the MOA is further exemplified by his construction of the second sentence of Section 2. According to Judge Wedekind, the passage in Section 2 of the MOA – stating "except in no case will the COMPANY or the UNION strike or lockout prior to April 30, 2010" – was "intended to address whether and how the contract extension could be terminated prior to April 30, 2010, rather than after." (ALJD at 12). As the General Counsel concedes, this interpretation of the MOA is contrary to the undisputed evidence – and the Judge's own specific factual finding – that the 1983 CBA was extended until at least, and could <u>not</u> be terminated prior to, April 30, 2010. (GC Brief at 5-6; *see also* ALJD at 11).

The General Counsel attempts to minimize this obvious flaw in the Judge's logic in two ways. First, the General Counsel dismisses the Judge's mistaken analysis as mere "dicta" (GC Br. at 5). Second, the General Counsel attempts to resuscitate the Judge's analysis by suggesting that the Judge may have omitted a critical term from the text of his Decision that might make the Decision more defensible – at least in the General Counsel's view. (*Id.*). Neither explanation withstands scrutiny.

As an initial matter, the Judge's analysis of the text of Section 2 of the MOA – which is the focal point of the entire case – can hardly be dismissed as dicta. In addition, there is no evidence to suggest, as the General Counsel does, that a key term was inadvertently omitted from the Judge's Decision. In fact, the evidence shows just the opposite. After issuing his Decision, Judge Wedekind circulated an errata sheet identifying several corrections to the Decision that he

considered necessary. Despite his review and correction of other passages, the Judge did not seek to modify the Decision to include the term that the General Counsel now suggests was inadvertently omitted.[1].

C. The General Counsel Has Clearly Misinterpreted the MOA

In further defense of the Judge's Decision, the General Counsel argues that "either party could have terminated the MOA prior to April 30, 2010," even though the 1983 CBA would continue through at least April 30, 2010. (GC Br. at 6). The General Counsel is wrong. By its express terms, the MOA (including the no-strike/no-lockout obligation and the 1983 CBA) clearly remained in effect through at least April 30, 2010, even if notice of termination of the MOA was given prior to that time.

This is made clear by the example set forth in the Section 2 of MOA, which states in pertinent part:

> This means, for example, that if either party wanted to take action May 15, 2010, written notice would have to be provided to Management or the Union no later than March 15, 2010.

As the plain text of the MOA shows, either party could give notice to terminate the MOA (including the 1983 CBA and no-strike/no-lockout prohibition) before April 30, 2010 (e.g., on March 15, 2010), but the MOA and 1983 CBA would not terminate as of the date of the notice,

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1 The Judge found that the interim LSE agreement extended the entire no-strike/no-lockout agreement in the 2009 Contract Extension MOA and it would have been "unnecessary to do so if the MOA, including the no-strike or no-lockout agreement, rolled over and continued in effect absent such notice." (ALJD 15:5-9). The General Counsel acknowledges that DuPont had "reason to seek additional protection" via the LSE agreement, demonstrating that the Judge's conclusion reflects a misunderstanding of the interim LSE agreement, and how it related to the 2009 Contract Extension MOA. (GC Br. at 16-17).

and neither party could take any action for at least 60 days after the termination notice was given (e.g., until at least May 15, 2010, if notice was provided on March 15, 2010).

Moreover, the record evidence shows that the parties considered termination of the extension of the 1983 CBA and the no-strike/no-lockout prohibition to be one in the same. In his brief, the General Counsel claims that Union witness Jim Briggs testified to a different interpretation of the MOA. According to the General Counsel, "Briggs' understanding had been that the contract would be extended to April 30, 2010, before which date the Union could not give notice of a strike." (GC Brief at 13-14). As an initial matter, Mr. Brigg's "understanding" of the MOA is demonstrably wrong. As explained above, the example set forth in the MOA makes it crystal clear that the Union could give notice to terminate the MOA prior to April 30, 2010, but could not actually strike until 60 days after the notice was given, or April 30, 2010, whichever occurred later.[2] Mr. Briggs' failure to understand the MOA is understandable, given that he was not present for its negotiation. (Briggs, 98-99). The record shows that the terms of the MOA were negotiated by Ms. Sarazin and Union Vice President Jim Bright, both non-lawyers, away from the bargaining table, and the MOA was simply read to Mr. Briggs over the phone at some point after it was negotiated. (Sarazin, 272; Briggs, 150). Ms. Sarazin testified that the MOA, and 1983 CBA, were intended to continue in force until 60 days written notice of termination was provided. (Sarazin, 272). Notably, the Union failed to call Mr. Bright to testify

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[2] As the General Counsel correctly notes, Mr. Idzik, the Company's chief negotiator, had a distinctly different understanding of the MOA; Mr. Idzik testified, consistent with the terms of the MOA, that the Union could give notice at any time before April 30, 2010, but would not be able to strike for 60 days after that (and after April 30). (GC Brief at 10, n.8).

as to the meaning of the MOA. The Union's failure to call as a witness the one Union-side individual who participated in negotiating the MOA leaves Ms. Sarazin's testimony unrebutted.

D. There Is No Logical Reason for the Parties to Have Intended That the Contract Extension Expire Automatically on April 30, 2010

As DuPont noted in its initial brief, there was nothing magical about the April 30, 2010 date identified in the MOA, and no reason for the parties to enter into an agreement in November 2009 that would have allowed the 1983 CBA to expire automatically on April 30, 2010. Indeed, the evidence shows that the April 30, 2010 date was selected simply to allow the parties time to negotiate a new contract without having to worry about a looming contract expiration or potential strike or lockout.

In his brief, the General Counsel argues that interpreting the MOA to provide for expiration of the 1983 CBA on April 30, 2010, is consistent with two rationales identified by the Union. First, the General Counsel suggests that the Union sought to extend the 1983 CBA only until April 30, 2010, rather than indefinitely, to hold the Company's "feet to the fire" to complete contract negotiations. (GC Br. at 14). Next, the General Counsel claims that the Union wanted an April 30, 2010 expiration date to provide it with bargaining leverage with respect to future BeneFlex changes. (*Id.*). Neither rationale supports the General Counsel's argument.

If the Union sought to have the 1983 CBA expire on April 30, 2010 as a means of putting pressure on the Company to reach a successor contract, as the General Counsel suggests, then one would certainly expect the Union to have raised the contract's expiration sometime in or around the MOA's purported expiration date. As the General Counsel concedes, and as the bargaining notes and testimony of both parties' witnesses show, there was no discussion of contract expiration at any time during February, March, April or May of 2010. (GC Br. at 11-

12). The alleged contract expiration date came and went with no mention, which is inconsistent with the theory that it was intended to spur the Company into action.

In addition, as Judge Wedekind noted, the argument that the Union sought an April 30, 2010 contract expiration date with future BeneFlex changes in mind is illogical given the time and context in which the 2009 Contract Extension MOA was negotiated. (ALJD 14, n. 13). The Company had a consistent practice of announcing BeneFlex changes in the fall and implementing the changes a few months later on January 1st. To suggest that the Union sought an April 30, 2010 contract expiration date so it could challenge BeneFlex changes announced in the fall of 2010, presupposes that in November 2009 the Union believed that contract negotiations would not be completed by at least September or October 2010, after more than 10-11 months of bargaining. There is no evidence that either party anticipated – in November 2009 – that they would be unable to reach agreement by the time the next round of BeneFlex changes were announced and implemented. In addition, under its view that the Company is prohibited from making BeneFlex changes after the expiration of the contract, the Union would have had the ability to challenge future BeneFlex changes without the MOA expiring automatically on April 30, 2010. All the Union needed to do was provide the Company with written notice to terminate the MOA at least 60 days before January 1, 2011 – prior to the next round of BeneFlex changes.

E. The July 2010 Interim Agreement Did Not Supersede or Otherwise Displace the 2009 Contract Extension MOA

Apparently recognizing that the Judge's construction of the MOA does not withstand scrutiny, the General Counsel argues that the parties' July 2010 Interim Agreement terminated the contract extension contained in the MOA. (GC Brief at 20-21). The General Counsel's argument rests on the last sentence of the July 2010 Interim Agreement, which states "No

promises or representations are intended with regard to any other subjects other than strike and lockout." (*Id.* at 20). This argument finds no support in the record.

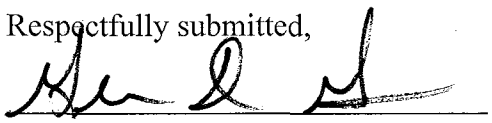
As an initial matter, the July 2010 Interim Agreement makes no reference to the MOA or to the termination of the 1983 CBA. And no such reference was necessary because the evidence shows that neither party had given notice to terminate the MOA, nor ever indicated an intent to do so. Simply put, the negotiation and execution of the July 2010 Interim Agreement had nothing to do with the continued extension of the 1983 CBA.

Moreover, the last sentence of the July 2010 Interim Agreement, relied on by the General Counsel, actually refutes his argument that the Interim Agreement was intended to be a "complete substitute for any prior understanding between the parties" as to issues outside the scope of the Interim Agreement, such as the expiration of the 1983 CBA. On its face, the last sentence of the July 2010 Interim Agreement states that it was not intended to address any issue other than strikes and lockouts.

CONCLUSION

For the foregoing reasons, Respondent E.I. DuPont de Nemours and Company respectfully requests that ALJ Wedekind's Decision be reversed and the Complaint issued in this case be dismissed in its entirety.

Respectfully submitted,



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April 17, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 17th day of April 2012, I caused a true and accurate copy of the forgoing Reply Brief in Further Support of Exceptions to Decision of Administrative Law Judge Jeffrey D. Wedekind to be served by electronic mail and first class United States mail, postage prepaid, on the following:

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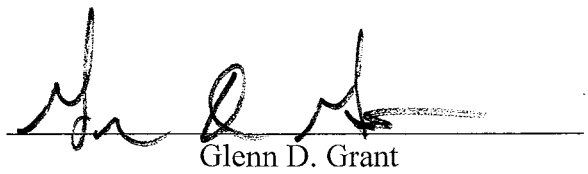

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