UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Weyerhaeuser Company

and Cases 19-CA-33069

19-CA-33095

Association of Western Pulp

And Paper workers

WEYERHAEUSER'S EXCEPTIONS TO THE DECISION

OF THE ADMINISTRATIVE LAW JUDGE

Respondent Weyerhaeuser Company (hereinafter "Respondent") excepts to the Decision of the Administrative Law Judge (hereinafter "ALJ") in the below stated particulars.

1. **Respondent excepts to the ALJ's interpretation that Local Ground Rule 2 "provides union representatives reasonable time off work for contract administration that cannot be performed during working hours" (Dec. 3:46-47). The ALJ's contractual interpretation is contrary to the plain wording of the Ground Rule (Jt. Ex. 5 at 146).**

Local Ground Rule Number 2 provides, in relevant part:

> "**When his/her work situation permits**, a local union officer, committee member or shop steward **may** be allowed reasonable time off his/her work to conduct business involving **contract administration which cannot be properly accomplished outside of working hours.** In each such case the Union representative must receive permission from his/her supervisor***" (emphasis added)

In concluding that under Local Ground Rule 2 (hereinafter "LGR 2") "reasonable time off" for contract administration is the rule rather than the exception, the ALJ engages in purely contractual, rather than statutory, interpretation. That is not her province. There is not a scintilla of evidence in the record to support the ALJ's gratuitous interpretation.

LGR 2 requires that three conditions be met before a Union representative may conduct contract administration business on **Company** time: (1)-the employee's work situation permits; (2)-the contract administration cannot properly be accomplished **outside** of working hours; and (3)-the supervisor grants permission. There is no evidence in the record that these conditions were ever met by the union. There is no evidence that any union representative asked for permission to conduct union contract administration on Company time. Certainly there is no evidence relating to Union requests to use the Company email system. There is no evidence that any union contract administration work could not be properly accomplished outside of working hours. The Union representatives would obviously like to do Union work on the

Company's payroll, rather than on their own time, but that is not the test. Finally, there is no evidence regarding any union representatives' work situation. The ALJ apparently assumes that such circumstances regularly occur, but her assumptions cannot substitute for evidence. That is why contract interpretation must be left to arbitrators.

It bears emphasis that the authority of union officers to conduct union business, contract administration or otherwise, on company time, if any, is a matter of contract right, not statutory right. Union representatives have no Section 7 right to conduct Union business on Company time. The Union can attempt to bargain such a right, but that is the limit of an employer's statutory obligation, see generally *Axelson, Inc.* 234 NLRB 414 (1978). Company time is for Company work.

The ALJ's unsupported and uninvited interpretation of the parties' contract must be rejected.

2. Respondent excepts to the ALJ's conclusion that the CIN "violates Section 8(a)(1)" (Dec. 7:41). The conclusion is contrary to the holding in *Register Guard* **that the Union had "no statutory right to use the Respondent's email for Section 7 matters" (351 NLRB 1110, 1114).**

First, it is important to note that in this case, unlike *Register-Guard*, there is **no** evidence in the record that the Company email system is a commonly used medium for employee communication or that the Company email was a "natural meeting place". Here, unlike *Register Guard*, there was not testimony from numerous "employees that they spend large portions of their workday on the computer, that they use email regularly, and that to some extent it has replaced in-person communications." (Id. at 1122). To the contrary the evidence here was that

"very few employees have their own dedicated computer terminals, and some employees do not use their work emails" (Dec. 3:39-40). Indeed the only evidence in the record regarding email use by bargaining unit employees is that some Union representatives used the Company email system for Union business (R Exs. 1-4). Moreover, unlike *Register-Guard,* there was **no** evidence that employees routinely used the Company email system for non-business purposes (351 NLRB at 1111). Again to the contrary, the record is clear that employees have been disciplined for non-business use of the email system (see R Ex. 7). Indeed, employee Gilliam understood that he was not to view non-business related emails at work. In fact, he testified that he "sent those [non-business related emails] to my home email so I could read them on my own time" (Tr. 46: 1-4).

Whatever the merits of the argument that decades of Board precedent must be discarded because "email has revolutionized communication both within and outside the workplace" (Id. At 1121), this is not that case. This is not a newspaper or office work environment where computers are ubiquitous and the primary mode of production. Rather this is a pulp mill where, with few exceptions, computer use is (at best) ancillary to the majority of employees' work duties. Here, like in *IRIS-USA,* 32-CA-17763, Advice Memorandum dated February 2, 2000, the Company computer system does not constitute a "work area" and neither the Company e-mail policy nor the CIN violate the Act.

The ALJ does not even pay lip service to the well-settled principle that employees "have no statutory right to use an employer's equipment or media for Section 7 communications" (*Id.* at 1116). Instead, as discussed more fully below, the ALJ seeks to circumvent decades of Board

decisions by creating faux distinctions and finding ambiguity where none exists. The ALJ compounds her error by indiscriminately and mechanically applying *Lutheran Heritage Village* 343 NLRB 646 (2004). *Lutheran Heritage Village* did not involve the use of Company owned equipment for Section 7 communications or Union business. Rather, in *Lutheran Heritage Village* the Board found that the employer's "no solicitation", "no loitering" and "no unlawful strikes" work rules were overbroad.

According to the ALJ, if an employer allows ANY use of Company property for union business, it must allow ALL use of Company property for Union business because otherwise the Employer is discriminating on the basis of Section 7. Under the ALJ's perfunctory application of *Lutheran Heritage Village*, an employer restriction on use of Company email for Union solicitations or Union business to non-working time, would be presumptively **in**valid because on its face, the restriction "explicitly restricts Section 7 activity" (Dec. 9:6) Surely the ALJ is not rejecting 50 years of Board law back to *Stoddard Quirk Mfg. Co. 138 NLRB 615* (1962).

An employer has a property and management right to restrict Section 7 communications on Company equipment or media so long as those restrictions are no "more restrictive than necessary" to protect the employer's interests" *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 502-503 (1978) (quoted by the dissent in *Register Guard at 1123)*. Indeed, the then General Counsel conceded that an employer has a legitimate interest to limit employee non-business emails for any number of reasons including "maintaining productivity" (Id at 1113). Here, it is difficult to conceive that the CIN could be more narrowly crafted. It applies to only a handful of employees. It allows Union representatives to identify any dispute they may have with the

Company using the Company email system and request that a meeting be convened for any one of the plethora of contractual forums. The Union representative is then free to make any argument he/she wants in that forum. The ONLY restriction in the CIN is that the arguments are to be made at the appropriate time and in the appropriate place as provided by the contract. Thus, the CIN does not restrict the **substance** of the Union's communications; it only restricts the time, place and manner. There is no material difference between the CIN and the "occasional, incidental and infrequent" settlement approved in *Pratt and Whitney* 12-CA-18446.

Time, place and manner restrictions are at the heart of the Court's holding in *Republic Aviation* 324 U.S. 793 (1945) and this Board's holding in *Stoddard*, supra. Moreover, time, place and manner restrictions have long been a fixture of First Amendment jurisprudence, see *Perry Ed. Assn. v Perry Local Educators' Assn.*460 U.S. 37 (1983). The Free Speech Clause is not absolute and has never been interpreted to guarantee all forms of speech without any restriction. The same is true of Section 7. In each case, the rights are subject to private property and management interests.

Contrary to the conclusion of the ALJ, this is not an all or nothing proposition. The Company is not required to surrender all control over its property and allow its email system be converted to a Union blog for union business or run afoul of Section 8(a)(1).

3. Respondent excepts to the ALJ's conclusion that Respondent's previous liberal enforcement of Local Ground Rule 2 is relevant to its ability to enact the CIN (Dec.9:1-4). The collective bargaining agreement explicitly provides that the "failure of the Company to exercise any right reserved to it or its exercise of any such right in a particular way shall not be deemed a waiver of any such right or its authority to

exercise any such right in some way not in conflict with the terms of this Agreement" (Jt. Ex. 5 at 52).

In the first place, the Company's previous enforcement of LGR 2, or lack thereof, is irrelevant to any issue before the ALJ. There are no allegations that the Employer made any unlawful unilateral change when it issued the CIN (see Dec. fn7).

Here again, the ALJ engages in a contract, not a statutory-based analysis. If the ALJ is determined to interpret and apply the contract she ought to interpret all of it. The parties have mutually agreed that a failure by either to exercise a right granted under the contract shall not be deemed a waiver to later exercise of that right (Jt. Ex. 5, p.52). Under the Agreement, ground rules "in effect on the signing of this Agreement***shall have the same force and effect as any other section of this Agreement. An alleged violation of such a rule may be made subject to a grievance and may be processed through arbitration" (Jt. Ex. 5 p.29). Thus the Company had the contractual right to issue the CIN and the Union had the right to grieve it but failed to do so.

4. Respondent excepts to the ALJ's conclusion that "business purposes" and "contract administration" are vague or ambiguous (Dec. 9: 29-30; 10:1-3). The Board has for decades upheld restrictions on Union use of Company equipment to business purposes only.

The ALJ is apparently the only one who is confused concerning the application of the CIN. The Union is not confused; it has voluntarily agreed to limit use of the Company email system to the limited categories identified in the CIN (R Ex. 5). In addition, employee Gilliam did

not admit to any confusion. To the contrary, Gilliam testified that he was fastidious about limiting non-business use of the Company email to his own time (Tr. 46)

The ALJ says that it is "unclear from the face of the document, what, if any, union activities are also considered to have a business purpose. Reasonable minds can certainly differ on where to draw the line between what serves a business purpose and what is a Union matter" (Dec. 10:30-31). This is a straw man. The line is an easy one. Is the individual acting in his/her capacity as a Union representative? If so, it is a Union matter. Alternatively, is the individual acting within the capacity of his/her job duties as a Weyerhaeuser employee? If so, it is a business-related matter. What is so hard about that?

The ALJ makes reference to "Standing Committee meetings" (Id). Here again, the ALJ should have taken the time to read all of the CBA. If she had, she would have found that the correct reference is Standing Committee***s*** meetings. These meetings consist of the **Local Union Standing Committee** and the Company Standing Committee. If the individual is communicating in his/her capacity as a Union member duly elected to the Union Standing Committee, it is a Union matter. It really is that simple.

Finally, the same is true of the term "contract administration". Does the matter at issue implicate the terms of the collective bargaining agreement? "All disputes, complaints or grievances of any employee **or the Local Union** may be presented through the grievance procedures****" (Jt. Ex. 5, 40). Any such dispute, complaint or grievance is clearly contract administration. That is why there are Union representatives and shop stewards. There is no ambiguity here. It simply requires an application of common sense.

Finally, this Board has never noted any difficulty in deciding what is a business purpose and what is a Union matter. It is not an intellectual matter requiring precise lines. Sixty-plus years of industrial experience inform the decisions. The individual need only ask "whose interest am I trying to represent/protect"? Nothing more, nothing less.

5. **Respondent excepts to the ALJ's conclusion that "any productivity argument is not substantiated" (Dec. 10:34-35). The record establishes that Union representatives were conducting Union business via Company email during work time (R. Exs. 1, 2, 3, and 4). Conducting Union business on Company time is by any common sense understanding contrary to the Employer's legitimate interest in productivity**.

Work time is for work. The Company is in the business of manufacturing liquid packaging products. The Company is not in the business of administrating the Union contract; that is the Union's business and why the Union members elect officers. Union use of the Company email system for the Union business of contract administration does not deliver one dime of value for the Company shareholders. It is simply wrongheaded to hold that evidence of union business during Company work time does not impact productivity. Of course it does.

6. **Respondent excepts to the ALJ's conclusion that the CIN is a vague and ambiguous restriction, rather than a narrowly tailored and reasonable limitation, of Union use of the Company email system (Dec. 10:37-39).**

Notwithstanding that the CIN is limited to only Union representatives conducting Union contract administration business on the Company's email system, the ALJ finds that the CIN is neither narrowly tailored nor reasonable. In essence, the ALJ holds that if an employer allows

the Union the opportunity to use company property for **any** Union purpose, it may not place any restrictions on the exercise or abuse of that opportunity.

The ALJ accuses Respondent of glossing "over a key difference between this case and *Register Guard.* The restriction in *Register Gua*rd was non work-related solicitations" (Dec. 10). While it is true that on its face, the policy appeared to apply to solicitations only, this distinction is meaningless. In the first place, the employer there clearly considered the e-mail policy to have broader application because it disciplined the Union Vice President for violating the [policy] by using e-mail "for conducting Guild business" (Id. at 1111). More importantly, it is the ALJ who glosses over the central holding in *Register Guard:* "we hold that Respondent's employees have no statutory right to use the Respondent's email system **for Section 7 purposes**." (Id. at 1110). The ALJ creates this faux distinction between this case and *Register Guard* because she must. Otherwise, she cannot ignore the fact that the focus of the debate is on company-owned email systems and mechanically "apply" *Lutheran Heritage.*

7. Respondent excepts to the ALJ's conclusion that because management uses the Company email system to communicate with the Union concerning contract matters, the Union has a corresponding right to use the email to communicate with the Company (Dec. 11: 8-10). The Act "does not command that labor organizations * are entitled to use a medium of communication simply because the Employer is using it" *NLRB v. Steelworkers 357 U.S. 363-364 (1958).***

The ALJ ignores the obvious and fundamental fact: it is the Company's email system. This Board has never held that the Union has the same right to use Company property that the Company does. In fact, the Board and Courts have routinely held to the contrary. It is plain and

simple, the Union doesn't own the computers; the Company does In *NLRB v Steelworkers,* 357 U.S. 357(1958) the Court reversed the Board's holding in *Avondale Mills 115 NLRB 840 (*1956) that an employer violated 8(a)(1) by denying employees work time access to coworkers while permitting supervisors to engage in antiunion solicitation on company time. See also, Heath Co*. 196 NLRB* 134 (1972); *Champion International Corp.* 303102, 109 (1991); *Eaton Technologies,* 322 NLRB 848,853 (1997) and *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000). The law simply does not require parity between an employer and the union in the use of the company's assets.

8. Respondent excepts to the ALJ's conclusion that the letter of expectation issued to Gilliam violated Section 8(a)(1) (Dec. 11:16).

For all of the reasons stated above, the Company had the right to remind employee Gilliam of his obligations under the CIN. The letter was nothing more than notice to Gilliam of his obligations. The letter was not discipline and was not intended to be. If the Company wanted to issue discipline, it would have issued a reprimand just like it had done previously (R. Ex. 8).

Conclusion

For all of the foregoing reasons, the Decision of the Administrative Law Judge should be rejected and the Consolidated Complaint dismissed.

s/Richard VanCleave

Attorney for Weyerhaeuser

CERTIFICATE OF SERVICE

I certify that I served a copy of Weyerhaeuser's Exceptions to the Decision of the Administrative Law Judge by electronic mail on February 27, 2011 on Ryan Connolly, Esq., for the General Counsel, and Greg Pallesen for the Association of Western Pulp and Paper Workers.

s/Richard VanCleave

Attorney for Weyerhaeuser