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, LOCAL 580

ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Ryan E. Connolly, Counsel for the Acting General Counsel ("General Counsel"), submits this Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge ("Respondent's Exceptions").

I. INTRODUCTION

Administrative Law Judge Eleanor Laws (the "ALJ") found in her January 30, 2012, Decision (the "Decision"), that a workplace rule of Weyerhaeuser Company ("Respondent"), the "Company Informational Notice" ("CIN"), violated Section 8(a)(1) of the National Labor Relations Act (the "Act"). The CIN prohibits representatives of the Association of Western Pulp and Paper Workers, Local 580 ("Union"), at Respondent's Longview, Washington, facility from communicating by email regarding the substance of disputes with Respondent. The ALJ found that, as such, the CIN violates Section 8(a)(1) of the Act and, therefore, that the discipline of employee and Union representative Gerald Gilliam pursuant to the CIN further violates Section 8(a)(1) of the Act. The ALJ presented a well-reasoned and in-depth analysis to support each of her findings.

In each of its eight Exceptions, Respondent repeatedly introduces arguments without a record foundation, takes findings out of context, and attempts to create discrepancies

where none exist. Taken together, Respondent's Exceptions are no more than a reiteration of its failed defense, and this Answering Brief will address the failing of each Exception in turn. As Respondent's Exceptions lack merit, the General Counsel asks that the Board adopt the findings and conclusions of the ALJ discussed herein.

II. ANALYSIS

A. Exception 1

Respondent's first Exception asserts the ALJ improperly engaged in "contract interpretation" regarding a provision, Local Ground Rule 2, when analyzing the lawfulness of the CIN. (R. Br. 2).[1] Respondent's treatment is cursory, asserting the ALJ's looking to the contract constitutes interpretation best left to an arbitrator, and that the interpretation made is incorrect. (R. Br. 2). Understanding why the ALJ is not only correct, but why in her analysis it is absolutely necessary to thoroughly consider the parties' agreements, requires examination of the disputed finding in the context of the Decision.

The CIN prohibits Union representatives from communicating with Respondent by email regarding the substance of a dispute; it limits use of email to discussions of process. (ALJD 4:17-37). In finding the CIN violated the Act, the ALJ conducted the appropriate inquiry was whether the CIN would reasonably tend to chill employees in the exercise of their Section 7 rights, consistent with the Board's decision in *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). (ALJD 7:43-45). The ALJ further held the appropriate test for answering this question was articulated by the Board in *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646 (2004). (ALJD 7:46-50). As she stated, under *Lutheran Heritage*, the first prong of the test is that if the rule explicitly restricts Section 7 rights, it is unlawful. (ALJD 7:46-47).

[1] Transcript citations will be referred to by page number and line number as (Tr. __:__); Respondent's Exceptions to the Decision of the Administrative Law Judge will be referred to by page number as (R. Br. __); and references to the ALJ's Decision will be referred to by page number and line number as (ALJD __:__).

The ALJ conducted a detailed analysis of the rule and concluded the CIN expressly restricted Section 7 activity and, as a result, was unlawful under this first prong of the *Lutheran Heritage* test. (ALJD 8:4-46, 9:1-6). In conducting this analysis, she established the proper context of communication between the Union and Respondent regarding contract administration prior to the implementation of the CIN, analyzed the language of the rule, and then considered the evidence of contract administration with the rule in place. (ALJD 8:36-46, 9:1-4). Having found the only change brought about by the rule was a restriction on Union representatives' ability to communicate regarding contract administration, which is clearly Section 7 activity, the ALJ concluded the rule violated section 8(a)(1) of the Act as alleged. (ALJD 9:4-6).

In reaching this conclusion, the ALJ found the evidence established that, prior to the CIN, the parties' agreed upon mechanism for workplace communication regarding contract administration was contained in Local Ground Rule 2. (ALJD 9:1-4). The Decision sets forth the full text of Local Ground Rule 2 and, in describing the status of the parties' communication prior to the CIN, explains "The CBA, through Local Ground Rule 2, provides union representatives reasonable time off from work for contract administration business that cannot be performed during working hours." (ALJD 3:46-52, 4:1-4). The ALJ also found the record evidence established that, prior to both the CIN and the arrival of Mill Manager Tim Haynes in 2008, Local Ground Rule 2 was "not enforced very tightly," and "some union officials had routinely engaged in contract administration on Company time without negative consequence." (ALJD 4:6-10). Upon Haynes's arrival, he "advised that he would be following all of the rules in the CBA, including Local Ground Rule 2." (ALJD 4:6-10).

By Exception 1 Respondent takes issue with the ALJ's finding that Local Ground Rule 2 "provides union representatives reasonable time off from work for contract

administration business that cannot be performed during working hours." (R. Br. 2). Respondent claims both that (1) the ALJ interprets Local Ground Rule 2 incorrectly, and (2) her interpretation of Local Ground Rule 2 at all constitutes contract interpretation properly left to an arbitrator. (R. Br. 2-3).

In regard to its first argument, that the ALJ interpreted Local Ground Rule 2 incorrectly, this is mere assertion by Respondent. Respondent makes no reference in its brief to any record evidence in support of its position, and cites to no record evidence contrary to the ALJ's finding. As the ALJ stated in the Decision, it is "***undisputed*** that, prior to the CIN, Respondent had permitted union representatives to use its email system to perform the contract administration work Local Ground Rule 2 contemplates." (ALJD 9:1-2, emphasis added). This is not an instance where the ALJ considered two pieces of evidence and made a determination contrary to Respondent; rather, the record literally contains no evidence contrary to her finding.

In regard to the second argument, that the ALJ erred by interpreting a contractual provision, this is also without basis. Respondent is generally correct that an arbitrator typically interprets vague or disputed contract provisions in a collective bargaining agreement, and that the Board avoids performing this function. However, an ALJ is not required to ignore the parties' collective bargaining agreement; indeed, it would be inappropriate for the ALJ to do so in many instances. The ALJ's examination of record evidence is not only entirely reasonable, but also the proscribed manner in which to asses whether the statutory violation occurred. This is the only reason the ALJ addressed Local Ground Rule 2; not to interpret its application to the parties, but as a tool for determining whether the statutory violation occurred. This Exception is based on a faulty premise, as the ALJ's conclusion and methodology is sound, reasonable, and persuasive. The Exception should be overruled.

B. Exception 2

By its second Exception, Respondent asserts the ALJ incorrectly found the CIN violates Section 8(a)(1) of the Act because such a finding contradicts with the Board's decision in *Register Guard*, 351 NLRB 1110 (2007), *enfd. denied in part,* 571 F.3d 53 (D.C. Cir. 2008), *rem. and supp.*, 357 NLRB No. 27 (2011). (R. Br. 3). In its arguments in support of this Exception, however, Respondent does not explain why *Register Guard* should be applied as the relevant legal precedent, but instead only highlights a number of perceived factual differences between *Register Guard* and the instant case. (R. Br. 3-6).

As a legal matter, to the extent Respondent claims the CIN should be analyzed under *Register Guard*, Respondent is mistaken. The Board's decision in *Register Guard* addresses the subset of workplace rules that both address communication ***and*** distinguish between business and non-business-related use, charitable and non-charitable solicitations, and other similar situations. *Register Guard*, 351 NLRB at 1118. The CIN is not such a rule; its lacks the second element. As such, the ALJ correctly applied the *Lutheran Heritage* test to the CIN.

Respondent appears to argue that the finding in *Register Guard* that employees have "no statutory right to use the Respondent's email for Section 7 matters" should be read into the *Lutheran Heritage* test in a manner that absolves it of any wrongdoing, but it fails to explain how it reaches this conclusion or any legal authority for such a claim. (R. Br. 3). Similarly, Respondent merely points out differences between the newspaper work environment, the factual context of *Register Guard*, and the paper mill involved in the instant case. (R. Br. 3). In short, Respondent has presented no argument why the CIN should be analyzed differently than the *Lutheran Heritage* test applied by the ALJ, or how any factual differences dictate a different result. Accordingly, Exception 2 should be overruled.

C. Exception 3

As noted earlier, in finding the CIN violated Section 8(a)(1), the ALJ analyzed communication between the Union and Respondent prior to the implementation of the CIN, the CIN itself, and the communication regarding contract administration the with the rule in place. (ALJD 8:36-46, 9:1-4). In Exception 3 Respondent takes issue with the ALJ's first finding that, prior to the implementation of the CIN, Local Ground Rule 2 was not strictly enforced. (R. Br. 6-7). Specifically, Respondent claims that the parties' collective bargaining agreement states a failure to enforce a right does not constitute a waiver. (R. Br. 7).

This contract language is not relevant, as noted in regard to the first Exception; it is the statutory interpretation that is at issue and, by this Exception, Respondent is interjecting a contractual interpretation defense. In finding Local Ground Rule 2 was not strictly enforced in the past, the ALJ was not addressing Respondent's current right to assert a contractual right, a question for an arbitrator where the waiver language would be relevant, but instead relevant facts necessary to determine whether a statutory violation had occurred. As the waiver argument is not relevant to the statutory violation, Exception 3 is without merit.

D. Exceptions 4, 5, and 6

Respondent's primary defense in the instant case is that the CIN is lawful because it is a narrowly tailored and reasonable limitation on Union representatives, necessary to protect Respondent's legitimate interest in productivity. The ALJ rejected this contention, finding the CIN is not narrowly tailored, in part because it is premised on vague or ambiguous terms such as "business purposes" and "contract administration," and that Respondent had failed to demonstrate by record evidence the productivity interest it claimed to protect. (10:8-10, 32-43). By Exceptions 4, 5, and 6, Respondent merely revisits

this failed defense in the name of "common sense," but this defense remains unsupported by record evidence or legal authority. (R. Br. 8).

1. The CIN Contains Vague or Ambiguous Terms

By Exceptions 4 and 6, Respondent disputes the first of the ALJ's findings, that the CIN is vague or ambiguous because of its "business purposes" and "contract administration" terms.[2] In analyzing the CIN, the ALJ expounded upon the inherent ambiguity of the terms in detail, addressing several specific situations in Respondent's workplace (*e.g.* the work of the joint Standing Committees) where a clear distinction between a business purpose and a Union matter cannot be drawn. In finding against Respondent on this point, the ALJ also relied upon the Board precedent holding "the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it." *NLRB v. Miller*, 341 F.2d 870, 874 (2d Cir. 1965), *enforcing, Miller-Charles & Co.*, 148 NLRB 1579 (1964).

Respondent's attack on the ALJ's well-reasoned decision is based neither on record evidence nor legal authority. Respondent instead merely asserts its interpretation of these terms, and adds that reaching its conclusion is "simple" and only requires "application of common sense." (R. Br. 8). Respondent posits that employees can simply ask themselves in what capacity they are acting, or whose interest they are trying to represent/protect, in order to eliminate all ambiguity from the rule. (R. Br. 8). Respondent applies the same solution to the Standing Committees example, arguing that, because a Union Standing Committee and an Employer Standing Committee are involved, a clear distinction can be drawn. (R. Br. 8). Respondent misses the ALJ's point, however, that a Union Standing Committee member may not be performing "Union business" exclusively when participating

[2] Exception 4 disputes the ALJ's finding that "business purposes" and "contract administration" are vague or ambiguous terms; Exception 6 disputes the corresponding finding that the CIN containing these terms is vague or ambiguous as a result.

in any sort of joint capacity with Respondent's Standing Committee. Respondent's disagreement with the ALJ's finding does not invalidate the ALJ's well-grounded reasoning.

Further, under Respondent's posited rationale it is entirely possible a Union representative who asks this question and guesses the wrong answer would be subject to discipline, as there is no way of knowing how Respondent will interpret any given activity in advance. Respondent's "common sense" argument is both legally unsound and factually unconvincing in its failure to articulate a basis for disregarding the ALJ's analysis.

Finally, Respondent asserts that its interpretation of these terms in the CIN is correct because the Union agrees with its interpretation, as demonstrated by employee Union representatives' attempt to comply with the terms of the rule. (R. Br. 7-8). That Union representatives employed by Respondent have tried to comply with Respondent's rule does not demonstrate agreement; merely attempted compliance. Indeed, the Union's filing of the instant charge speaks volume concerning its disagreement.

2. Productivity Interest

In Exception 5 Respondent challenges the second finding of the ALJ related to its defense, that Respondent failed to establish in the record the claimed email impact on productivity. (R. Br. 9). The ALJ had specifically noted Respondent failed to introduce any evidence of production deficiencies and, as such, found that "any productivity argument is not substantiated." (ALJD 10:34-35). In response, Respondent again asserts its "common sense" argument, arguing that it is not required to use evidence to show an impact on productivity, because such impact is self-evident. (R. Br. 8). In doing so, Respondent ignores the evidentiary deficiency and simply claims that, since "Union use of [Respondent's] email system for the Union business of contract administration does not deliver one dime of value for [Respondent's] shareholders," a negative impact on productivity can be presumed. (R. Br. 8). Respondent's failure to cite any authority for such

a standard or any basis for such a presumption renders Respondent's arguments mere assertions that fall far short of a convincing case. As such, it is entirely appropriate for the ALJ to hold Respondent to its burdens, including demonstrating the fundamentals of its defense by record evidence, regardless of the ultimate merits of that defense.

The ALJ considered Respondent's defense regarding the CIN fully based on the record before her and, after detailed analysis, dismissed the defense in full. Exceptions 4, 5, and 6 merely seek to revisit this failed defense and attack the ALJ's findings with bravado, citing little or no record evidence or legal authority. As such, each of these Exceptions should be overruled.

E. Exception 7

By Exception 7, Respondent asserts the ALJ held that, because Respondent's management uses its email system to communicate with the Union concerning contract matters, the Union has a corresponding right to use email to communicate with Respondent. (R. Br. 10). Respondent then cites to *NLRB v. Steelworkers (Nu Tone, Inc.)*, 357 U.S. 357, 363-64 (1958), for the premise that no such right exists. (R Br. 10). This is simply a non-issue; Respondent's Exception takes a portion of the ALJ's decision out of context and attempts to create a contradiction where none exists.[3]

The ALJ did not conclude the Union had an unfettered right to use email to communicate regarding contract administration, as Respondent implies by the broad wording of this Exception. Instead, the ALJ considered the email use of Respondent's

[3] The issue is incorrectly framed by Respondent; the ALJ did not make the finding Respondent attacks. However, were such a finding actually at issue, Respondent's reliance on *NLRB v. Steelworkers (Nu Tone, Inc.)*, 357 U.S. 357 (1958), would be misplaced. As the Board recently stated in *St. Johns Health Center*, 357 NLRB No. 170, slip op. at 5, fn. 13 (2011), "The 'very narrow and almost abstract question' in *Nu Tone* was whether, 'when the employer himself engages in anti-union solicitation that if engaged in by employees would constitute a violation of the rule[,] his enforcement of an otherwise valid no-solicitation rule against the employees is itself an unfair labor practice.'" *Id.* at 362. In *St. Johns Health Center* the Board specifically declined to expand the holding of *Nu Tone* to other factual contexts as Respondent suggests here.

management only in addressing Respondent's defense that the CIN is a narrowly tailored restriction that seeks to protect a legitimate productivity interest. (ALJD 11:8-13).

Specifically, in concluding the rule was not narrowly tailored, the ALJ merely addressed the email communication in the record between Respondent's representative and the Union's regarding contract administration. The ALJ noted that:

> Members of management apparently considered the emails they responded to as a permissible use of the email system, both before and after the CIN. If maintaining productivity and adhering to Local Ground Rule 2 are the interests Respondent wishes to protect, then the enforcement of Local Ground Rule 2 using the mechanism set forth in the rule itself appears much more narrowly tailored to address these problems than a vague restriction on email usage.

(ALJD 11:8-13). This finding is merely an ancillary point in a list of deficiencies with regard to Respondent's defense. The ALJ's observation does not suggest the Union has the same rights of usage as Respondent. As such, Exception 7 is without merit.

F. Exception 8

In its final Exception, Respondent excepts to the ALJ's conclusion that the "letter of expectation" issued to employee Gilliam violated Section 8(a)(1). (R. Br. 11). In support of its Exception, Respondent asserts the letter of expectation does not constitute discipline and that, if the CIN is found lawful consistent with its other arguments, the resulting discipline is then lawful. (R. Br. 11). Respondent is incorrect on both counts.

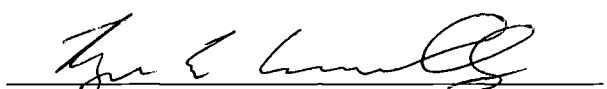
In regard to the first point, Respondent makes its assertion without support, citing to no record evidence or legal authority establishing that the letter of expectation issued to Gilliam did not constitute discipline. The ALJ specifically addressed in her Decision that, under established Board precedent, the letter of expectation constitutes discipline. (ALJD 11:20-42, 12:1-2). In regard to the second point, Respondent completely fails to address the correct basis for the ALJ's finding. The ALJ specifically found that *even if the CIN was*

lawful the letter of expectation issued to Gilliam violated Section 8(a)(1) of the Act because the actions that led to the discipline constituted protected concerted activity. (ALJD 12:9-11). As with the other Exceptions, Respondent's assertions are unsupported, and therefore Exception 8 fails.

III. CONCLUSION

Based on the foregoing, Respondent's Exceptions have no merit. The ALJ's findings and conclusions discussed above were based on a correct analysis of the facts and reasonable interpretation and application of the law. As a result, the Board should adopt her findings and conclusions.

Signed at Seattle, Washington, this 7th day of May, and respectfully submitted by:



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AFFIDAVIT OF SERVICE OF ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE.

I, the undersigned employee of the National Labor Relations Board, state under oath that on May 7, 2012, I served the above-entitled document(s) by E-Filing, E-Mail and post-paid regular mail upon the following persons, addressed to them at the following addresses:

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May 7, 2012.
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