

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

**WEYERHAEUSER COMPANY**

**And**

**ASSOCIATION OF WESTERN PULP  
AND PAPER WORKERS, AFFILIATED  
WITH THE UNITED BROTHERHOOD  
CARPENTERS AND JOINERS OF  
AMERICA**

**19-CA-122853  
19-CA-127089  
19-CA-127090  
19-CA-127561  
19-CA-128688  
19-CA-128740  
19-CA-131148**

**And**

**ASSOCIATION OF WESTERN PULP  
AND PAPER WORKERS, LOCAL 580  
AND LOCAL 633**

**RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## INTRODUCTION

Respondent Weyerhaeuser Company (“Respondent” or “the Company”) excepts to two of the Administrative Law Judge’s (“ALJ”) findings in this case – that it unlawfully implemented new rules regarding food safety in its Longview, Washington facility, and that it unlawfully implemented new rules regarding training evaluations. The Board should decline to adopt the ALJ’s findings on these two points because on the former point, the ALJ made up out of whole cloth provisions in the parties’ collective bargaining agreements that simply do not exist, and then relied on these phantom provisions to find a violation. On the latter, the ALJ selectively ignored the plain language of the CBAs and the un-contradicted testimony of the General Counsel’s own witnesses.

First, the ALJ found that the Company violated Section 8(a)(5) of the Act by unilaterally implementing rules relating to food safety, and rejected the Company’s waiver defenses. In doing so, the ALJ found that while the parties’ CBAs covered the implementation of work rules, it only dealt with “extant rules” and “not with Respondent’s right to unilaterally implement new work rules.” (Decision of Administrative Law Judge (“Dec.”) at 25). Unfortunately, the CBA explicitly says exactly the opposite of what the ALJ claims it says. While the ALJ somehow states that the CBA covers only existing rules, the plain language of the exact provision cited by the ALJ refers in four places to “changes in present rules,” “additional rules,” “existing rules,” and “new rules” that may be changed or implemented.

To make matters worse, the ALJ also stated that the same CBA provision “specifically states that there **shall** be discussion” between the Company and the Union over any changes to existing rules. (*Id.*, emphasis added). Again, the ALJ here is just plain wrong. To the contrary, the CBA – which the ALJ quotes on pages 23 and 24 of his decision – explicitly provides not

that there “shall” be discussion, but that “any existing or new rules or changes in rules **may** be the subject of discussions” between the Company and the Union. (Dec. at 24, emphasis added).

The entirety of the ALJ’s analysis of the food safety rules is predicated on and infected by these gross mischaracterizations. For this reason, and because the parties clearly struck a bargain, reflected in the CBAs, that the Company would be privileged to implement new rules subject to the Union’s ability to grieve them, the ALJ’s findings on the food safety rules should be disregarded.

The ALJ’s findings on the training evaluations rules are similarly problematic, as again the ALJ twists the parties’ bargained-for CBA provisions to reach his conclusion. The ALJ ignored testimony unfavorable to his conclusion and relies upon contract provisions, which on their face, do not apply to the allegations of the complaint. Because the parties clearly bargained for the Company to have the exclusive say with respect to the process used to verify whether an employee has satisfied qualification standards, the changes to the training evaluation method were permissible, and the ALJ’s findings should be disregarded.

## **ARGUMENT**

### **A. The ALJ Erred in Finding that the Union Did Not Waive its Right to Bargain Over the January 2014 Changes in Rules Regarding Food Safety (Exceptions 7-13).**

The ALJ erred by finding that the Union did not waive its right to bargain over the January 2014 changes in rules regarding food safety because the plain language of the CBA clearly and unmistakably reflects the Union’s agreement to waive its right to bargain over the creation of new plant rules in favor of the right to grieve the implementation of those rules.

Here, perhaps not surprisingly given his misquotes of the CBA language, the ALJ’s recitation of the facts surrounding the implementation of additional and new food safety hygiene rules is incomplete and fails to provide context.

The ALJ correctly notes that at the time Weyerhaeuser reacquired the Extruder operations from Tetra Pak in 2010, Tetra Pak, the Company's largest customer and one of the largest producers of liquid packaging containers for food products in the world ( Tr. 510, 58), had adopted and implemented food safety hygiene rules (GC Ex. 23). Upon acquisition, the Company unilaterally adopted, implemented and posted the Tetra Pak rules (Tr. 519).

In 2014, as a result of demands from Tetra Pak and other customers and pursuant to the parties' CBA, Respondent implemented Food Safety System Certification (FSSC) 22000, an international food safety program. FSCC 22000 was created by Tetra Pak and others to ensure that food packaging products were safe for human use (GC Ex. 23).

### **1. The Plain Language of the CBA Acts as a Waiver.**

The ALJ's entire finding that the Company violated Section 8(a)(5) of the Act by implementing new food safety standards is premised on two obvious and determinative misquotes of the parties' collective bargaining agreements. When the actual language of the CBAs is considered in context (rather than the made-up language cited by the ALJ), it is clear that the ALJ erred by finding that the Union did not waive its right to bargain.

The CBA provisions in question state as follows:

“A. Causes for discipline or discharge are as follows:

\*\*\*\*\*

#### 13. Refusal to comply with Company rules

- a. Provided that such rules shall be posted in each department where they may be read by all employees and further, that no **changes in present rules** or ***no additional rules*** shall be made that are inconsistent with this Agreement; and further provided that any existing ***or new rules*** or changes in rules ***may*** be the subject of discussions between the Local Union Standing Committee and the Local Mill Manager, and in case of disagreement, ***the procedure for other grievances shall apply.***” (Emphasis Added)

At the hearing and in its post-hearing brief, the Company argued that this language, when read in context, acted as a waiver of the Union’s right to bargain over the implementation of the food safety rules. The ALJ held it did not, stating as follows:

Here the language of Section 17 in both contracts deals with **discipline for not following extant rules not with Respondent’s right to unilaterally implement new work rules**. Indeed, the language of Section 17A.13 **specifically states that there shall be discussion** between the Respondent and Locals 580 and 633 regarding any changes to extant rules.

(Dec. at 25, emphasis added).

The ALJ is egregiously wrong here on two counts. First, the ALJ states that Section 17 deals with “discipline for not following extant rules not with Respondent’s right to unilaterally implement new work rules.” (Dec. at 25). But after a reading of the actual words of Section 17, it is frankly difficult to understand how the ALJ could possibly have come to this conclusion, as the plain language of Section 17 *explicitly* refers to “any existing **or new rules**.” Section 17 also makes two other references to “changes in present rules” and to “additional rules.” (Dec. at 23-24). Indeed, the language of Section 17 really could not be any clearer – it permits the Company to discipline employees for rules violations, and explicitly states that the Company may change existing rules or make new rules, as long as those rules are not “inconsistent with this Agreement.” (*Id.*). There is simply no other reasonable reading of this language. It could not be any clearer.

Second, the ALJ states that the operative provision here “specifically states that there **shall** be discussions between the Respondent and Locals 580 and 633 regarding any changes to extant rules.” (Dec. at 25, emphasis added). But this is most definitely not what the CBAs say. To the contrary, the CBAs “specifically” say that “changes in rules may be the subject of discussions” between the Company and the Union, and that if there is disagreement, “the

procedure for other grievances shall apply.” (Dec. at 24-24). Obviously, “shall” does not mean the same thing as “may”; indeed, they have two very different meanings.<sup>1</sup> Again, it is difficult to understand how the ALJ could possibly have come to read the CBAs in this way. If the parties wanted to make discussions mandatory, they could have. But they did not, and the ALJ may not change the parties’ agreed-upon language in search of a violation of the Act.

When these two obvious mistakes made by the ALJ are corrected and the actual language of the CBA is read in context, it is clear that the Union clearly and unmistakably waived its right to bargain over the changes to the food safety rules. First, Section 17 of the CBA explicitly permits the Company to make “changes in present rules,” or “changes in rules” or make “additional rules” and “new rules,” as long as those rules are not “inconsistent with this Agreement.”

Second, the parties clearly bargained for a trade-off here. The Company, on one hand, is given the right to implement new rules or changes in existing rules, as long as those rules do not conflict with the CBAs. The Union, on the other hand, is given the right to discuss those rules with the Company if they so choose (“changes in rules may be the subject of discussion”), and is given the right to challenge those new rules or changes in existing rules via the grievance procedure (“in case of disagreement, the procedure for other grievances shall apply”). That is the bargain that the Union struck. The Union relinquished the right to bargain about new or additional work rules in exchange for the right to adjudicate the rules through the grievance process. The ALJ has no authority to deprive Respondent of the benefit of this agreement.

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<sup>1</sup> Webster’s defines “shall” as “used to give a command or to say that you will or will not allow something to happen.” (<http://www.merriam-webster.com/dictionary/shall>). “May” is defined as “used to indicate possibility or probability <you *may* be right> <things you *may* need>.” <http://www.merriam-webster.com/dictionary/may> (emphasis in original).

Third, to further prove the point, there was evidence at the hearing that this is exactly how the parties viewed their rights and obligations, as these same food safety rules had been established unilaterally by the Company just four years earlier in 2010 when Respondent reacquired the Extruder operations from Tetra Pak. (Tr. 519).

This case is substantially similar to the Board's decision in *Provena St. Joseph Hospital*, 350 NLRB 808, 810, 815 (2007). Here, as there, the contract gives the employer the right to suspend, discipline, or discharge employees. Here, as there, the contract gives the employer the right to promulgate and implement Company work rules or to change existing rules. Here, as there, by "agreeing to that combination of provisions, the Union relinquished its right to demand to bargain..." Here, as there, "the contract plainly speaks to the right of the Respondent to act." Accordingly, here, as there, the ALJ's decision must be rejected and the allegations dismissed.

Obviously, an ALJ is not free to ignore clear and explicit language that is inconvenient or incompatible with his interpretation. The fundamental rules of contract interpretation require that **all** language be interpreted and **all** language of an Agreement must be given its ordinary meaning. *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971). Here, the contract clearly and unambiguously gives the Respondent the right to make changes to present rules or make additional (e.g. new or additional) rules subject only to the restriction that they not be inconsistent with the Agreement. There is no dispute that the changes in this case – the prohibition of eating or drinking in certain areas and the requirement of filling out a checklist – are not prohibited by the CBA. Thus, the ALJ erred in ignoring the clear language of the Agreement, and the Company's exceptions on this point should be upheld. *See also Kennametal, Inc.*, 358 No. 68 (2012) (*Noel Canning* case) (rejecting ALJ's finding that implementation of requirement to fill out safety checklist was violation where CBA permitted

Company to “continue to make reasonable provisions for safety” and referred to “such reasonable safety and health rules as may from time to time be established by the Employer,” finding those provisions “sufficiently specific to constitute a waiver of the Union’s right to bargain”).

**2. The Union Waived its Right to Bargain by Failing to Challenge the Food Safety Changes.**

It is undisputed here that while the food safety changes went into effect in February 2014, the Union did not challenge them until months later, when they filed their charge in May 2014. In his decision, the ALJ dismisses the Union’s inaction by citing one case for the proposition that there can be no waiver over a change that is presented as a *fait accompli*. (Dec. at 25, citing *Intersystems Design & Tech. Corp.*, 278 NLRB 759 (1986)). First, under the ALJ’s application, a Union that became aware of a change (*e.g.*, through complaints from the bargaining unit) yet took no action would be absolved of its inaction. That is not the law. See *Reynolds Metals*, 310 NLRB 995 (1993); *Kansas Nat’l Educ. Ass’n* 275 NLRB 638 (1985); *Haddon Craftsman, Inc.*, 300 NLRB 1190 (1990).

Second, the change here was not a change that was presented as a *fait accompli*. The concept of a *fait accompli* requires a notice accompanied with actions or words indicating that the Employer will brook no dissent or discussion; in other words, any attempt to bargain would be futile. There is no such evidence here. Indeed, there is evidence to the contrary. First, the Company rolled out training on the new food safety rules *prior* to their implementation. The Union could have – but did not – complain about the rules or request bargaining at that time. Second, the parties were engaged in bargaining during the time in question, yet the Union made no proposals nor ever raised the food safety rules.

Thus, the Union's inaction after actual notice here constitutes a separate waiver of their right to bargain over the food safety changes.

**B. The ALJ Erred in Finding that the Union Did Not Waive its Right to Bargain Over the October 2013 Change in Training Evaluations (Exceptions 1-6).**

**1. The Plain Language of the CBA Acts as a Waiver.**

The ALJ holding that the Company improperly implemented a change in training evaluations is also flawed, for similar reasons as his holding that the Company violated the Act when implementing the food safety rules. Again here, the ALJ twists the parties' bargained-for contract provisions to reach his conclusion. Whereas with the food safety rules, the ALJ simply made up CBA provisions that did not exist, here he ignores testimony unfavorable to his conclusion and relies upon contract provisions which on their face do not apply to the allegations of the complaint. (Dec. 17: 27-34).

First, it is undisputed that the E & U Final Design agreement gives the Company the exclusive responsibility and authority to "Assess mastery; verify learnings" to the "System Leader" and provides that the "System Leader" has the sole authority to "Approve/Veto" such determinations (GC Ex. 37:24-26). And General Counsel witnesses uniformly testified that the Company has the sole authority to determine whether an individual meets the relevant qualifications for a job or promotion.

**General Counsel Witness Anderson:**

**Q** "\*\*\* under the labor---under the MLA, General Counsel's Exhibit 4, in determination of qualifications, who makes that determination?"

**A** I believe that management does." (Tr. 51:7-10)

**General Counsel Witness Hill:**

**Q** "Who has the authority to make a determination as to

whether an individual is trained?

A The process owner would be at the point that I've ever been around it.

Q Well that would be the Company.

A. The what?

Q. The Company.

A. The Company. Yes it is process.

Q And the union doesn't have a voice.

A It states and designed that we're supposed to have a voice, **but it has never been carried out**" (Tr.222:16-25-223:1) (emphasis added)

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Q "Is it your position, as chairman of the standing committee that the Company has to negotiate the questions it asks during evaluations?"

A No. (Tr. 223: 19-23)

Finally, General Counsel witness Sauer testified as follows:

Q "And the decision as to whether an employee was qualified and ready to move on was always a management decision?"

A Yes"

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Q "Okay. So to your knowledge, has the E & U trainer ever had a vote?"

A No."

(Tr. 186:8-10, 187: 1-3).

Second, the ALJ cites to several contract provisions relating to alleged joint decision - making regarding several items; but those items are not at issue in this case. The ALJ makes much of the provision that states "[t]he Company and the Union will jointly develop the means of evaluation." But as is clear even from the face of the ALJ's decision, this provision only

applies to “certification requirements where required by law or when recommended by industry standards” (Dec. 13:29-30). No such certification requirements are at issue here.

The ALJ also relies on the language stating that “[t]he minimum qualification levels and performance standards will be determined by mutual agreement between the Company and Union.” But there was no evidence that Respondent changed the qualification levels or performance standards in any way in this case. Rather, the issue is *the process used to verify that the employee has satisfied those standards*. As the General Counsel’s witnesses conceded, the determination of whether an employee is in fact qualified is the sole province of Respondent, as it has been for years. Prior to 2013, the process for verifying qualifications was relatively informal and was delegated by Respondent to the individual employee’s front line supervisor. Beginning in the fall of 2013, the verification process was expanded. Department Manager and process owner Alsemaan became personally involved and there was an increased focus on safety and environmental training and responsibilities, the first two skill blocks of each position.

Finally, the ALJ relies on the CBA provision stating that “[t]he Company and Union shall jointly develop the instrument(s) to be used to measure capability and aptitude through the application of a structured external evaluation tool, such as Work Keys or another mutually agreed tool.” Again, as is clear from the face of the ALJ’s decision, this provision only applies to new hires before they are allowed to enter a work system. The verification process at issue in this case only applies to employees who are already in the E & U work system.

Thus, rather than support a conclusion that in all cases the parties have agreed that there would be joint decision making, the above cited provisions support the opposite conclusion. *Expressio unius, est exclusio alterius*. In other words, if the parties intended that the Union would have a voice in verifying whether an individual was qualified and/or the evaluation

process, they would have explicitly stated so. They did not. To the contrary, the E & U Work Design Agreement specifically assigns the authority and responsibility to “Assess mastery; verify learnings” to the System leader (GC EX. 37:24-26).

**2. The Union Waived its Right to Bargain by Failing to Challenge the Changes to the Training Evaluations.**

It is undisputed here that while the changes to training evaluations went into effect in October 2013, the Union did not challenge them until April 2014, nearly six months later. In his decision, the ALJ again dismisses the Union’s inaction by noting the proposition that there can be no waiver over a change that is presented as a *fait accompli*. (Dec. at 18, citing *Intersystems Design & Tech. Corp.*, 278 NLRB 759 (1986)). First, as discussed above, under the ALJ’s application, a Union that became aware of a change (*e.g.*, through complaints from the bargaining unit) yet took no action would be absolved of its inaction. That is not the law. See *Reynolds Metals*, 310 NLRB 995 (1993); *Kansas Nat’l Educ. Ass’n* 275 NLRB 638 (1985); *Haddon Craftsman, Inc.*, 300 NLRB 1190 (1990).

Second, as was the case with the food safety rules, the change here was not a change that was presented as a *fait accompli*. The concept of a *fait accompli* requires a notice accompanied with actions or words indicating that the Employer will brook no dissent or discussion; in other words, any attempt to bargain would be futile. There is no such evidence here.

In this case, the Union waited months after Respondent expanded the verification process to even request information. Thereafter, even though the parties were engaged in bargaining for several months the Union made no proposals. There can be no evidence that bargaining would have been futile, because the Union never tried. Thus, the Union’s inaction after actual notice here constitutes a separate waiver of their right to bargain over the training evaluations changes.

**CONCLUSION**

For the foregoing reasons, the Board should decline to adopt the ALJ's findings that Weyerhaeuser Company violated Sections 8(a)(1) and 8(a)(5) of the Act by implementing the rules relating to food safety and the training evaluations.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I certify that on May 6, 2015 I served a copy of Weyerhaeuser's Post-Hearing Brief by e-mail to the following:

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