

**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 OF CARPENTERS  
AND JOINERS OF AMERICA;**

**ASSOCIATION OF WESTERN PULP AND  
PAPER WORKERS, AFFILIATED WITH THE  
UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA, LOCALS 580  
AND 633**

**Case Nos. 19-CA-122853  
19-CA-127089  
19-CA-127090  
19-CA-127561  
19-CA-128688  
19-CA-128740  
19-CA-131148**

**COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS  
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the General Counsel submits this Answering Brief to the Exceptions filed by Respondent Weyerhaeuser Company (“Respondent”) to the March 25, 2015, decision of Administrative Law Judge John L. McCarrick (the “ALJ”). (See Decision of ALJ John L. McCarrick, dated March 25, 2015) (the “ALJD”).<sup>1</sup> Respondent’s exceptions take issue with the ALJ’s failure to find that the Charging Party Unions waived their statutory rights to be notified and provided the opportunity to bargain prior to Respondent’s unilateral implementation of changes to its training evaluation process and new food safety rules, in violation of *NLRB v. Katz*, 369 U.S. 736 (1962), either through the plain language of the contracts between the parties, or through the Unions’ conduct following the unilateral changes. As discussed in more detail below, the ALJ’s findings are appropriate, proper, and fully supported by the credible record evidence in all respects. Accordingly, the Board should sustain the ALJ’s findings of fact, conclusions of law, proposed remedy, and recommended order regarding Respondent having violated the Act as alleged.

## **I. FACTS**

Respondent is a State of Washington corporation with its headquarters in Federal Way, Washington, and a facility in Longview, Washington, where it operates a paper and pulp mill. (JD 2:15-17).

Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America, and its Locals 580 (“Local 580”) and

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<sup>1</sup> References to ALJD will be noted as: (JD \_\_:\_\_), which shows the decision page and line, respectively. References to the official transcript will be designated as ( \_\_-\_\_ ), including appropriate page and line citations. References to the General Counsel’s Exhibits will be referred to as (GC Ex.), with the appropriate exhibit number.

633 (“Local 633”) (collectively, “the Locals”), represent extruder, paperboard, and maintenance/energy/utility bargaining units of Respondent’s employees as defined in the complaint and set forth in the ALJD. (JD 2:35-44; 3:1-42).

**A. The October 2013 Change in Training Evaluations**

As properly noted in the ALJD, it is uncontested that, beginning in October 2013, Respondent significantly changed the way that its Energy and Utilities (“E&U”) department performed training evaluations. (JD 16:14-15)

For the 20 years leading up to the significant changes made in October 2013, E&U training evaluations consisted of the trainee-operator’s direct supervisor – or Team Development Manager (“TDM”) – asking a few questions in a single meeting that lasted from 15 to 30 minutes, following which the employee was immediately promoted, absent any concerns with the trainee’s qualifications. (JD 16:15-21; 14:35-40; 287:10-289:22; 293:17-295:6; 154:2-10; 157:19-160:10; 287:10-289:22; 293:17-295:6; 148:22-24; 154:6-25; 158:23-159:11; 211:9).

Then, sometime in August of 2013, Weyerhaeuser hired Assaad Alsemaan (“Alsemaan”) as its new E&U manager. (190:15-16; 137:5-9). In the fall of 2013, Alsemaan became involved with the evaluation process and completely changed the way E&U employees were evaluated and promoted. (163:8-170:11; GC Ex. 35 and 36; 163:15-24; 165:3-24; 297:1-300:10). The most dramatic change was that Alsemaan would orally test employees for a period anywhere from four up to 14 hours before moving that employee up to the next classification. (163:15-24; 165:3-24; 297:1; 306:13; 307:17-309:5). In addition, the evaluation meetings were now run by Alsemaan, with a process owner, TDM, and the classroom trainer also present. (164:1-

8). These significantly longer evaluations would be broken up into two hour increments, with the parties meeting up to seven different times in order to complete the process. (163:15-24; 165:3-24; 201:19-202:19; 297:1-30; 297:1-306:13; 307:17-309:5). As these meetings now involved several different meeting times and coordinating multiple members of management, they became difficult to schedule. (192:15-193:22; 200:17-201:15; 201:19-202:19). In addition, in the evaluation sessions, Alsemaan began testing employees in detail on areas that were not previously covered, such as on safety and environmental issues. (164:11-165:2; 297:21-299:2; 307:9-16). As the ALJ thus accurately summarized, starting in October 2013, the single 15 to 30 minute meeting process changed to a process that entailed between four and 14 hours of training, all of which also included upper management. (JD 16:15-18). Because of scheduling conflicts, the new training process often took months for a trainee to complete, which was months longer than it had before Alsemaan became involved. (JD 15:4-14; 192:15-193:22; 200:17-201:15; 201:19-202:19).

It is uncontested that Respondent neither notified nor bargained with Local 580 prior to the implementation of the changes to its training evaluation process. (JD 16:29-30). In fact, on April 2, 2014, after learning from the E&U employees that Alsemaan had made changes to the E&U department employees' evaluation process, Local 580 President Michael Silvery ("Silvery") wrote a letter to Human Resources Manager Zolotko requesting that Respondent meet and bargain about the changes and requesting documentation regarding the changes. (423:13-24; GC Ex. 6). On April 8, 2014, Zolotko responded by email stating only that the bargaining issue should be addressed by the parties' grievance procedure. (GC Ex. 8). Thus, having been

presented with a *fait accompli*, there was no waiver by the Local of the right to bargain. (JD 18:18-21; 9:10-16).

**B. The January 2014 Changes in Rules Regarding Food Safety**

In January 2014, Respondent announced that it was implementing a set of new hygiene standards at the Mill that applied to the paperboard and extruder units. (GC Ex. 23). These rules were introduced to employees through a series of food safety training sessions which took place in late January 2014. (JD 19:34-38; GC Ex. 23). The new rules were implemented immediately following the training sessions. (JD 19:38-39; GC Exs. 23, 24, and 25).

Among the changes Respondent implemented were new tobacco, food, and drink restrictions in the Mill's production zones, as well as the creation of two new "Hygiene Zones." (JD 20:10-34; GC Ex. 23). There were many new restrictions on what employees could bring into the production zones, including food and drink. (GC Ex. 23 at p. 30; GC Ex. 26). Respondent also implemented a series of similar, but more stringent, restrictions for the newly created Hygiene Zones. (GC Ex. 23 at p. 31; GC Ex. 26; 96:10-20) Similar new restrictions were placed around the Extruder, as Respondent admitted at the hearing. (GC Ex. 23 at 8-9; 526:9-529:4). Respondent's Human Resources Director, Diana Zolotko ("Zolotko"), confirmed that employees could be disciplined for failing to abide by the new restrictions. (JD 20:36-37; GC Exs. 24 and 25).

As properly found by the ALJ, it is undisputed that, in addition to the new food and drink restrictions, Respondent also announced in its January 2014 trainings that employees would now be expected to ensure that specific areas and pieces of

equipment in the Mill were thoroughly cleaned and to fill out “Cleaning Inspection Checklists” certifying that they had checked and cleaned each of the areas and/or equipment listed. (JD 20:40-22:17; GC Ex. 23 at 34; 602:18-603:2; GC Ex. 24 at bullets 8-10; GC Ex. 25 at bullets 8-10; GC Ex. 56). In January 2014, right after the food safety training, management presented bargaining unit members with these checklists and instructed them that they had to be filled out and provided to their TDM every day. (JD 21:1-3; 603:3-24; GC Exs. 56-103). Respondent’s Technical Service Manager Scott Donaldson admitted that these checklists and employee responsibilities associated with the checklists were implemented for the first time in February 2014 and that, prior to February 2014, employees were not responsible for this kind of inspection or cleaning. (JD 21:7-10; 538:24-543:19).

The ALJ properly confirmed that there is no dispute that all of these changes were implemented by Respondent without first notifying or bargaining with the Locals. (JD 23:14-27; 38:10-17; 85:12-21; 100:16-101:1; 122:22-25).

## **II. ANALYSIS**

First, Respondent excepts to the ALJ’s failure to find that Local 580 waived its right to have been first notified of and offered the opportunity to bargain over Respondent’s October 2013 changes to its E&U Department training evaluation process, both through contractual language and by failing to challenge the changes after they were implemented. As explained below, the ALJ properly found not only that the plain language of the contract does *not* constitute a clear and unmistakable waiver of Local 580’s statutory right to have been notified and bargain prior to the implementation of these changes, but also, the contract *itself* requires that the parties

jointly develop the means of evaluation, rendering Respondent's conduct in violation of both the Act *and* the contract. Further, the ALJ properly found that Respondent's unilateral implementation of the changes to its training evaluation process, with no prior notice to Local 580, constituted a *fait accompli*, such that Local 580's conduct following Respondent's unlawful action could not have acted as a waiver. *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986).

Second, Respondent argues that the ALJ erred by failing to find that the Locals waived their statutory rights to be notified and bargain prior to Respondent's unilateral implementation of the new food safety rules in January 2014, through contract language and by their failure to challenge the new rules after they were implemented by Respondent. Again, the ALJ properly found that the plain language of the contract did not clearly and unmistakably waive the Locals' statutory rights. Also, the ALJ properly found that Respondent's unilateral implementation of the new food safety rules, with no advance notice to the Locals, constituted a *fait accompli*, such that the Locals could not have waived their rights to be notified and bargain after the fact. *Id.*

**A. The ALJ Properly Found that Respondent Violated Section 8(a)(5) by Making Changes to its Training Evaluation Process in October 2013, Since Local 580 Did Not Waive its Right to Bargain Over Such Changes (Exceptions 1-6)**

The ALJ properly noted that it is uncontradicted that, in the fall of 2013, new E&U Manager Alsemaan significantly changed the way E&U employees, represented by Local 580, were evaluated and promoted. (JD 15:4-14; 16:14-27). The ALJ also properly confirmed that it is uncontested that Respondent failed to notify or bargain with Local 580 about its intention to change the method by which it was going to be conducting training evaluations or the effect that these changes would have on its

bargaining unit employees. (JD 16:29-32). Rather, Local 580 only learned of the changes from its members after Respondent put the changes into effect.

Under Section 8(a)(5) of the Act, an employer must provide its employees' representative with notice and an opportunity to bargain prior to instituting changes to a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962). However, an employer only violates the Act if the unilateral change to a mandatory subject of bargaining is a "material, substantial, and significant change." *Toledo Blade Co.*, 343 NLRB 385, 387 (2004) (citing *Flambeau Airmold Corp.*, 334 NLRB 165 (2001)). It is well established that all aspects of wages, including merit pay, are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Also, evaluations, especially those that have the potential to affect the wage rate an employee might receive, are a mandatory subject of bargaining. *Saginaw Control & Engineering*, 339 NLRB 541 (2003). The Board has long held that, even after the expiration of a collective bargaining agreement, an employer violates Section 8(a)(5) when it unilaterally changes wages, hours, and other terms and conditions of employment, as those terms and conditions generally survive the expiration of the agreement. *Hen House Market No. 3*, 175 NLRB 596 (1969). Further, "an employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if these practices are not required by the collective bargaining agreement." *Prime Healthcare Services*, 357 NLRB No. 63, 8 (2011) (citing *Sunoco, Inc.*, 349 NLRB 240, 244 (2007)).

Accordingly, an employer cannot change such established past practices without notifying and offering to bargain with its employees' collective bargaining representative. *Id.*

### **1. The Plain Language of the CBA Does Not Act as a Waiver**

As discussed above, the changes here to a long-established practice were significant and a mandatory subject of bargaining, such that they required notice and an opportunity to bargain prior to implementation, under *Katz*. 369 U.S. 736 (1962). However, it is true that a waiver of the duty to bargain may result from action or inaction, through contractual language specifically waiving the right of a party to bargain about a particular subject, or in the failure of a party to protest unilateral action. *Ador Corp.*, 150 NLRB 1658 (1965); *U.S. Lingerie*, 170 NLRB 750 (1968). As the ALJ rightly cautions, though, the Board and the courts have construed the waiver doctrine narrowly and have been reluctant to infer waiver in the absence of *clear and unmistakable conduct*. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

In this case, not only did the ALJ find no evidence of a clear and unmistakable waiver by Local 580 of its statutory right to bargain over these changes in the contractual language, but in fact, he properly found that the contract specifically *requires* that Respondent and Local 580 *jointly* develop the means of evaluation and states that the minimum qualification levels and performance standards will be determined by *mutual* agreement between Respondent and Local 580. Without a doubt, it cannot be said that the relevant contractual language, *requiring* joint development of Respondent's training evaluation process, constituted a clear and unmistakable waiver of Local 580's right to be notified and bargain prior to Respondent's unilateral implementation of

significant changes to its 20-year-long past practice of how it performed E&U training evaluations.

Specifically, under the subheading “Pay for Skills”, 580 Local Ground Rule No. 48 of the parties’ E&U collective bargaining agreement provides:

. . . Some component of pay will be based on skill, with increasing pay as additional skills and capabilities are acquired and used. Processes will be developed to assure that acquired skills are maintained and continuously improved upon. For greater clarity, management shall have the right to implement certification requirements where required by law or when recommended by industry standards (e.g. Black Liquor Recovery Boiler Advisory Committee, Factory Manual). *The Company and the Union will jointly develop the means of evaluation.*

. . .

The new work design will define the advancement process. *The minimum qualification levels and performance standards will be determined by mutual agreement between the Company and the Union.*

. . . *The Company and the 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 to tool.*

(GC Ex. 4 at 176-77, *emphasis added*). This provision of the Local 580 collective bargaining agreement remains unaltered in the parties’ successor agreement. (GC Ex. 5).

In addition, the parties’ 1999 E&U Design Agreement (referred to in the Local 580 collective bargaining agreement as the “new work design”) clearly states that Local 580 and Respondent have joint decision making authority with regard to the “level of skills needed,” the “gap between current and needed skills,” and scheduling training for E&U employees. (JD 14:7-12; GC Ex. 37 at 26; 172:17-173:6).

Interestingly, Respondent’s exceptions brief is the first time it has taken the position that the contract in any way privileged it to take this unilateral action. Ignoring

the relevant contractual language above, which strongly supports the ALJ's finding, Respondent instead focuses on language in the 1999 new work design agreement specifying that Respondent's "System Leader" is the actor who has the ultimate authority to "Assess mastery; verify learnings," and "Approve/Veto" such determinations. (JD 14:14-16; GC Ex. 37 at 24-26). However, it is undisputed that the contract gives Respondent the right to ultimately determine whether a given employee has demonstrated the requisite skills to advance within Respondent's pay scale. No one is arguing that Local 580 should be included in making final decisions as to individual employees' aptitude or satisfaction of Respondent's job skills requirements. The issue at hand is that the contract requires that the "means" or "instrument" of evaluation be developed jointly between Local 580 and Respondent, which the above-cited contractual language makes clear.

Respondent then argues that the language that "management shall have the right to implement certification requirements where required by law or when recommended by industry standards" means that only where such law-required or industry-recommended certification requirements are at issue must Respondent include Local 580 in joint development of the means of employee evaluation. It is unclear where Respondent finds support for this proposition; the language quoted does nothing to narrow the circumstances under which Respondent must bargain with Local 580. Rather, again, this language simply demonstrates Respondent's contractual right to define its skills requirements for employees. Per the contract, though, any changes to how employees are *evaluated* for whether they have met such requirements require Local 580's involvement.

Finally, Respondent postulates that the language providing for joint development of the evaluation instrument “only applies to new hires before they are allowed to enter a work system,” noting that this purported qualification of the contractual language is “clear from the face of the ALJ’s decision.” (R. Br. 11). However, there is no support in the record, let alone in the ALJ’s decision, for this narrowing of the contractual requirement that the parties jointly develop the means of evaluation. Rather, the quoted language regarding “Pay for Skills” details how Respondent’s employees will advance through the ranks and earn increased pay as they gain and demonstrate new skills throughout their employment with Respondent.

In sum, the ALJ properly found that, despite Respondent’s legal and contractual obligations to bargain over the instant changes to its E&U training evaluation process, it did not do so. Since there is no evidence in the contract of a clear and unmistakable waiver of Local 580’s right to be notified and bargain over changes to the training evaluation process, and since the contractual language in fact seems to further require that Respondent act jointly with Local 580 to develop or make changes to its E&U training evaluation system, Respondent, as the ALJ properly found, clearly violated Section 8(a)(5) (and, arguably, the contract) when it radically changed that evaluation process after 20 years, without first notifying or bargaining with Local 580.

## **2. Local 580 Did Not Waive its Right to Bargain by Failing to Challenge the Changes to the Training Evaluations**

The ALJ also properly found that, since Local 580 was given no notice prior to Respondent’s implementation of the food safety rules in February 2014, Local 580 could not have waived its right to bargain. (JD 19:10-11). Rather, Respondent’s conduct constituted a *fait accompli* under *Intersystems Design & Technology Corp.*, 278 NLRB

759 (1986). (JD 18:18-31). Respondent excepts to this conclusion, arguing that *fait accompli* can only be found where an employer gives “a notice [of planned changes] 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.” (R. Br. 12). Applying this standard, Respondent argues that the fact that Local 580 did not quickly catch on, object, and demand bargaining when Respondent unilaterally implemented substantial changes to its E&U training evaluations constituted an after-the-fact waiver of its right to have been first notified and offered the opportunity to bargain *prior* to the unilateral changes. This is not a proper analysis of the law.

Section 8(a)(5) requires that an employer affirmatively notify and provide the union with an opportunity to bargain prior to implementing any unilateral change to working conditions. When an employer fails to do so and instead implements changes without any advance notice to the union, the result is simple: the changes constitute a *fait accompli*. *Intersystems Design*, 278 NLRB 759 (1986). To avoid a *fait accompli*, an employer must not only *inform* the union of its proposed action before undertaking it, but also must do so *under circumstances which afford a reasonable opportunity for counter arguments or proposals*. *Id.* Respondent’s analysis that *fait accompli* requires a notice accompanied with actions or words indicating the employer will brook no dissent or discussion belies the error in its legal analysis; in this case, Respondent did not even inform Local 580 of its plans before it implemented them, let alone give Local 580 a reasonable opportunity to first make any counter-proposal. Thus, the ALJ properly

reached the obvious conclusion that Respondent's conduct resulted in a *fait accompli* and that Local 580 could not have waived its right, after the fact, to be notified before the changes were implemented.

**B. The ALJ Properly Found that Respondent Violated Section 8(a)(5) by Making Changes to its Rules Regarding Food Safety in January 2014, Since the Locals Did Not Waive their Rights to Bargain Over the January 2014 Changes in Rules Regarding Food Safety (Exceptions 7-13)**

It is uncontested that, in January 2014, Respondent placed new restrictions on its employees' ability to use chewing tobacco or have food, drink, and other personal items on in the production area as well as the newly designated Hygiene Zones, and that all of these changes were implemented without first notifying or bargaining with the Union. (JD 23:24-27). Respondent's implementation of these new food safety rules, when taken together, materially affected its employees' terms and conditions of employment and constituted a mandatory subject of bargaining. (JD 23:27-29). The Board has found tobacco bans and food restrictions to be material and constitute a unilateral change in terms and conditions of employment, especially where those new work rules could be grounds for discipline. *W-I Forest Products Co.*, 304 NLRB 957, 959 (1991); *King Soopers, Inc.*, 340 NLRB 628 (2003); *The Toledo Blade Co., Inc.*, 343 NLRB 385 (2004).

It is also undisputed that in February 2014, Respondent unilaterally implemented new job duties related to food safety, requiring employees to fill out checklists ensuring that certain areas of the Mill were clean. (JD 23: 14-18). In addition, if those areas were not clean, the employee would be responsible for cleaning those areas. (JD 23:18-19). It is also unrebutted that, as of February 2014, Respondent newly required

employees, including those who work in the rewinder area, to spend the last hour of their four-day shift thoroughly cleaning each of the areas listed on the checklist, a job duty that was not previously required. (JD 23:19-22). Employee job assignments are a mandatory subject of bargaining. *Flambeau Airmold Corp.*, 334 NLRB 165, 171- 72 (2001). The Board has found that an increase in job duties constitutes a unilateral change. *Bundy Corp.*, 292 NLRB 617, 678 (1989).

As to all of these changes, it is unrebutted that Respondent failed to notify or bargain with the Locals regarding its intention to implement changes to its food safety regulations or of the effect that these changes would have on the Locals' bargaining unit employees. (JD 23:14-16; 23:24-26). As such, the ALJ correctly found that Respondent violated Section 8(a)(5) by unilaterally implementing these new job duties and assignments as well as the food safety rules. *Flambeau Airmold Corp.*, 334 NLRB 165, 171-72 (2001); *Bundy Corp.*, 292 NLRB 617, 678 (1989); *W-I Forest Products Co.*, 304 NLRB 957, 959 (1991); *King Soopers, Inc.*, 340 NLRB 628 (2003).

### **1. The Plain Language of the CBA Does Not Act as a Waiver**

In its exceptions brief, Respondent argues that the ALJ erred by not finding that, through the following contractual language (found in both contracts), the Locals waived their rights to bargain over changes to work rules, rendering Respondent's admitted unilateral implementation of the food safety rules lawful:

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 furthers, 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.

(GC Ex. 4, p. 21, sec. 17; GC Ex. 3, p.21). Applying *Provena St. Joseph Hospital*, 350 NLRB 808, 815 (2007), as well as *Cincinnati Paperboard*, 339 NLRB 1079 (2003), and *Ingham Regional Medical Center*, 342 NLRB 1259 fn. 1 (2004), the ALJ properly concluded that the above language did not “clearly and unmistakably” give Respondent the right to formulate (and implement) new work rules without notifying and bargaining with the Locals. Instead, the ALJ acknowledged that this language was designed to define the work rules under which employees could be properly disciplined and in no way grants a Respondent a contractual right to unilaterally implement new work rules.

In its exceptions brief, Respondent argues that this language “could not be any clearer – it... explicitly states that the Company may change existing rules or make new rules, as long as those rules are not ‘inconsistent with this Agreement’.” (R. Br. 5). On the contrary, the language does clearly reflect that Respondent may *not* make new rules that are inconsistent with the Agreement. In the other direction, though, there is no language in this section *granting* Respondent any right – let alone one contrary to the Act – *to* unilaterally create new rules of any kind (or enact changes to old rules).

In sum, as the ALJ rightly concluded, Section 17A.13 grants Respondent no additional contractual rights; rather, the purpose of Section 17 is to define the circumstances under which Respondent can discipline employees, including for

violation of Company work rules, as addressed in the above-quoted language.<sup>2</sup> Employee discipline for violation of Company work rules is not at issue in this case. To impute a clear and unmistakable waiver by the Locals of their statutory right to be notified and bargain over changes to working conditions like the new food safety rules at issue here, based on this language, would be ludicrous. Accordingly, the ALJ properly found no clear and unmistakable waiver in this contract language.

Respondent also points out that the ALJ erroneously suggested that Section 17A.13 “specifically states that there *shall* be discussion between the Respondent and Locals 580 and 633 regarding any changes to extant rules” (emphasis added). (JD 25:14-15). As Respondent notes in its exceptions brief, the language of Section 17A.13 actually suggests that there “may” be such discussions between the parties. However, the ALJ’s use of the wrong word is irrelevant. Absent a clear and unmistakable waiver of the statutory right, which, as discussed above, cannot be found in this language, the Locals had a right to be notified and given the opportunity to request bargaining prior to the implementation of the new food safety rules – whether such discussions ended up occurring or not. No one disputes that no such opportunity was given here. As such, the ALJ rightly found that Respondent violated Section 8(a)(5) when it implemented these widespread new food safety rules without first notifying and bargaining with the Locals.

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<sup>2</sup> The ALJ specifically concluded: “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. Section 17B.3 [sic] has nothing to do with the Unions’ waiver of bargaining over work rules.” (JD 25:10-16).

## 2. The Locals Did Not Waive their Right to Bargain by Failing to Challenge the Food Safety Changes

The ALJ also properly found that Respondent's conduct in implementing the food safety rules in January 2014, without any prior notice to the Locals, constituted a *fait accompli* under *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986). (JD 25:19-25).

Again, as with the unilateral changes to its E&U training evaluation process, Respondent attempts to defend itself by arguing that it began training its employees on the new food safety rules prior to their implementation – and, as such, the Locals had plenty of opportunity to learn about the imminent changes from their respective bargaining units and then complain to Respondent, yet they did not. Respondent characterizes these facts as constituting a clear and unmistakable waiver of the Locals' statutory rights. Respondent's analysis is not sound.

First, the trainings themselves began without notice or an opportunity to bargain, in violation of Section 8(a)(5) of the Act. As the ALJ properly found, the widespread new food safety rules were then implemented *immediately* following the training sessions. (JD 19:34-38; GC Exs. 23, 24, and 25). There was no time for the Locals to act, even if they had been clearly notified by Respondent as the trainings began. Further, Section 8(a)(5) required *advance* notification to the Locals, and an opportunity to bargain, prior to Respondent's implementation of these changes. Respondent cannot escape the fact that it did not give such advance notification here before it imposed the food safety rules, resulting in a *fait accompli*. 278 NLRB 759 (1986). As such, the ALJ properly determined that Respondent violated Section 8(a)(5) when it unilaterally implemented these substantial new food safety rules and restrictions in January 2014.

### **III. CONCLUSION**

It is uncontested that Respondent dramatically changed the way that the E&U Department performed its training evaluations beginning in October 2013, with the evaluation process changing from a single 15-30 minute check-in to up to 14 hours of detailed testing. This change in form resulted in candidates facing major delays in acquiring their move up to the next classification. In addition, the content of the materials that were tested changed dramatically, from a focus on basic job duties to the minutia of Respondent's safety and environmental policies. These changes had a direct impact on a candidate's ability to earn a higher hourly wage, as each classification comes with a significant wage increase.

It is also uncontested that Respondent imposed significant new food safety rules on its employees in January 2014, which included new tobacco, food, and drink restrictions in various areas of the Mill, violation of which could result in employee discipline, as well as additional cleaning requirements and the creation of detailed "Cleaning Inspection Checklists" which employees were instructed to fill out daily, resulting in significant additional work duties.

Respondent does not contend that it notified or bargained with the Charging Party Unions prior to its implementation of either the October 2013 changes to its training evaluation process, or the January 2014 changes to its food safety rules. Neither does any section of the collective bargaining agreement demonstrate a clear and unmistakable waiver of the Unions' statutory right to have been notified and given the opportunity to bargain prior to Respondent's unilateral implementation of these two sets of significant changes to employees' working conditions. As such, it is clear that

the ALJ properly found that Respondent violated Section 8(a)(5) when it unilaterally changed the length, content, and format of its training evaluations, and implemented new food safety rules which imposed myriad new food, drink, and tobacco restrictions on employees (as well as substantial additional cleaning duties), without first notifying and bargaining with the Unions about these changes. *NLRB v. Katz*, 369 U.S. 736 (1962); *Saginaw Control & Engineering*, 339 NLRB 541 (2003).

Based on the foregoing, and the entire record evidence, Counsel for the General Counsel respectfully submits that the Board should reject Respondent's exceptions, as the ALJ properly found that Respondent violated the Act as alleged. The Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order. It is further requested that the Board order any additional relief it deems just and necessary to remedy Respondent's violations of the Act.

DATED AT Seattle, Washington this 20<sup>th</sup> day of May, 2015.

Respectfully submitted,



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## Certificate of Service

I hereby certify that a copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision was served on the 20<sup>th</sup> day of May, 2015, on the following parties:

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