

**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 REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## INTRODUCTION

Counsel for the General Counsel's ("Counsel for the GC") response ("*GC Br.*") to Respondent Weyerhaeuser Company's ("Respondent" or "the Company") exceptions 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 – misses the point in multiple ways, and is ultimately an attempt to muddy what is clear contract language giving the Company the right to take the actions complained of here.

The Board should decline to adopt the ALJ's findings on the food safety and the training evaluations allegations in this case. With respect to the food safety rules, Counsel for the GC concedes that the ALJ got it wrong by citing made-up language that is nowhere to be found in the parties' CBAs. Yet strangely, Counsel for the GC then goes on to say that "no language" in the CBA provision in question gives the Company the right to "create new rules of any kind," despite the fact that the language in question explicitly contemplates "changes in present rules," "additional rules," "existing rules," and "new rules," as long as those rules are not inconsistent with the CBA, and provides the Union with a potential remedy – discussion and/or the grievance procedure – if they believe the rules are unreasonable.

With respect to the training evaluations, the ALJ and Counsel for the GC both cherry-pick inapplicable CBA language while ignoring the unfavorable testimony of their own witnesses. The parties bargained for a process – the Company and the Union together would develop qualification standards, while the Company alone would measure if those standards were met. All of the changes in question here relate to the latter, not the former, and the Company was therefore privileged to implement them.

Finally, the ALJ wrongly held that the Unions did not waive their right to bargain by their long delay in challenging both of the changes at issue here. For these reasons and the reasons set forth in the Company's opening brief, the ALJ's findings on the food safety and the training evaluation portions of his decision should be disregarded, and these two complaint allegations should be dismissed.

### 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.**

As a starting point, Counsel for the General Counsel agrees – as she must – that the ALJ was wrong with respect to at least one portion of his decision, conceding that the ALJ somehow quoted language from the CBAs that simply does not exist, and used that made-up language as the basis for his finding of a violation. (*GC Br.* at 16). Yet Counsel for the GC contends that the ALJ's mistake was irrelevant because the language of the CBA does not constitute a clear and unmistakable waiver. For several reasons, Counsel for the GC is wrong.

The crux of Counsel for the GC's argument is that because the contract provision in question is titled "Causes for discipline or discharge are as follows," and what follows discusses violation of Company rules, there cannot be a clear and unmistakable waiver of the right to bargain over the implementation of new rules. But this overly formalistic analysis ignores the plain language of the provisions in question. The CBAs state:

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

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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)

Counsel for the GC states in her brief 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,” and that “there is no language in this section granting Respondent any right . . . to unilaterally create new rules of any kind.” (GC Br. at 15).

With all due respect to Counsel for the GC, this is just flat wrong. The language makes **explicit** reference to “new rules,” “additional rules,” “changes in present rules,” and “changes in rules.” While it is true that the provisions don’t explicitly say “Respondent can unilaterally create new rules and change existing rules,” it is unreasonable to read those explicit references and come to any other conclusion. There is no other explanation for the language regarding “new rules,” “additional rules,” “changes in present rules,” and “changes in rules.” Where else would “new rules” or “changes in present rules” come from but the Company? Why does the CBA say “changes in present rules or no additional rules **shall be made**” if the Company cannot make changes in present rules or make additional rules? Why qualify the Company’s right to make rules by stating that such rules cannot be inconsistent with the agreement? Why include the language about the grievance procedure? There would be nothing to grieve if no changes to rules were permitted. If new rules or changes to existing rules were not permitted, the CBAs would just say that Respondent could discipline for violations of existing rules.

Counsel for the GC also ignores the second portion of the ALJ’s mistake. The ALJ held that the CBA language was not a waiver because it “specifically states that there shall be

discussion” between the parties regarding changes to rules. As outlined in the Company’s opening brief and as conceded by Counsel for the GC, the CBA actually says that there “may” (not “shall”) be discussion about “new rules or changes in rules,” and that if there is disagreement, “the procedure for other grievances shall apply.” This is a long-established trade-off that many companies and unions make – the company gets to make rules unilaterally, and the union gets to challenge those rules through the grievance process.

Moreover, the interpretation propounded by Counsel for the GC directly contradicts the Board’s holding in *Provena St. Joseph*, 350 NLRB 808, 815 (2007). In *Provena St. Joseph*, the Board held that a combination of contract provisions giving the employer the rights to discipline and promulgate works rules, “relinquished [the Union’s] right to demand to bargain” over a new attendance rule. Here, the collective bargaining agreement has the same combination of provisions. It grants Respondent the right to suspend or discharge (see Section 17 B.3) and it grants Respondent the right to promulgate change rules, make additional rules and make new rules ( Section 17 A.13). Here as in *Provena St. Joseph*, the contract “clearly speaks to the right of Respondent to act.” Here as in *Provena St. Joseph*, the ALJ’s finding of an improper unilateral change must be rejected.

Finally, even if the language did not constitute a clear and unmistakable waiver, the Unions waived any right to bargain over the changes to the food safety rules. It is undisputed that the Company held multiple training sessions regarding the new rules *before* they were implemented; there is simply no reasonable argument that the Unions were unaware of the changes, yet they waited months to challenge them. And obviously, holding training sessions on new rules before they are implemented is hardly indicative of a *fait accompli*, or an attitude that brooks no dissent or discussion or otherwise indicates bargaining would be futile. To the

contrary, the parties were engaged in bargaining for a successor agreement at the time, yet the Unions never brought up the food safety rules until filing a charge months after bargaining ended. For this additional reason, the ALJ's findings on food safety should not be upheld, and the Complaint allegation should be dismissed.

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

As was the case with the food safety rules, the ALJ got the facts wrong with respect to the changes in training evaluations. The ALJ – and Counsel for the GC in her brief – make much of the fact that the CBA requires that minimum qualifications and performance standards are determined by mutual agreement. And they are right – no one disputes this. But it has little to do with this case. The Company did not change the minimum qualifications or performance standards. Instead, the issue is *the process used to verify that the employee has satisfied those standards*. And several General Counsel witnesses conceded that that determination (whether an employee is in fact qualified) is the sole province of the Company, and has been for years.

What's left, then, is the ALJ's conclusion that the CBA language stating that “[t]he Company and the Union will jointly develop the means of evaluation” means that the changes here were impermissible. That language comes, as Counsel for the GC correctly notes, in Local Ground Rule 48, which states:

. . . 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, Factor Manual). The Company and the Union will jointly develop the means of evaluation.

(GC Br. at 9).

This portion of Local Ground Rule 48 clearly states that the Company has the right to implement certification requirements where required by law or recommended by industry standards, and that if the Company does so, it will jointly develop the means of evaluation with respect to those newly-implemented standards. It does not mean that the Company has somehow abdicated its long-held right (confirmed by multiple GC witnesses) to determine whether an employee meets the general performance standards sufficiently to be promoted or receive a raise. This has always been the Company's sole province, and remains so.

Moreover, the ALJ and Counsel for the General Counsel not only cherry pick inapplicable language from Local Ground Rule 48, they ignore the central purpose and function of Local Ground Rule 48. Local Ground Rule 48 is titled **“Work Design Principles Processes and Roles”**. Local Ground Rule 48 mandates the “main elements included in their designs” including “verification of skills and knowledge.” The parties in fact negotiated a Work Design Agreement for the E & U Department (GC Ex. 37). As required by Local Ground Rule 48, the E & U Work Design includes provisions for “verification of skills and knowledge.” The E & U Work Design Agreement assigns the responsibility and authority to “Assess mastery; verify learnings” exclusively to Respondent and provides that Respondent shall have sole authority to “Approve/veto” such determinations. Thus, it is The E & U Work Design Agreement which controls the resolution of the issue before the Board.

Finally, even if there was no waiver via contract, there was a waiver via inaction. As was the case with the food safety rules, the ALJ misstated the law. In the ALJ's view, any change that is implemented without notice is a *fait accompli*. That cannot be the law, or there could never be a waiver in such a situation. And in any event, the change here was not a change that was presented as a *fait accompli*. There is no evidence that the Company gave the impression

that any attempt to bargain would be futile; indeed, the parties were engaged in bargaining at the time of the change. Despite that, for several months the Union made no proposals. Instead, as was the case with the food safety change, the Union just waited until months after the change to even raise any sort of challenge.

### **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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Dated: May 27, 2015

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**CERTIFICATE OF SERVICE**

I certify that on May 27, 2015 I served a copy of Weyerhaeuser's Post-Hearing Brief by e-mail to the following:

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