Weyerhaeuser Company *and* Association of Western Pulp and Paper Workers. Cases 19–CA–033069 and 19–CA–033095

June 20, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On January 30, 2012, Administrative Law Judge Eleanor Laws issued the attached decision. The Acting General Counsel and the Respondent each filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The Respondent, a manufacturer of pulp and paper, operates facilities throughout the United States and worldwide, including a plant in Longview, Washington, where the Association of Western Pulp and Paper Workers (the Union) represents a unit of about 150 production and maintenance employees. This case involves two rules that the Respondent maintained to limit employee use of its electronic resources.

1. In approximately 2004, the Respondent promulgated, on a companywide basis, its electronic media use policy, which restricted employee use of its electronic media to "business purposes only" and provided for limited personal use only with managerial consent. We agree with the judge's conclusion that the Respondent's maintenance of this rule was lawful.

2. Prior to June 15, 2010, employee union representatives at the Longview facility regularly used the Respondent's email system to communicate about contract administration matters. On June 15, the Respondent's management at the Longview facility promulgated a Company informational notice (CIN), which stated, in relevant part:

> This Company Informational Notice supersedes all previous discussions on the use of the Company e-mail system by Union Representatives to conduct Contract Administration. . . . While the Company has granted the Union permission to utilize the Company's e-mail system to discuss Standing Committee related business, the amount of time being taken by Union Representatives to compose and send emails during working hours has risen to an unacceptable volume.
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> These communications should they continue to be allowed to take place on the Company's e-mail system, should be focused on the process that needs to take place rather than protracted dissertations or arguments composed and sent during working hours of the Union Representatives. Failure to abide by these guidelines when using the Company e-mail system, regardless of when, will result in the Company reassessment of allowing Union Business to take place on the Company email system.

The CIN applied only to union representatives at the Longview facility. Counsel for the Respondent reiterated during the hearing that the Respondent implemented the CIN because it believed that union representatives were spending too much worktime sending emails and because its email system was not a "debating society." After the CIN issued, the Union instructed its members to cease conducting most union business via email.

The Acting General Counsel alleged that the Respondent's maintenance of the CIN violated Section 8(a)(1) of the Act. At the hearing, counsel for the Acting General Counsel argued specifically that the rule unlawfully "discriminate[d] on its face along Section 7 lines." For the following reasons, we adopt the judge's conclusion that the Respondent's maintenance of the CIN was unlawful.

Consistent with the Acting General Counsel's argument, we find that the CIN was facially discriminatory and therefore unlawful. By its own terms, the CIN placed limitations only on email messages sent by union representatives and related to union business. Accordingly, we find that the CIN violated Section 8(a)(1). See *Enloe Medical Center*, 348 NLRB 991, 991 (2006) (holding that a rule barring the placement of union literature in the breakroom was discriminatory on its face).

In finding the CIN facially discriminatory, we observe that the Respondent does not argue that the CIN is an application of its existing electronic media use policy, which required that employees obtain permission from management to send personal emails. Moreover, any such argument would be unpersuasive. The CIN did not refer to the electronic media use policy, which predated the CIN by 6 years and was promulgated on a companywide basis. The CIN, in contrast, was specific to the Longview facility and was promulgated in response to email use by union representatives there. In our view, the CIN was a freestanding restriction on union-related email that the Respondent put in place independently of

[1] We have modified the judge's recommended Order to conform to the Board's standard remedial language and the violations found, and have substituted a new notice to conform to the Order as modified.

its previous efforts to regulate the use of its electronic media.[2]

Nevertheless, even if the two rules were read together, we would find the CIN to be discriminatory.[3] The Respondent contended that the CIN was necessary because union representatives were spending an excessive amount of time emailing during work hours. In order to justify its concerns to the judge, the Respondent introduced into evidence various email messages that were sent by union representatives on the company email system. While many of these emails related to union matters, others were entirely personal in nature, such as emails addressing family issues or forwarding jokes. Thus, the evidence indicates that the Respondent had at least tacitly permitted union representatives to send personal emails on its system. And, by the Respondent's own account, employee emails regarding contract administration were only part of the alleged problem regarding the misuse of worktime. Nonetheless, the CIN singled out just these union-related emails for more restrictive treatment. See *Colburn Electric*, 334 NLRB 532, 551–552 (2001) (holding that a rule prohibiting employees from talking about the union during work was facially unlawful), enfd. 54 Fed.Appx. 793 (5th Cir. 2002). For these reasons, we conclude that the CIN violated Section 8(a)(1).

Because we find the CIN to be unlawfully discriminatory, we agree with the judge that the Respondent also violated Section 8(a)(1) by disciplining employee Gerald Gilliam pursuant to the CIN.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Weyerhaeuser Company, Longview, Washington, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Disciplining employees for violating the Company informational notice."

2. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, revise or rescind the Company informational notice and notify employees in writing that it has done so."

3. Insert the following after revised paragraph 2(a) and reletter the subsequent paragraphs.

"(b) Within 14 days from the date of this Order, rescind the unlawful discipline issued to Gerald Gilliam."

Dated, Washington, D.C. June 20, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the June 15, 2010 Company informational notice.

WE WILL NOT discipline employees for violating the Company informational notice.

[2] See *Albertson's*, 351 NLRB 254, 258–259 (2007) (reversing judge for improperly analyzing work rules in tandem). The Respondent also observes that, under the parties' collective-bargaining agreement, union representatives were permitted to spend only reasonable time during work on contract administration business that could not be accomplished outside working hours. The CIN, it argues, was merely a tool to enforce this contractual provision. But the CIN went beyond simply reinforcing existing restrictions on union-related business during work time; it placed broad substantive prohibitions on the types of emails that union representatives could send.

[3] Member Block agrees with her colleagues that the CIN is a free-standing policy that is facially discriminatory and therefore unlawful. She finds it unnecessary to decide whether the CIN would be unlawful if considered in tandem with the electronic media use policy.

[4] In finding Gilliam's discipline unlawful, we note that the Board's analysis in *Continental Group*, 357 NLRB No. 39 (2011), does not apply here, as this case involves an unlawfully discriminatory rule rather than an unlawfully overbroad rule.

In light of our finding that the CIN was unlawful, we need not rely on the judge's alternative finding that Gilliam's discipline would have been unlawful even if the CIN were lawful.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of their rights listed above.

WE WILL, within 14 days from the date of the Board's Order, revise or rescind the Company informational notice and notify employees in writing that we have done so.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful discipline issued to Gerald Gilliam pursuant to the Company informational notice.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Gerald Gilliam, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WEYERHAEUSER COMPANY

Ryan Connolly, Esq., for the General Counsel.
Richard N. Van Cleave, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Longview, Washington, on November 8, 2011. The Association of Western Pulp and Paper Workers (the Charging Party, hereinafter referred to as the "Union" or "AWPPW") filed the charge in Case 19–CA–33069 on April 27, 2011, and the charge in Case 19–CA–33095 on May 24, 2011.[1] The Regional Director for Region 19 issued a consolidated complaint on August 30. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), by maintaining an overly-restrictive electronic media use policy and an overly-restrictive rule in the form of an "Informational Notice" regarding the Union's use of its email system. The complaint also alleges that Respondent violated Section 8(a)(1) by issuing written discipline to employee Jerry Gilliam. Respondent filed a timely answer denying all material allegations in the complaint.

On the entire record, including my observation of the witnesses' demeanor, and after considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Washington corporation with an office and place of business in Longview, Washington (the facility), is engaged in the manufacture and production of pulp and paper. During the past 12 months and at all material times it derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points outside the state of Washington. Respondent admits, and I find, that Respondent is engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. I further find, and it is uncontested, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and the Collective-Bargaining Agreement

The Union, Local 680, represents a unit of roughly 150 of Respondent's production and maintenance employees, and has done so for more than 30 years. In all, there are approximately 400 bargaining unit employees at the facility. The current collective-bargaining agreement (CBA) is effective from March 15, 2007, through March 14, 2014. (Jt. Exh. 5).[2]

The CBA, section 28, sets forth a multi-step grievance process for resolving disputes, complaints, and grievances. If a grievance is not resolved between the employee and his/her supervisor at step I, it is referred to the Company's Standing Committees. The Union Standing Committee and Company Standing Committee each have three representatives. At step II, the Union Standing Committee sets forth the grievance in writing to the Company Standing Committee, and the two Committees meet within 10 days. If they cannot resolve the grievance, it goes to the Mill Manager at step III.[3]

Apart from the grievance process, the Union can request a Standing Committee meeting on any topic of concern. A Standing Committee meeting may also serve as a conduit for the Company or Union to introduce and disseminate information. (Jt. Exh. 5, pp. 40–41; Tr. 80–82).

Section 19 of the CBA addresses safety, and provides for establishment of a Central Safety Committee with equal members from the Company and the Union. Local Ground Rule 21, section I, sets forth a detailed procedure to resolve disputes about unsafe working conditions. (Jt. Exh. 5.)

B. Electronic Media Use Policy

Respondent maintains an electronic media use policy (the Policy) that has been in place since approximately 2004. The Policy applies to all employees, including employees in the bargaining unit, and provides, in pertinent part:

> It a Weyerhaeuser policy that the company's electronic media, including intranet, Internet, extranet, telephony and messaging services are to be used for business purposes only. Limited personal use may be permitted with the consent of the employee's supervising manager if the use does not adversely affect:
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> - productivity;
> - work performance;
> - network performance;
> - Weyerhaeuser's goodwill or reputation;
> - or the cost of doing business.

[1] All dates are in 2011 unless otherwise indicated.

[2] Abbreviations are as follows: Joint Exhibit is "Jt. Exh."; General Counsel's exhibit is "GC Exh."; Respondent's exhibit is "R. Exh."; Transcript is "Tr."; General Counsel's brief is "GC Br."; and Respondent's brief is "R. Br."

[3] The grievance process is set forth in full at Jt. Exh. 5, pp. 41–42.

The Policy does not define the approved or appropriate "business purposes." Instead, it illustrates inappropriate use by way of the following 14 bullet-point examples:

- excessive, unreasonable or unauthorized personal use;
- visiting or sending information to or receiving information from Internet sites that involve pornography, terrorism, violence, racism, hate, gambling, militancy, hacking, illegal drugs or other offensive or inappropriate topics;
- storing, sending or forwarding e-mails that contain libelous, defamatory, racist, obscene, inappropriate or harassing remarks;
- sending or forwarding chain mail;
- unauthorized use, sharing or distributing of IDs or passwords;
- using company resources for personal benefit such as to run a business or provide a service;
- violating copyright or software licensing rules;
- posting messages to external non-business related newsgroups or chat rooms from a company computer;
- bypassing or disabling company network security measures, including anti-virus, firewalls, security patches and auditing services;
- forging or attempting to forge e-mail messages, or disguising or attempting to disguise or impersonate identities when sending e-mail;
- auto-forwarding e-mail to external mail systems;
- failing to apply company retention standards to electronic information;
- violating standards for e-mail box size and attachment limits;
- and creating or retaining protocols and applications not allowed within the firewall, e.g. peer top peer services, password cracking software, and rogue wireless access points.

(Jt. Exh. 1.)

Respondent provides email accounts to all employees at the facility, but very few employees have their own dedicated computer terminals, and some employees do not use their work email accounts. Employees receive annual training on the Policy. (Tr. 20, 53–54; R. Exh. 2 p. 17.)

C. Local Ground Rule 2

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. Specifically, it states, in pertinent part:

> When his/her work situation permits, a local union officer, committee member, or shop steward may be allowed a reasonable time off from his/her work to conduct business involving contract administration which cannot be properly accomplished outside of working hours. In each such case, the Union representative must receive permission from his/her supervisor to leave his/her job or department. If the Union representative is going to another department, the supervisor of that department will be notified.

(Jt. Exh. 5, 164–165.)

Tim Haynes became mill manager on January 1, 2008. Prior to that time, Local Ground Rule 2 was not enforced very tightly, and some union officials routinely engaged in contract administration on Company time without negative consequence.[4] When Haynes arrived, he advised that he would be following all of the rules in the CBA, including Local Ground Rule 2. (Tr. 85–86.)

D. Company Informational Notice (CIN)

On June 15, 2010, Respondent promulgated a local rule, set forth in a Company Informational Notice (CIN), which states as follows:

> This Company Informational Notice supersedes all previous discussions on the use of the Company e-mail system by Union Representatives to conduct Contract Administration. Local Ground Rule No. 2 prescribes that Union Representatives will be allowed reasonable time off from his/her work to conduct business involving contract administration which cannot be accommodated outside of working hours. While the Company has granted the Union permission to utilize the Company's e-mail system to discuss Standing Committee related business, the amount of time being taken by Union Representatives to compose and send emails during working hours has risen to an unacceptable volume.
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> These communications should they continue to be allowed to take place on the Company's e-mail system, should be focused on the process that needs to take place rather than protracted dissertations or arguments composed and sent during working hours of the Union Representatives. Failure to abide by these guidelines when using the Company e-mail system, regardless of when, will result in the Company reassessment of allowing Union Business to take place on the Company email system.
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> The Company fully recognized the rights of the Union to vigorously represent their membership but will require that all arguments related to that representation be directed to the appropriate processes provided for in the collective bargaining agreement.

(Jt. Exh. 2.)

The CIN was introduced at a Standing Committee meeting. It is specific to the facility, applies only to union representa-

[4] Chris Centers, Respondent's former human resources manager, testified that some supervisors did not assign certain union officers work because they were spending so much time on union business. (Tr. 86.)

tives, and its subject matter is confined to union business.[5] (Tr. 39.) Respondent issued the CIN based on its determination that its email system was being used inappropriately, perpetrating violations of Local Ground Rule 2. (Tr. 85.)

In an undated notice,[6] Mike Silvery, Local 580 President, and Jim Anderson, Local 633 President, sent the following message:

> Due to current and previous disciplinary actions to Union Officers and members, and the on-going confusion as to what is appropriate and what is not, Locals 580 and 633 take the following position regarding E-mail usage:
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> 1. E-mail is not an adequate notification to the membership on company policies. All such policies need to be posted and hard copies to Union Employees
> 2. Since Union members have either been investigated and/or disciplined because of e-mail usage, we will no longer conduct any business other than the following exceptions:
>   a. Requests for Union LOA's.
>   b. Union requests to schedule meetings with the Company.
>   c. Minutes from 2d and 3d step meetings will still be provided electronically to the appropriate Union officials.
>   d. Contract Notifications.

(R. Exh. 5.)

The Union is attempting to abide by the CIN pending its challenge. It contends, however, that the CIN represents a change in working conditions and is a subject of bargaining.[7] (Tr. 23, 35.)

E. Discipline of Gerald Gilliam

Gerald Gilliam works for Respondent as a vibration analyst. In that capacity, he collects vibration data from equipment using a computerized data collector and analyzes it to assess the condition of Respondent's machinery and troubleshoot when necessary. (Tr. 17.) Gilliam has been an AWPPW Local 580 member since 2003, the time of his hire. In January 2010 he was elected as a Standing Committee Officer.

In November 2010, Gilliam became involved in a safety complaint involving Glenn Kyllo, a unit member. Kyllo observed that contractors were working within 6 feet of the leading edge of a roof without fall protection or fall restraint. He also noted that there was no fall protection plan posted at the jobsite. Kyllo contacted the supervisors at the facility, who in turn contacted the Haynes, the mill manager.[8] Haynes advised the contractor regarding the safety violation and the need for fall protection. He also filled out a safety incident report. During a morning toolbox meeting, Kyllo expressed some concerns about the details in the safety report, and asked the supervisor present if there could be a more thorough investigation. After receiving no response, Gilliam told Kyllo he would take care of the matter. (Tr. 24–25.)

On November 18, 2010, while at home and using his own computer,[9] Gilliam sent an email addressed to Stacy Fanchin, safety manager, copied to several others, including the union safety representative, voicing his concerns over how Respondent investigated and reported the safety incident.[10] Specifically, he mentioned that the investigator(s) never met with Kyllo to ensure pertinent details were included in the report. He also noted that the report did not mention the lack of a Company-approved fall protection plan on the jobsite. In addition, the supervisor overseeing the projects was the sole investigator, in contravention of Company policy. Gilliam expressed concern about the breakdown in the incident investigation process, and opined this was indicative of how Respondent's "broken and fragile" safety program. He concluded by noting four recent incidents where employees broke through grating in different areas of the mill, and stated, "I fear we are skating on thin ice and are at risk for a serious, if not fatal injury. Please, lets [sic] get serious about fixing our safety issues BEFORE such a thing occurs." (Jt. Exh. 3; Tr. 24–26.) Gilliam used company-supplied email addresses to transmit copies to at least four of the recipients. (Tr. 45.)

On November 29, 2010, during a closed door meeting, David Kay, maintenance manager, issued Gilliam a "Letter of Expectations-Conduct."[11] The letter addressed Gilliam's alleged failure to follow proper channels in reporting the safety concerns, as well as his use of the company email system to voice a contract administration issue, in violation of the CIN. Kay noted that Gilliam was obligated to follow the CIN despite the fact that the Union had not responded to it. Kay concluded by informing Gilliam that, if the Union's duly appointed safety representative or his/her backup does not address safety concerns, then "reporting such concerns in a simple short transactional e-mail to the appropriate representative will suffice." (Jt. Exh. 4.) Chris Centers, who was Respondent's human resources manager prior to her retirement on July 7, reviewed the letter of expectation before it was issued. (Tr. 87.)

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[5] There was testimony that the scope was limited to "contract administration," but the CIN itself uses some broader terminology, such as "Standing Committee related business" and "Union business."

[6] Testimony indicates that the notice was distributed after to the CIN and was an attempt to comply with it. (Tr. 33–35.)

[7] The complaint does not allege unilateral change and failure to bargain in violation of Sec. 8(a)(5).

[8] Although Haynes is not specifically mentioned in Gilliam's testimony on this point, it is undisputed he was the mill manager at the time Kyllo raised his safety concerns.

[9] Gilliam testified that when an email concerning union matters or other topics not related to work comes to his Company email account, he forwards it to his personal email account. (Tr. 45–46.)

[10] The email was also sent to (1) Tim Haynes, mill manager; (2) Tim Pfeifer, acting president of Local 580; (3) Jim Chonzena, safety representative for Local 580; (4) Rex Osborne, standing committee member; (5) David Howell, standing committee member; and (6) Trent Scarborough, standing committee members. He sent a courtesy copies to: (1) Chris Redfearn, corporate safety representative; (2) Shaker Chandrasekhan, vice president of Cellulose Fiber; and (3) Glenn Kyllo, the employee who had reported the safety concern to Gilliam. Jt. Exh. 2.

[11] Rex Osborne was present at the meeting as Gilliam's shop steward; Also present for management was Becky Philpot, a mechanical planner for Central Maintenance.

The CBA mentions written records of oral reprimand, letters of reprimands, suspensions and termination, but does not mention letters of expectation or letters of coaching. (Jt. Exh. 5, 20, 159; Tr. 75.) Respondent generally does not conduct fact findings prior to issuing letters of expectation or letters of counseling. Fact findings are held, however, prior to the issuance of reprimands. (Tr. 40–41, 87–88; R 7, 8.)

According to Gilliam, letters of expectation and letters of coaching are an inherent part of Respondent's disciplinary process. They are maintained by the supervisor and can be referenced in later formal disciplinary action. (Tr. 29–30.) On November 1, Robbie Wilson, maintenance manager, issued a written reprimand to employee Rex Osborne for improperly conducting contract administration business during working hours. The reprimand referred to previous coaching for similar conduct. (GC Exh. 2.) Gilliam recalled another employee, John Nuso,[12] also recently had a letter of coaching referenced in later discipline. (Tr. 30.) Centers agreed that formal discipline can reference prior letters of coaching, and testified that supervisors consult with human resources prior to issuing letters of expectation or letters of coaching. (Tr. 93–94.)

III. ANALYSIS AND DISCUSSION

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

A. Electronic Media Use Policy

For the reasons set forth below, I find that the Electronic Media Use Policy does not violate Section 8(a)(1).

General Counsel has the burden to prove that a rule or policy violates the Act. Respondent's electronic media use policy is analyzed under the Board's decision in *Register Guard*, 351 NLRB 1110 (2007). The employer in *Register Guard*, a newspaper, maintained a policy that prohibited the use of its email system for "non-job-related solicitations." Noting that the issue of whether employees have a right to utilize a company's email system for Section 7 activity was an issue of first impression, the Board in *Register Guard* looked to policies involving other types of employer purchased equipment. In line with cases finding no statutory right to equipment such as televisions, telephones, bulletin boards, and public address systems, the Board found that the Union had no statutory right to utilize the newspaper's email system for Section 7 matters. Id. at 1114. It concluded that a Company may "lawfully bar non-work-related use of its e-mail system" unless it "acts in a manner that discriminates against Section 7 Activity." Id. at 1116. Because the policy at issue in *Register Guard* was not facially discriminatory, maintaining it did not violate the Act.

General Counsel concedes that Respondent's electronic media use policy, which generally prohibits the use of its email and telecommunication systems for all nonbusiness related purposes, is not discriminatory under *Register Guard*. Rather, it contends that the standards set forth in *Register Guard* are erroneous and should be overturned. Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board. Because the Electronic Media Use Policy is facially neutral, applying *Register Guard*, I find that its maintenance alone does not violate Section 8(a)(1). I therefore recommend dismissal of Paragraph 5 of the complaint.

B. The Company Information Notice

For the reasons detailed below, I find the CIN violates Section 8(a)(1).

In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity. *Firestone Tire & Rubber*, 238 NLRB 1323, 1324 (1978).

As an initial matter, some discussion regarding whether the CIN is a "work rule" is warranted. This is because the CIN is somewhat unique, in that it is applies only to union representatives and union business, and therefore is more limited in scope and application than most general workplace rules.

The law in this area initially developed with work rules prohibiting or curtailing union solicitation efforts and distribution of union organizing material. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945) (Court upheld the Board's presumption that a ban on solicitation at the premises during non-work time absent special circumstances violated the Act); *Stoddard-Quirk*, 138 NLRB 615 (Prohibition on distribution of literature in non-work areas during non-work time are presumptively unlawful). The law has evolved to cover rules and policies that do not involve solicitation or distribution, and are not tied to organizing efforts. See, e.g., *Lutheran Heritage Village-Livonia*, supra at 646 ("no loitering" rule found unlawful); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (confidentiality rule unlawful where confidential information was defined as "wages and working conditions such as disciplinary information, grievance/complaint information, performance evaluations, [and] salary information"). This evolution makes sense given that Section 7 protects rights beyond organizing, and explicitly includes the right for employees to "bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of

[12] The surname "Nuso" was transcribed phonetically, so the spelling may be incorrect. (Tr. 30.)

collective bargaining or other mutual aid or protection."

The CIN does not, on its face, apply to a broad range of employees. It does, however, implicate a broad range of Section 7 concerns. The CIN limits Union use of the email system to "the process that needs to take place" and threatens to take away all access for union business. It directs that all arguments related to representation be referred to the process provided for in the CBA.[13] Clearly, the CIN implicates Section 7 concerns of "concerted activities for the purpose of collective bargaining or other mutual aid or protection." There is nothing in the language of the Act, and I could find nothing in the Board's case law, to require that, in order for an employer promulgated rule to be subject to enforcement under Section 8(a)(1), it must explicitly apply to all employees or even most employees.[14] Accordingly, I find the CIN is appropriately analyzed as a workplace rule or policy.

Turning now to whether the CIN violates Section 8(a)(1), General Counsel argues that the CIN explicitly restricts Section 7 activity, and therefore it is unlawful under the first prong of the *Lutheran Heritage Village-Livonia* test articulated above. The CIN instructs that if the communications it previously allowed, which pertained to contract administration and Standing Committee matters, are to continue to be allowed, they "should be focused on the process that needs to take place rather than protracted dissertations or arguments composed and sent during working hours of the Union representatives."

As set forth above, under Local Ground Rule 2, a local union officer, committee member, or shop steward may be permitted a reasonable time during work hours to conduct contract administration work that cannot otherwise be accomplished outside of working hours. 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. By implementing the CIN, respondent curtailed the use of email for contract administration work it had previously deemed permissible.[15] There can be no doubt that contract administration work implicates Section 7 concerns. Accordingly, I find that the CIN explicitly restricts Section 7 activity, and is therefore unlawful under *Lutheran Heritage Village-Livonia*, supra.

Respondent asserts that by challenging the CIN, the General Counsel is "asking that Local Ground Rule 2 be voided and that Union representatives be given unfettered access to the company email system for purely Union business." (R. Br.) This misconstrues Local Ground Rule 2, however, which has the built in safeguard of supervisory approval. If Local Ground Rule 2 is being enforced, then the supervisor, who must grant permission to for the union official to take work time to attend to contract administration, would be able to control the amount of time spent regardless of the forum. Thus, enforcement of Local Ground Rule 2 and the use of email are attenuated. Rather than enforcing Local Ground Rule 2 with its intrinsic mechanism of requiring supervisors to determine and grant only reasonable time for contract administration business, Respondent appears to be taking a backdoor approach by curtailing email usage. Challenging the CIN, therefore, does not void Local Ground Rule 2. It merely encourages Respondent to enforce it the way it was intended.

Respondent also argues that *Register Guard* stands for the proposition that since its Electronic Media Use Policy can prohibit the Union's use of its email system entirely, it follows that the CIN can set limits on how the Union may use it. The CIN warns that failure to abide by it "will result in the Company reassessment of allowing Union Business to take place on the Company e-mail system." As such, the CIN plainly is premised on a belief that the Policy can be enforced to disallow email for anything that might be considered Union-related. This premise, however, is faulty.

The Policy states that use of Respondent's email is for "business purposes" only.[16] It is unclear from the face of the document, what, if any, union activities are also considered to have a business purpose.[17] Reasonable minds can certainly differ on where to draw the line between what serves a business purpose and what is a Union matter. They are not mutually exclusive.[18] For example, there was testimony that the Standing Committee addresses work concerns aside and apart from the CBA, and that Standing Committee meetings are often the place where important Company information is initially conveyed. There is no neat way to label the Standing Committee's broad function as "Union activity" or as Company "business-related" activity. It straddles both. The other area the CIN focuses on is "contract administration." Reasonable minds can certainly differ as to what constitutes a contract administration matter and what serves a business purpose. To illustrate, Kay viewed Gilliam's November 18, 2010 email raising the Union's concerns about Respondent's investigation into the safety violation Kyllo reported as voicing a contract administration issue. (Jt. Exh. 3.) Gilliam viewed it voicing as a safety concern, not a contract administration concern. (Tr. 48.)

Given the lack of clear definition of the terms "business purpose," and "contract administration," longstanding precedent

[13] The CBA is silent on mode of communication, other than to say that grievances are to be "in writing." On its face and standing alone, this does not preclude email.

[14] The CIN indirectly does impact all unit employees, because it curtails email communication with union representatives about work-related concerns.

[15] The same rationale applies to standing committee work and other union business Respondent had previously deemed permissible topics for the use of its email system.

[16] While not to be exhaustive, many of the delineated items in the Policy's 14-item bullet list of unauthorized activities concern matters that are unlawful, are generally regarded as immoral or extremely distasteful, or that violate Company rules. Local Ground Rule 2 permits reasonable time off work for "business" involving contract administration. The CIN refers to "Standing Committee related business." There are clearly "business purposes," in the broad sense of the term, implicated by both of these rules.

[17] The ambiguity of "business-related" is illustrated by its definition in the Cambridge Dictionary as "connected to business." The examples of its use are: "The Network provides business-related news."; and "I'm not sure what I'm going to do when I leave college—something business-related." http://dictionary.cambridge.org/dictionary/business-english/business-related.

[18] The Act recognizes this in Sec. 1.

requires that "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); see also *Norris/O'Bannon,* 307 NLRB 1236, 1245 (1992*)*. Some Union matters, including contract administration, can therefore also be reasonably construed to serve a business purpose. Accordingly, the Policy does not prohibit use of Respondent's email system for Union-related activities that can also reasonably be considered to have a business purpose.[19] Respondent's argument based upon this premise therefore fails.

In its brief, Respondent argues that the tone and civility of the emails eroded because it is easier to say things in an email than it would be in a face-to-face message. The only evidence that can arguably be related to the tone and civility of the emails offered as a justification for the CIN comes from the document itself, which states that communications should be focused on process rather than "protracted dissertations or arguments." Respondent points to several specific emails ranging in date from September 2008 to June 11, 2010, and ranging in length from a few sentences to roughly a page, in support of its contention. There was no testimony or other evidence connecting the tone of these emails to the decision to issue the CIN, which was ostensibly promulgated to help enforce Local Ground Rule 2. Moreover, the argument that it is easier to say things in an email than face-to-face is not unique to communications from union representatives. There are plenty of workplace exchanges that would lend themselves to this dynamic, and the only way to meaningfully guard against it would be to ban the use of email in the workplace altogether.

Finally, Respondent contends that the CIN is a narrow restriction to protect its legitimate interest in productivity. Respondent did not present evidence that Gilliam or any other bargaining unit employee had production deficiencies due to email usage. Therefore, any productivity argument is not substantiated.

Moreover, for reasons detailed in this decision, the CIN is a vague and ambiguous restriction rather than a narrowly tailored solution to Respondent's concern about union officials spending too much time on union matters. The *Lutheran Heritage* principle provides that the Board must give the rule under consideration a reasonable reading. 343 NLRB at 647; and ambiguities are construed against the promulgator of the rule. *Lafayette Park Hotel*, 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007). Respondent presented a series of both pre and post-CIN email communications between Union Standing Committee Chair Rex Osborne and different managers, including Centers and Haynes, regarding matters reasonably construed as contract administration issues. Both Osborne and management alike used the email system for these communications. (R. Exh. 2.) Respondent also presented a series of emails Gilliam wrote. Some of these emails were to other union members and/or representatives, while others were exchanges with members of management.[20] Many of the exchanges preceding and some postdating the CIN were between Gilliam and Bob Gallegos from human resources, concerning what can reasonably be construed as contract administration matters. (R. Exh. 2 pp. 27–45.) 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.

C. Discipline of Gilliam

I find that the letter of expectation issued to Gilliam violated Section 8(a)(1) for the reasons discussed below.

As a threshold issue, Respondent argues that the letter of expectation was not discipline because the CBA, section 17, states that "[d]ischarge, suspension or letter of reprimand of an employee shall be for just or sufficient cause." (R. Br.) Because letters of expectation are not on this list, Respondent asserts, they are not discipline. This reasoning, however, runs afoul of Board precedent. *Promerdical Health Systems*, 343 NLRB 1351, 1351–1352 (2004), enfd in relevant part 2006 Fed.App. 0737N (6th Cir. 2006) (Not selected for publication in the Federal Reporter, No. 05–1660, 05–1736), cert. denied 549 U.S. 1338 (2007). In *Promerdical Health Systems*, the Board found that "coachings" were discipline because they played a significant role in the company's progressive discipline process. Specifically, if an employee had received a coaching or counseling, this was considered when determining the nature and extent of any discipline for future infractions. Similarly, the Board has held that warnings and reprimands that are "a foundation for future discipline" are a part of the employer's disciplinary process. *Trover Clinic*, 280 NLRB 6, 16 (1986).

I find the General Counsel has proved that letters of expectation, such as Gilliam received, are a foundation for future discipline, and as such are part of Respondent's progressive disciplinary process. It is clear from the record that Respondent uses letters of expectation and letters of counseling in shaping future discipline. Respondent's human resources manager testified that supervisors consult with human resources prior to issuing letters of coaching, and that future discipline can make reference to prior coachings. (Tr. 92–93.) This is exemplified

[19] Respondent's argument glosses over a key difference between this case and *Register Guard.* The restriction in *Register Guard* was on non work-related *solicitations* only. The restriction here is on all nonbusiness related matters, not just solicitations. Trying to separate out Union related activity from business related matters was not present with a rule involving only solicitations. In fact, discipline issued for using the newspaper's email system for a Union related matter that was not a solicitation was rescinded in *Register Guard* because it was not a violation.

[20] Some other emails in R. Exh. 2 were jokes sent via the email system from what appear to be private email accounts. The senders were not identified at the hearing, and it is not possible to discern some of the senders' identities from the emails themselves. (R. Exh. 1 pp. 18–22.) While Respondent clearly has a right to restrict email circulating such jokes, this is not within the scope of the CIN. There is one rather lengthy 2-1/2-page email Gilliam sent from his work email address to his home email address in May 2008. (R. Exh. 1 pp. 3–5.) The remainder of the emails range from a few sentences to about 1/2 page.

in employee Rex Osborne's reprimand for improperly conducting contract administration business during working hours. The reprimand refers to a coaching for similar conduct, and finds its justification on a "serious pattern" of violations. (GC Exh. 2.) Under these facts, applying *Promerdical Health Systems,* supra and *Trover Clinic,* supra, Respondent's argument that the letter of expectation was not discipline must fail.[21]

Discipline of an employee violates Section 8(a)(1) if it is the result of enforcement of an unlawful rule. *Nova Southeastern University*, 357 NLRB No. 74 (2011). Gilliam was issued the letter of expectation was for violating the CIN. Because, for the reasons stated herein, I find the CIN unlawful, I find that Gilliam's discipline for failure to abide by it violates Section 8(a)(1).

Even assuming the CIN is not unlawful, I find Gilliam's letter of expectation violates the Act because the November 18, 2010 letter that served as the basis for the discipline constituted protected concerted activity. Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Rights guaranteed by Section 7 include the right to engage in "concerted activities for the purpose . . . of mutual aid or protection." An employee's discipline independently violates Section 8(a)(1), regardless of the employer's motive or a showing of animus, where "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). In addition, it is violation of Section 8(a)(1) if employee is disciplined for engaging in concerted protected activity, even where the employer honestly and in good faith, but wrongly, believes that the employee has engaged in misconduct in the course of that protected activity. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964).

The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub non *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887.

[21] Even assuming the letter of expectation was not discipline, its issuance would still be a violation of Sec. 8(a)(1). In *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403 (1993), the Board found that the issuance of a "conference report" in response to a complaint about various employment conditions violated Sec. 8(a)(1) even though it was not considered discipline. The violation was based on the Board's finding that the conference report was a threat of future reprisal for protected concerted and union activities. As discussed below, I find Gilliam's email that led to the letter of expectation was protected concerted activity, and that least one of its purposes was to address safety concerns.

Gilliam's November 18, 2010 email was written in direct response to Kyllo's expression of concern to him regarding the investigation into Kyllo's reports of safety infractions. Kyllo had asked the supervisor at a toolbox meeting if there could be a more thorough investigation into the safety issue he had raised. After getting no response, Kyllo had talked to Gilliam about sending an email to inquire about taking things to the next level of management. Gilliam advised Kyllo that he would take care of that himself. (Tr. 24.) Gilliam's email was clearly an effort to bring Kyllo's concerns to management's attention. The letter itself is phrased in terms of the Union's concerns, with Gilliam noting that he lacks authority to speak on behalf of non-Union employees. The substance of the email itself, however, expresses concerns that, in Gilliam's view, potentially affect all facility employees. It therefore constitutes concerted activity.

Respondent asserts the complaint should have been lodged through different channels, such as the grievance procedure, the Standing Committee, a meeting with the mill manager, or the contract safety procedure. Gilliam explained his understand of the Standing Committee process was to attempt to resolve the matter at the supervisory level first. If this was unsuccessful, the next step would be to contact the Company Safety Manager and Union Safety Representative, and if they could not come to agreement, the matter would go to the mill manager. Gilliam testified that he felt he was following an appropriate process when he sent the email. In addition, Gilliam testified that Respondent maintains an open door policy when it comes to raising safety concerns. (Tr. 48–50.) I credit Gilliam's testimony both because it is unrefuted, and because of Gilliam's demean or. Gilliam was somewhat hesitant to answer a couple of questions about the whether the Union was complying with the CIN, noting at one point that he felt he was being "set up." I do not attribute this to lack of candor, however, but rather to concern that, in light of the confusion surrounding the topic, he was going to misspeak or say something that would be misconstrued. His demeanor during the testimony regarding the procedure he followed when sending the email at issue was forthcoming and straightforward. (Tr. 47–50.) In any event, regardless of the forum Gilliam used, the email was concerted activity protected by Section 8(a)(1). Rather than discipline Gilliam, if Respondent wanted the complaint processed in a particular forum, it could have easily routed it there.

Accordingly, based on the foregoing, I find the General Counsel has met its burden to prove that issuing the letter of expectation to Gilliam violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act as set forth herein.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. As I concluded that the Company Informational Notice is unlawful, the recommended order requires that the Respondent revise or rescind it, and advise its employees in writing that said rule has been so revised or rescinded.

Further, the Respondent having unlawfully disciplined Gerald Gilliam will be ordered to make appropriate changes to personnel files and/or other supervisor maintained files. The Respondent will be ordered to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[22]

ORDER

The Respondent, Weyerhaeuser Company, Longview, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing the June 15, 2010 Company Informational Notice.

(b) Disciplining employees for violating the Company Informational Notice or for engaging in protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, revise or rescind the Company Informational Notice.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Gerald Gilliam and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 19, after being duly signed by the Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[24] In the event that, during the pendency of these proceedings, the Respondent has gone out of business or left the jobsite involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 2010.

(d) Within 21 days after service by the Regional Office, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 30, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT maintain or enforce the June 15, 2010 Company Informational Notice, which instructs that if the communications it previously allowed pertaining to contract administration and Standing Committee matters, are to continue to be allowed, they "should be focused on the process that needs to take place rather than protracted dissertations or arguments composed and sent during working hours of the Union representatives" and threatens to reassess allowing any Union business to take place on Company email "regardless of when."

WE WILL NOT discipline employees for violating the Company Informational Notice or for engaging in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights stated above.

WE WILL revise or rescind the rules contained in the Company Informational Notice.

WE WILL rescind the letter of expectation issued to Gerald Gilliam on November 29, 2010.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[24] The question of whether the Respondent electronically communicates with employees is left to the compliance stage of these proceedings.

WE WILL remove from our files any reference to the unlawful discipline of Gerald Gilliam and notify him in writing that this has been done and that the discipline will not be used against him in any way.

WEHERHAEUSER COMPANY