UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of SOLUTIA, INC. and UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 414C/INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL, AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, CLC and IUE-CWA, LOCAL 288, INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS OF AMERICA, AFL – CIO (Party in Interest)	CASE 1-CA-45447

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

I. SUMMARY

A hearing in this case was held before Administrative Law Judge Jeffrey D. Wedekind on April 7 and 8, 2010. Judge Wedekind's Decision and Recommended Order issued on July 30, 2010, finding that Respondent violated the National Labor Relations Act by failing and refusing to provide United Food & Commercial Workers Union, Local 414C/International Chemical Workers Union Council, affiliated with United Food and Commercial Workers International Union, CLC (herein, "Local 414C" or "the

Union"), with an opportunity to bargain over Respondent's decision to consolidate its laboratory operations and transfer Local 414C unit work, and the effects of that decision on unit employees. Judge Wedekind ordered restoration of the status quo, and reinstatement and back pay to employees who were transferred, bid out, or retired as a result of Respondent's unlawful actions. Exceptions to these findings and conclusions were filed by Respondent on August 25, 2010.

Counsel for the Acting General Counsel files this brief in support of certain findings of the Administrative Law Judge, and in answer to Respondent's exceptions. As addressed more fully below, the Administrative Law Judge's identified findings and conclusions are fully supported in fact and in law, and it is respectfully submitted that they be upheld by the Board.

Judge Wedekind found that Respondent's unilateral movement of unit work outside the bargaining unit of Local 414C was a mandatory subject of bargaining, and that Respondent unlawfully failed to bargain over the decision, or the effects of the decision. In reaching the conclusion that Respondent unlawfully failed to bargain over the decision to transfer unit work, the Administrative Law Judge properly found that this was not the type of "work relocation" that triggered the balancing test of *Dubuque Packing,*[1] and accordingly, that it was unnecessary to engage in the balancing test established therein. Moreover, the Administrative Law Judge properly determined that even if the *Dubuque* balancing test were applied, Respondent would still have been obligated to bargain over the decision under the requirements of that test. The

[1] 300 NLRB 386 (1991).

Administrative Law Judge's decision further found that 414C did not waive its right to bargain over the consolidation decision, or the effects of that decision.

Judge Wedekind further found that the appropriate remedy for Respondent's unlawful conduct was restoration of the status quo, and that Respondent be ordered to reinstate and make whole those employees who opted to retire as a result of Respondent's unlawful actions. Contrary to Respondent's exception, the Administrative Law Judge stated the proper legal standard for analyzing these claims, and the "constructive discharge/voluntary quit" standard urged by Respondent's exceptions is inappropriate. As argued more fully below, the constructive discharge/voluntary quit standard is required primarily to excuse the inherent irrationality of the drastic choice of quitting employment in the context of an allegation of discriminatory or retaliatory treatment in violation of 8(a)(3). Here, employees who opted for the lump sum payout were accepting one of several limited options *sponsored by Respondent* to deal with the effects of Respondent's unilateral action in violation of 8(a)(5) and 8(d).[2] Under such circumstances, shifting the analysis to a question of voluntary quit/constructive discharge imposes an additional burden of motivation – which improperly skews the analysis and does not properly restore the status quo ante. Accordingly, the standard for analyzing the reinstated rights of retired employees articulated by the Judge should be upheld by the Board.

[2] The Complaint alleges this theory as one of two alternate theories of a violation. Cross Exceptions have been filed in response to the Administrative Law Judge's failure to find a violation under the Acting General Counsel's alternate theory, which is that Respondent unilaterally modified the scope of the bargaining unit.

II. ARGUMENT

A. The Administrative Law Judge Properly Found that There was No Change in the Nature, Scope or Direction of the Corporate Enterprise, and that this Case is Controlled by *Westinghouse Electric*, 313 NLRB 452 (1993).

Respondent first excepts to the finding of the Administrative Law Judge that by consolidating its laboratory operations, Respondent did not change the nature, scope, or direction of the corporate enterprise. The Administrative Law Judge correctly found that no such change in the nature, scope or direction of the enterprise occurred, and accordingly, the strikingly similar case of *Westinghouse Electric,* 313 NLRB 452 (1993), compelled the conclusion that Respondent was obligated to bargain over the work transfer.

The only significant evidence to support Respondent's first Exception is that Respondent sought, in conjunction with the consolidation, to upgrade the skills of the Saflex Control Analyst (the 288 employees who received the transferred work), ensuring the quality of the product, and thereby achieving a "world class" laboratory. However, under applicable law, including the cases cited by the Administrative Law Judge, such executed intention simply does not rise to the level of a change in the nature or scope of the operation. Not surprisingly, Respondent cites no authority to support its position to the contrary. Not every change is an entrepreneurial change. Clearly, changes aimed at improving the quality and efficiency of operations are efforts to *do the same thing*, only better. As such, Respondent's argument in Exceptions is unpersuasive.

Given the absence of any change in the nature, scope, or direction of the corporate enterprise, the Administrative Law Judge properly concluded that the case is

governed by *Westinghouse Electric*, supra, and *Holmes & Narver*, 309 NLRB 146 (1992), which held that where the employer has shifted work from a group of employees in one building on an employer's corporate premises to a group of employees in another employer-owned building at the same site is not the kind of relocation that triggers the multi-step analysis required by *Dubuque,* supra. Accordingly, it is unnecessary to address Respondent's Exceptions 2 and 3, which involve the labor cost component of the *Dubuque* test. Moreover, even if this argument were reached, for the reasons cited by the Administrative Law Judge, Respondent would still have been required to bargain. Mere speculation that the Union could not have offered concessions is insufficient. The Judge's conclusion that there was no change in the nature, scope or direction of the corporate enterprise, and that this case is controlled by *Westinghouse Electric*, supra, should be affirmed.

B. The Administrative Law Judge Properly Found That Local 414C had not Waived the Right to Bargain Over the Decision.

Respondent next contends, by Exception 4, that the Administrative Law Judge erred in finding that Local 414C did not waive any right to bargain over the decision. The record evidence makes clear that Human Resource Director Joe Coppola, at meetings held in early March 2009, announced Respondent's intention to close the West Control Lab, and the Union responded by telling Respondent that it did not believe that Respondent had the right to move the work.[3] Clearly, this is the point at which Respondent (under a theory that such action is a mandatory subject of bargaining), was obligated to provide the opportunity to bargain. It did not do so. Moreover, over the

[3] See General Counsel Exhibit ("GC") 19, at p. 3.

course of the next two and a half months, Respondent's actions made clear that they were steadfast in the view that they had no obligation to bargain over this decision.[4]

Based on these undisputed facts, and the authority cited by the Administrative Law Judge, the conclusion that the Charging Party's failure to request bargaining in this context does not constitute a waiver is well supported, and should be affirmed by the Board.[5]

C. The Administrative Law Judge Stated the Proper Standard for Determining a Retiree's Entitlement to Reinstatement.

Respondent's final set of exceptions relate to Remedy. Respondent contends by Exception 6 that the Administrative Law Judge articulated an improper standard for determining whether an employee is entitled to reinstatement or backpay. The Judge ordered reinstatement or back pay for those employees who retired "as a result of Respondent's unlawful transfer of unit work." By its Exceptions, Respondent argues that the Board should require a "constructive discharge" standard. However, constructive discharge is not the appropriate standard, because the employees here did not take the extraordinary step of voluntarily quitting their employment. See *Grocer's Supply Co*, 294 NLRB 438 (1989) (constructive discharge occurs when an employee

---

[4] See GC 20, notes, aptly tightly "Lab Closure" meeting, reflecting statements by JC (Joe Coppola) that "the Fundamental purpose of today's meeting is the plan [sic] relocation of the west control lab. The Company made that decision....four positions will be ELIMINATED." (Emphasis in original). The notes, "For the record the Company has offered that the Lawyers get together and the Union refused. Acknowledged letter sent by BB (Bob Bellerive) & MH (Mike Humiston) and will respond verbally and written. There are some pieces that need to be negotiated as we proceed. It's our feeling the Company doesn't need to bargain the move of work." (Emphasis added.)

[5] By Exception 5, Respondent argues that because the Administrative Law Judge's finding and conclusion that Respondent failed to provide Local 414C the opportunity to bargain the decision will be reversed, the Board will have to formally reach whether Respondent provided the opportunity to bargain over the effects of the lab consolidation. Because the Administrative Law Judge's decision regarding bargaining over the decision is proper, it is not necessary to address this argument.

voluntarily quits because his employer has deliberately and intentionally made the working conditions so unbearable as to force resignation, and did so to discourage union activities, in violation of 8(a)(3)).

As is true with most of the record evidence, the facts related to the retirees are largely undisputed. On about June 16, 2009, Respondent posted a memo, signed by Plant Manager David Lahr, entitled "Written Notice of Department Cutback – West Control Lab," that stated:

> This is to inform you of our decision to cutback four TA positions in the West Control Lab effective Sunday, August 2, at midnight.
>
> Affected employees will be placed per Article VI of the collective bargaining agreement.[6]

On June 25, 2009, new Local 414C President Mike Humiston sent a letter to Lahr, again opposing Respondent's actions of transferring the WCL work, and including the following:

> As a result of the company's unilateral action, members of 414C bargaining unit have been forced to bid on jobs (which were recently posted by the company) under duress and protest, but they have done so in order to protect their rights under the CBA. Had the bargaining unit employees not put in bids for these posted jobs, and the company made the announced unilateral changes, the employee's [sic] would be at the mercy of placement to possible lesser paying jobs by the company. The possibility of this forced them to place bids for jobs they would not have otherwise pursued.

[6] The negotiated language of Article VI (Seniority) regarding layoffs is not applicable in this context, because the jobs were eliminated due to a unilateral transfer of work, a mandatory subject of bargaining.

> The union is hereby notifying you in advance that we expect those employee's [sic] to be permitted to return to the Control Lab jobs even if we are forced to fight this matter through Arbitration, Labor Charges, etc...Moreover, we further expect them to be made whole for any lost wages resulting from their having to take other jobs as a result of the forced bids (or forced company placement) from the Control Lab, due to the company['s] unilateral action. (GC 10).[7]

Subsequently, a number of WCL employees bid for and were awarded transfers to different 414C positions at the facility.[8] James Moquin, who has worked at Solutia since 1987, had been an analyst in WCL beginning in 2004. He testified that he bid out of WCL and into a production operator position in August of 2009, because of the changes that were occurring in the WCL. He explained that absent those changes, he would not have initiated this transfer. He has trouble with his lower back, and his limitations are better suited to the less physically demanding work of the WCL, where he rarely lifts more than six pounds. In contrast, the demands of production will often require moving bags, drums, and other equipment weighing up to 60 pounds. (Tr. 338-339).[9]

After the terms of a new contract was announced, but prior to the deadline to take advantage of the lump sum pension option, a number of WCL employees opted to retire, some of whom testified at the hearing. Gary Labak had been a Solutia employee since 1978. He moved from production work into a lab analyst position from 2001 until

---

[7] Under the Layoff provisions described in Article VI, any employee whose job was eliminated would be reassigned consistent with the provisions of that Article. By bidding into open positions, rather than waiting for that eventuality, WCL employees were able to have some say in where they ended up, rather than simply awaiting a potentially less appealing fate.

[8] See GC 12. Transfers included Gary Bordeau, Cynthia Hoyte, James Moquin, and Steven Plata.

[9] Tr. refers to transcript page numbers in the administrative record.

November of 2009, when he opted to accept the limited lump-sum pension option and retire. He explained that when he handed in his retirement papers, he also handed in his resume, as he was interested in continuing to work in the SCL, doing the same work that he had previously been doing in WCL. (Tr. 411-413). He had previously been told by Lab Supervisor Gary Grubb that he would be a "perfect fit" for the new 288 Analyst position that was being created in SCL as a result of the consolidation. (Tr. 406-407). Labak also explained that he was involved in training the SCL employees who would be taking over the work that was being moved from the WCL. (Tr. 407-408). He testified that the only reason that he took retirement was because he learned that the limited testing work that was to remain for 414 employees would ultimately be done as part of the production process, by "ADEs" and he was not interested in doing this type of physically demanding work. (Tr. 408-409).[10] He had waited to see whether the contract negotiations would offer any favorable resolution for the WCL positions that were being eliminated. It did not, so he opted to take the lump sum instead.

Gary Bordeau began with Solutia in 1976. He successfully bid into a WCL Analyst position in 2004. Following Respondent's announcement of the plans for the WCL, in August of 2009, Bordeaux successfully bid into a South Butvar production position. (Tr. 376).[11] Subsequently, Mr. Bordeau opted to take the lump sum and retire, even though he had no prior intention of retiring, and his economic obligations were

[10] At WCL, tech analysts tested both Solutia and Guest Operator Cytec products. As a result of the consolidation, Cytec opted to have its own salaried staff perform some of the Cytec lab testing in a different facility run by Cytec (rather than pay all the costs of WCL, as hoped by Respondent). Respondent planned to convert the remaining Cytec adhesives testing work, which would still be done by Solutia (414) employees, to "in process" testing, to be performed in the department, rather than at a lab, in conjunction with other production responsibilities by ADEs, "Additional Department Employees", as permitted under a MOU in 1988. Joint Exhibit ("JT") 1, p. 62.

[11] See also, GC 12.

stressed by having a sick wife and a child in college. (Tr. 375-376). He explained that he did this because, "The job that I had was the lab job, it was the job I wanted to work in and I had asked many times was there going to be lab work through this consolidation and was not able to get a defined answer." (Tr. 376). However, because of physical limitations, which include injuries that have led to a pin in his shoulder, he, like Mr. Labak, did not want to do the more physically demanding production work at that point in his career. (Tr. 377).

The record demonstrates that at least one employee, Gary Labak, did not mean by accepting the lump-sum payout to permanently sever his employment with Respondent. Even as he was handing in his retirement papers, he handed in a resume, with the hopes of securing the position he was being pushed out through the consolidation. (Tr. 404). Significantly, Respondent's failure to bargain the proposed consolidation left no avenue for the experienced, senior analysts of the West Control Lab to continue working in the newly consolidated facility. Had Respondent respected the language of the recognition article, or alternately, properly bargained the decision and its effects, this would likely not have been the case.

On this record, the Judge properly ordered that a full determination as to those employees who retired as a result of Respondent's unlawful actions be determined at the compliance stage of the proceedings.

Section 10(c) of the Act gives the Board broad discretionary power to fashion remedies to effectuate the Act's policies. See *NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344, 346 (1953). Remedial orders designed by the Board should "restor[e] the situation, as nearly as possible, to that which would have obtained but for [the unfair labor

practice]." *Die Supply Corp.*, 160 NRLB 1326, 1344 (1966). The Supreme Court has recognized that Congress conferred on the Board broad discretion to meet specific situations where normal modes of relief would not suffice to right the wrong. In the leading case of *Phelps Dodge Corp. v. NLRB*, supra at 194, Justice Frankfurter stated that Court's view of the Board's powers in this area:

> ...[I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.

The Board routinely issues orders requiring that that Employers rescind disciplinary actions, and reinstate discharged employees, where such actions occurred as a result of an employer's unilateral change in terms or conditions in violations of 8(5), and where to do so would not otherwise be inconsistent with Section 10(c) of the Act. See *Anheuser Busch, Inc.*, 342 NLRB 560 (2004).

Moreover, the Board has held that the receipt of a pension is not per se evidence that an employee intended to sever the employment relationship, disqualifying him or her for a make whole remedy under the Act. In *Alaska Pulp Corp.*, 326 NLRB 522 (1998), the Board considered the question of whether strikers who resigned employment in order to receive their 401(k) funds remained entitled to back pay. The Board specifically noted the significance of the Employer's unfair labor practices in affecting the employee's election to resign, stating:

> In the absence of these and the Respondent's other serious unfair labor practices, strikers formerly employed in the maintenance department may have made a different choice

> regarding resignation. We will hold any uncertainty in this regard against the Respondent, the wrongdoer here. We will thus find that these claimants' right to reinstatement was not affected by their resignations.

Although the situation here does not involve strikers, the guiding principles are nonetheless applicable in fashioning an appropriate remedy. Respondent's unfair labor practice included a repudiation of a critical term of the collective bargaining agreement – the application of the recognition article to the unit work in the WCL, a serious unfair labor practice that had significant mid-contract effects on the terms and conditions of unit members' employment. As a result, long-term employees were forced to accept significantly more onerous work, or, resign their employment, accept a lump-sum payout, and look for appropriate work elsewhere.

The possible acceptance of the lump-sum option was clearly recognized by Respondent as an available option for impacted West Control Lab employees. Indeed, the facts reveal that Respondent advised employees even before the final approvals had been obtained of their intentions respecting the WCL, "to give people as much of a lead time as possible, about what was likely to be happening with the West Control Lab, *so that if they wanted to take options on other positions and so on, they'd be able to do that.*" (Tr. 212) (Emphasis added). Not surprisingly, employees responded to this information as anticipated.

The record raises the likelihood that as a consequence of the announcement and implementation of Respondent's unlawful actions respecting the West Control Lab, employees such as Gary Labak, and Gary Bordeau accepted the lump-sum pension option. That this option was offered and available amongst the array of the unilaterally

imposed effects is a *key element* that distinguishes these circumstances from a situation where an employee voluntarily quits. While the constructive discharge framework, at first blush, appears to fit the situation of a "voluntary retirement" rather aptly, it is ultimately a red herring, and inappropriate for analyzing this issue. The constructive discharge framework is appropriate in the context of 8(a)(3), and not 8(a)(5) violations. The higher burden of an 8(a)(3) constructive discharge requires evidence of discriminatory intent, which is not necessary for proving Respondent's violation of 8(a)(5). To require such evidence for purposes of the remedy unnecessarily restricts the Board's ability to fashion an appropriate remedy under 10(c) of the Act.

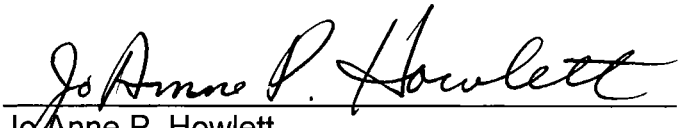
The gravamen of the case is Respondent's unilateral action of consolidating the lab, and unilaterally transferring unit work (in violation of the recognition article) outside the unit. Employees impacted by Respondent's unlawful actions made reasonable choices based on the circumstances at the time; in addition to the unilaterally offered option of bidding out, their choices included the limited time option of a lump-sum retirement option. As the Board held in *Alaska Pulp,* supra, any uncertainty with respect to the choices made, and why, should be held against the wrongdoer. Accordingly, the Administrative Law Judge stated the proper standard for analyzing retired employees' right to reinstatement, and it is respectfully urged that the Board affirm the Administrative Law Judge's order, and a determination of which employees meet that standard should be fully litigated at the compliance stage of this proceeding.

III. CONCLUSION

For all of the above reasons, it is respectfully submitted that Respondent's Exceptions be denied in their entirety.

Dated at Boston, Massachusetts, this 1ST day of October, 2010

Respectfully submitted,



Jo Anne P. Howlett
Counsel for the Acting General Counsel
10 Causeway St, 6th Floor
Boston, MA 02222-1072
413-727-8141
413-727-8142 (fax)
JoAnne.Howlett@nlrb.gov