UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the matter of:

| | | |
|---|---|---|
| SOLUTIA, INC. | : | |
| | : | CASE NO. 1-CA-45447 |
| And | : | |
| | : | |
| UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 414/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) | : | October 15, 2010 |

**REPLY BRIEF OF SOLUTIA INC. IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

## INTRODUCTION

The facts in the record and controlling law demonstrate that the Administrative Law Judge ("ALJ") erroneously concluded that Solutia violated its general statutory duty to bargain by moving work without first bargaining with the Union, (Exceptions 1-5). The ALJ reached this incorrect decision because he failed to apply the proper legal standard

as set forth in Dubuque, 300 NLRB 386 (1991). The Dubuque standard must be applied in this case because Solutia did more than simply move work to a different location – it fundamentally changed the way testing work was done at the Indian Orchard Plant in order to execute its overarching plan to create a "world class" laboratory and produce a superior final product. In addition, the cost of labor on a per employee basis was not a factor in Solutia's decision and, to the extent that Solutia took overall labor costs into account, the Union could not have made cost concessions that would have changed its decision. Therefore, under the rule in Dubuque, Solutia was not obligated to bargain with the Union over its decision.

In addition, the ALJ recommended three improper remedies which should not be adopted by the Board, even if the ALJ's underlying decision is upheld. Those remedies include potential reinstatement for individuals who opted to retire, certain health care payments, and an order requiring Solutia to "reimburse" Local 414C for any Union dues that would have been paid by employees had they remained employed. Notably, neither Counsel for the Acting General Counsel ("General Counsel") nor the Union opposed Solutia's position concerning the impropriety of the remedy relating to health care payments.

## ARGUMENT

1. All Matter Contained in the Union's Answering Brief That Exceeds the Scope of Solutia's Exceptions Should Be Disregarded by the Board.

Solutia has excepted to eight specific findings/conclusions and/or remedies set forth in the ALJ's decision. Section 102.46(c) of the Rules and Regulations of the NLRB states that "[a]ny brief in support of exceptions shall contain no matter not included within the scope of the exceptions . . . ." Similarly, subsection (d)(2) provides that "[t]he answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof." The Union's Answering Brief is filled with alleged facts and argument that are beyond the scope of Solutia's exceptions. The following items should be disregarded by the Board in ruling upon Solutia's exceptions,:

1. All alleged facts/surmise and related arguments concerning the Union's contention that Solutia's actions increased the risk of health and safety problems for the Union's production employees. (UAB p. 1, 9-10).

2. All arguments relating to the Union's contention that Solutia could not consolidate laboratory operations and/or transfer lab work to non-unit employees without the Union's consent. (UAB p. 4, 7-8).

3. All discussion/argument concerning whether 414C analysts were more highly trained than the Saflex analysts and whether Gary Labak was permitted to apply for the newly created Saflex Lab positions. (UAB p.6, 9, 15).

2. There Was a Change in the Nature or Scope of the Operations.

In response to Solutia's first exception, General Counsel and the Union merely state that the cross-training of analysts and corresponding upgrading of their skills is

insufficient to establish a change in the scope of the operations in order to bring this case under the principles set forth in Dubuque, supra. (Counsel's Answering Brief ("CAB") p. 4; UAB p. 7). Their argument, however, is not supported by any authority. Rather, they simply insist without analysis that the facts of this case are akin to those in Westinghouse Electric , 313 NLRB 452 (1993) and Torrington, 307 NLRB 485 (1992) and, therefore, that those cases should govern. The facts here, however, differ significantly from those cases. In both Westinghouse Electric and Torrington, the shift of work at issue resulted in only a change in the identity of the employees doing the same work, *and nothing more*. Significantly, in those cases, there was no indication that there were any changes to the general function/role of the employees who received the work. In contrast, in the present case, the function of the employees who are now performing the butvar testing has *fundamentally changed* from a "test and report" function to a quality control analysis/problem solving function. The lab technicians in the Saflex Lab are testing a much wider variety of products than had been tested in the West Control Lab and exercising more decision-making authority. Moreover, that change was necessary to and part of Solutia's overall plan to create a "world class" laboratory and improve the quality of its products. Thus, the changes implemented by Solutia require this case to be analyzed under the test set forth in Dubuque.

3. The Union Could Not Have Offered Anything to Change Solutia's Decision.

Local 414C could not meaningfully have addressed the issues that formed the basis of Solutia's decision to consolidate the laboratory operations. General Counsel

has not responded to this exception (Exception 3) in her answering brief. While the Union has crafted a response, its suggestions would not have changed Solutia's decision. Specifically, with regard to the costs associated with the West Control Lab building, the Union surmises that it "may well have shown" Solutia that its assumptions regarding cost shifting to Cytec were improbable. (UAB p. 8-9). Solutia, however, had already taken into account the possibility that Cytec might choose to vacate the West Control Lab, and the cost savings associated with a vacant West Control Lab were already considered by Solutia. (GC-14 ("It will enable the WCL to be shut down or rented.")).

The Union's additional suggestion that it could address the West Control Lab building costs by agreeing to have 414C analysts perform the butvar resin testing at the Saflex lab on the East Side of the Indian Orchard campus is unrealistic. (UAB p. 9-11). Solutia would never have agreed to such a suggestion for two primary reasons. First, it would violate its collective bargaining agreement with Local 288. (JT-3 ("The Company recognizes [Local 288] as the sole collective bargaining agent for all . . . employees . . . . The terms 'employee' and 'employees' . . . shall include only those employees at that portion of the Indian Orchard Plant formerly known as the Springfield Plant . . . ."). Second, the suggestion fails to address Solutia's need to cross-train the analysts and have them perform *both the resin and Saflex product testing* in order to achieve the goals of creating a "world class" laboratory and improving the overall quality of the end

product. Local 414C could not have offered any concessions that would have changed Solutia's consolidation decision.

4. The Union Waived its Right to Bargain.

In response to Solutia's arguments regarding waiver, General Counsel concedes that, from the very beginning, Local 414C took the (incorrect) position that Solutia did not have the right to move the work without its consent. (CAB p. 5). General Counsel claims it was at this point that Solutia was "obligated to provide the opportunity to bargain." (CAB p. 5). General Counsel's argument, however, only bolsters Solutia's claim that Local 414C never requested to bargain over the decision and, thereby, waived its right to bargain. Indeed, General Counsel's concession illustrates that Local 414C *never* agreed with Solutia's decision and, therefore, *was never willing to bargain* with Solutia over the decision or its effects.

The Union takes a slightly different position. (UAB p. 11, citing T. 240, 249, 262). A review of the portions of the transcript relied upon by the Union, however, reveals that no demand to bargain over moving the work was ever made. At most, Local 414C communicated to Solutia that the issue of consolidation was a "negotiable item," (T. 240), but it did not, however, actually demand that Solutia negotiate that item. Moreover, the Union President testified that by a "negotiable item" he meant that it could be negotiated at the time of the normal collective bargaining near the end of the agreement's term. (T. 257). Moreover, Local 414C's failure to request bargaining is

consistent with its steadfast position that the Recognition Clause flat out barred Solutia's actions.

5. Solutia Did Not Fail to Engage in Effects Bargaining.

Solutia tried to bargain over the effects of consolidation with the Union, and, in fact, did bargain with the Union over those effects. General Counsel has not responded to this exception (Exception 5) in her answering brief. The Union has responded, but its response is notably silent with respect to several issues. First, the Union does not deny that it never requested effects bargaining as required by AG Communications Systems Corp., 350 NLRB 168, 172 (2007). Second, the Union does not deny that, in May 2009, Solutia explicitly invited it to bargain over the effects of its decision, (JT-7), and that the Union refused to take Solutia up on its offer. Lastly, the Union failed to rebut Solutia's actual evidence of effects bargaining, which include issues concerning Cynthia Hoyte, (Tr. 354), and Solutia's agreement in September 2009 to "make whole" employees who had pay reductions for training periods for the jobs they bid into as a result of the consolidation. (R-20, p. 2) (SOLU-00312).

Rather than address any of these issues, the Union asserts that effects bargaining was precluded because Mr. Coppola had already decided that the transferred work would "necessarily" be performed by Local 288 unit members, and that Solutia's refusal to hire Gary Labak at the Saflex Lab "made clear that any request for effects bargaining would have been futile." (UAB p.16). There is no merit to these arguments. Even though Solutia may not have been amenable to *every* request or

*certain specific* requests that the *Union might* have proposed in the course of effects bargaining, that does not mean that Solutia would have refused all requests or to engage in effects bargaining all together. Moreover, as discussed above, the undisputed evidence shows that Solutia did, in fact, explicitly invite the Union to bargain over the effects of its decision in May 2009. (JT-7). Accordingly, the Board should find that Solutia met is obligation to bargain over the effects of its decision.

6. The ALJ Applied the Wrong Standard for Potential Reinstatement of Retirees.

With regard to reinstatement, the ALJ and the parties all agreed that if reinstatement was found to be a possibility by the ALJ on the record developed at the hearing, then final determination as to whether it applied to any particular individual would be reserved for a compliance hearing. (Tr. 368, 371-72, 399). The ALJ erred by (1) finding that the record showed any possibility of reinstatement of retirees and (2) assuming that there could be such reinstatement, providing an incorrect standard for the subsequent compliance hearing.

With regard to each question, the ALJ should have applied a constructive discharge standard to its reinstatement remedy for the retirees.

Applying that standard, the evidence presented at the hearing shows that none of the retirees would qualify for reinstatement because Solutia did not deliberately make working conditions unbearable or demand that the employees give up their section 7 representation rights in order to stay employed. See Intercon I (Zercon), 333 NLRB 223 (2001). Rather, the evidence was that each retired to take advantage of the lump sum

retirement option that was disappearing. However, even if the Board disagrees with that conclusion, the Board should direct that reinstatement only be ordered with regard to those retirees who retired due to a constructive discharge, so that the proper legal standard is applied in compliance.

General Counsel concedes that the constructive discharge framework "appears to fit the situation of 'voluntary retirement' rather aptly." (CAB p. 13). General Counsel contends, however, that this standard should not be applied in this case because "the employees here did not take the extraordinary step of voluntarily quitting their employment." (CAB p. 6). General Counsel's position begs the question of what meaning, if any, General Counsel ascribes to the word "voluntarily"? General Counsel does not dispute that the Collective Bargaining Agreement *guaranteed* reassignment to all of the employees who chose to retire. Not a single employee was in danger of losing his job as a result of the change to the laboratory. Indeed, General Counsel does not contend that anyone was forced or coerced into retiring. Rather, General Counsel submits that the retirees *chose* to retire because they preferred retirement to doing production work. Finally, General Counsel bases its argument on the erroneous conclusion that Solutia "repudiate[ed] a critical term of the collective bargaining agreement." (CAB 12). The ALJ, however, disagreed with this argument and explicitly found that Solutia's actions did not modify the scope of the unit or violate the "future consolidation" language contained in the recognition clause. (ALJ Decision p. 7-10).

The Union argues that the Board should apply the burden-shifting approach set forth in Wright Line, Inc., 251 NLRB 1083 (1980). Wright Line, however, is inapposite and the approach advocated therein has been rejected by the First Circuit. See NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981). In Wright Line, the NLRB found that the employer discharged an employee because of his union activity in violation of Section 8(a)(3) of the Act. The present case, however, is wholly unlike Wright Line – it does not involve a violation of Section 8(a)(3), nor does it involve a discharge. Here, the retirees *chose* to leave their employment.

The Union devotes much of the remainder of is arguments to whether certain individual employees would qualify for reinstatement and back pay. This issue, however, is not currently before the Board. It was agreed by the parties and the ALJ that evidence and testimony on this issue would only be preliminary, and that final litigation would be reserved for compliance proceedings if it came to that. (Tr. 368, 371-72, 399). Accordingly, the Board should not rule on this issue beyond setting the appropriate standard to be applied in the compliance hearing.

## CONCLUSION

For the foregoing reasons, Solutia respectfully requests that the decision of the ALJ be modified consistent with the arguments set forth above and those contained in Solutia's initial brief in support of its exceptions and that the case against Solutia should be dismissed.

SOLUTIA, INC.

By s/Hugh F. Murray, III
Hugh F. Murray, III
hmurray@murthalaw.com

Murtha Cullina LLP
CityPlace I - 185 Asylum Street
Hartford, Connecticut 06103-3469
Telephone: (860) 240-6077
Facsimile: (860) 240-6150
Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via e-mail and First Class U.S. Mail on this 15th day of October, 2010 to the following:

JoAnne Howlett, Esq.
National Labor Relations Board, Region 1
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street – Sixth Floor
Boston, MA 02222-1072
JoAnne.Howlett@nlrb.gov

Randall Vehar, Esq.
UFCW Assistant General Counsel/
Counsel for ICWUC Local 414C
1799 Akron Peninsula Road
Akron, OH 44313
rvehar@ufcw.org

Robert W. Lowrey, Esq.
UFCW Assistant General Counsel/
Counsel for ICWUC Local 414C
1799 Akron Peninsula Road
Akron, OH 44313
rlowrey@UFCW.org

Maurice Gagne, Union President
Local 288
IUE-CWA, Local 288, AFL-CIO
170 Michael Street
Ludlow, MA 01056
scoutermoe@charter.net

s/Hugh F. Murray, III
Hugh F. Murray, III