Nos. 12-1129, 12-1174

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-1129

NATIONAL LABOR RELATIONS BOARD
Petitioner
v.
SOLUTIA, INC.
Respondent

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION,
LOCAL 414C/International Chemical Workers Union Council
Intervenor

No. 12-1174

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION,
LOCAL 414C/International Chemical Workers Union Council
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD
Respondent

SOLUTIA, INC.
Intervenor

ON APPLICATION FOR ENFORCEMENT AND PETITIONS
FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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(29 U.S.C. § 151 et seq.)

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce its Decision and Order issued against Solutia, Inc. ("Solutia"). The Board's Decision and Order issued on July 15, 2011, and is reported at 357 NLRB No. 15. (A.598-607.)[1] Solutia cross-petitioned for review of the Board's Order, and the United Food & Commercial Workers International Union, Local 414C/International Chemical Workers Union Council ("Local 414C" or "the Union"), the Charging Party before the Board, intervened in support of the Board. Local 414C also filed a petition for partial review of the Board's Order, in which Solutia has intervened. On March 14, 2012, the Court granted the Board's motion to consolidate the cases.

The Board had subject matter jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board found that Solutia violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). The Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

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[1] "A." references are to the Joint Appendix. The Board's Decision and Order, which incorporates the decision of the administrative law judge, is located at pages A.598-607. "AE" references are to the Joint Appendix containing the parties' exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Court has jurisdiction over the proceeding pursuant to Section 10(e) and (f) of the Act, as the unfair labor practices occurred in Springfield, Massachusetts. The Board filed its application for enforcement on January 23, 2012. Solutia filed its cross-petition for review on February 2, 2012. Local 414C also filed its petition for review on February 2, 2012. All were timely because the Act places no time limit on filings to enforce or review Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that Solutia violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide Local 414C an opportunity to bargain over its decision to consolidate and transfer certain testing operations within its facility and over the effects of that decision on the unit employees.

2. Whether substantial evidence supports the Board's finding that Solutia's consolidation of the testing operations and the transfer of the work nonetheless did not modify the scope of the bargaining unit or the contractual recognition clause during the term of its collective-bargaining agreement with Local 414C.

3. Whether the Board appropriately ordered Solutia to return working conditions to the status quo ante and make employees whole for their losses.

STATEMENT OF THE CASE

Upon an unfair labor practice charge filed by the Local 414C, the Board's General Counsel issued a complaint against Solutia, alleging violations of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A.599.) After conducting a hearing, an administrative law judge issued a decision on July 30, 2010. Specifically, the judge, in agreement with the General Counsel, found that Solutia violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide Local 414C an opportunity to bargain over its decision to consolidate and transfer certain laboratory testing operations within its facility and over the effects of that decision on Local 414C's unit employees. However, contrary to the General Counsel's and Local 414C's assertions, the judge also found that Solutia's consolidation of its testing operations and transfer of work out of the facility where Local 414C unit employees historically operated did not modify the scope of the bargaining unit or the contractual recognition clause during the term of its collective-bargaining agreement with Local 414C. (A.605.) After the General Counsel, Solutia, and Local 414C filed exceptions to the judge's decision, the Board issued a Decision and Order, affirming, with slight modifications, the judge's findings and conclusions regarding the unfair labor practices. (A.598.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background – Ownership and Representational History of the West (Bircham Bend) and East (Springfield) Sides of What Eventually Came To Be Solutia's Indian Orchard Plant

Solutia manufactures chemically-based specialty products and operates facilities throughout the country, including one in Springfield, Massachusetts, known as the Indian Orchard plant. The Indian Orchard plant is located on a relatively large, 250-acre site where there are numerous buildings. Two of the buildings, relevant to this case, are laboratories where Solutia's employees performed quality testing of the Solutia's products: the West Control Lab ("the WCL") and the Saflex Control Lab ("the Saflex Lab"). (A.599; A.58, 165, 242, AE.33.)

Historically, before Solutia came into existence, these two labs were completely separate facilities and were owned and operated by different companies. In fact, for many years there was a chain-link fence separating them. The WCL (previously known as the Bircham Bend plant) was on the west side of the fence, and the Saflex Lab (which had been called the Springfield Plant) was on the east side. Likewise, different and unaffiliated unions represented the employees at the two labs over the years: the west-side employees were represented by Local 414C and the east side by the International Union of

Electronic, Electrical, Salaried, Machine and Furniture Workers/Communications Workers of America, Local 288 ("Local 288").[2] (A.599; A.58-63, 269, AE.33.)

By 1963, Monsanto (Solutia's predecessor) had acquired both the east and west-side facilities described above. Nonetheless, the separation between the labs, both physical and otherwise, continued for many years. (A.599; A.69-70, AE.401-24.)

In 1982, however, Monsanto consolidated certain salaried employees working on both the west and east sides, including the salaried employees working in the manufacturing and the service department offices. At this point, it also took down the fence. (A.599; A.66, 71-72, 109-10, 242, 269, 378-79, AE.33, AE.401-24.) The 1982 consolidation did not immediately change other work done on each side, including work by the lab analysts and the other hourly production and maintenance employees, which were represented by Locals 414C and 288. Local 414C still represented work performed in the WCL on the west side of the historical line, and Local 288 continued to represent employees working at the Saflex Lab on the east side. (A.599; A.383.)

[2] Both Unions have changed their affiliations and names over the years. For the purposes of this case, it is enough to know that Local 414C or its predecessors have represented employees working in what is now the WCL. And Local 288 or its predecessors have represented the employees working in what is now known as the Saflex Lab.

While no immediate changes to the union-represented employees occurred in 1982, Monsanto and Local 414C entered into negotiations over a new collective-bargaining agreement that year. Among other things, they agreed to modify the recognition clause of Local 414C's contract (the new language is underlined):

> The Company recognized [Local 414C] as the sole collective bargaining agency for:
>
> A Unit comprising all hourly rated employees, excluding executives, office and clerical employees, guards, professional employees and supervisors as set forth in the National Labor Relations Board Certification of Representatives dated October 26, 1950, <u>for the then existing Bircham Bend Plant. This recognition clause shall be unaffected by any future consolidation of the plants at the Indian Orchard Site</u>. (A.599; A.72-74, 381-82, AE.36-37.)

B. Operational Changes and the Bargaining History with the Unions Over the Jurisdiction of Work

In the years after Monsanto's 1982 consolidation of the salaried employees, it occasionally made changes that resulted in the unions raising jurisdictional issues over which employees would perform certain work at the combined facility, which came to be known as the Indian Orchard plant. Monsanto bargained with the two local unions prior to implementing any changes that would affect the right of the respective unions to retain work historically performed by their members. For instance, Monsanto built a new Central Systems Facility that straddled the historic line between the west and east sides. As a result, Monsanto, Local 414C, and Local 288 negotiated and executed an agreement, referred to as a Memo of

Understanding ("MOU"), that described the building as "geographically neutral." This meant that neither union would have the sole claim to the right of the work that occurred in the building, and that each union would "continue to be recognized as the sole collective bargaining agent for their respective employees who [worked] in this new Central Systems Facility." (A.599-600; A.78-84, AE.38, AE.322, AE.391.)

Also following the 1982 consolidation, Monsanto and the two unions executed another MOU with respect to three new buildings. Two of the buildings were part of what was referred to as the Fork Truck Repair Yard, which was located on the east side of the historic line. The third building was for storage, and it was located on the west side. The MOUs stated that the buildings would also be "geographically neutral" or otherwise used by members of either union. But keeping with the traditional geographical understanding of the facilities, the maintenance for the work done at the east-side buildings would be performed by employees in the Local 288 unit, and the maintenance for the west-side building would be performed by employees in the Local 414C unit. (A.600; A.83, AE.39, AE.323, AE.392.)

Around the same time, after the 1982 consolidation but before Solutia came into existence, Monsanto bargained an additional MOU with Local 288 (but not Local 414C) that resulted in the transfer of the testing work related to product

samples known as Butvar. The agreement resulted in the shift of work from the Saflex Lab to the West Control Lab where the testing would then be accomplished by Local 414C members. (A.600 n.4; A.94, AE.42.)

In 1997, Monsanto "spun off" its chemical business to form a separate company called Solutia. (A.600; A.165.) As Solutia took control, it continued to recognize and negotiate successive collective-bargaining agreements with both Local 414C and Local 288. Relevant to the timing of Solutia's consolidation and transfer of work at issue in this case, Solutia had separate agreements with each union with effective dates beginning in 2006. Each agreement contained a recognition clause, and both clauses used geographical references to describe the bargaining units. Solutia's successor agreements with Local 414C, including the 2006 agreement, retained the same amended 1982 recognition language (described above). (A.600; AE.151.) The recognition clause in Solutia's 2006 agreement with Local 288 read as follows:

> The Company recognizes [Local 288] as the sole collective bargaining agent for all production, maintenance, service and research employees, excluding guards, salaried employees, office and factory clerks, clerical employees, salaried research employees, draftsmen, technical trainees, process investigators, hospital employees, executive foremen, assistant foremen, shift foremen, and all other supervisors. <u>The terms "employee" and "employees" as used in this Agreement shall include only those employees at that portion of the Indian Orchard Plant formerly known as the Springfield Plant</u> for whom [Local 288] is recognized as collective bargaining agent as set forth in this Section. (A.600; AE.272.) (Emphasis added.)

Solutia also executed separate MOUs with both unions in June and August of 2006 that allowed the union members to "cross lines," meaning one union's members would be allowed under certain circumstances to work on the side of the plant that they traditionally did not work. This was something both unions had historically opposed and was prohibited under previous agreements with Monsanto. These new MOUs superseded the prior agreements regarding the Fork Truck Repair Yard buildings on the east side and the Storage building on the west side. Under the new agreements with the unions, Solutia now had the "right to require" each union to share or perform work in the Maintenance, Stores/Utility, and Shipping departments, regardless of whether the work customarily had been performed by a particular union in those areas. The MOUs also contained provisions conceptually compelling Solutia to allocate future staffing evenly among each union. Notably, the new agreements did not cover the production departments as it related to work performed inside the WCL or the Saflex Lab. (A.600; A.94-98, 298-99, AE.197-99, AE.329.)

As another example of how certain new work was allocated during this period, in November 2006, Solutia and Local 414C negotiated a separate MOU regarding Solutia's "ALS (pre-lam)" operation, which involved a special type of material. Initially a pilot research project performed by non-union workers, ALS became a commercially viable production line, and Solutia decided to turn it into a

full-fledged manufacturing operation. As the work was being performed on the west side of the historic line, Local 414C demanded jurisdiction over the work. Solutia eventually agreed. (A.600; A.271-73, 299-300.) The agreement specifically stated, however, that recognition was being extended to Local 414C "based on the current location of the ALS operation in the facility formerly known as the Bircham Bend Plant [the west-side laboratory]," and "only for any period of time in which the ALS operation is located in [that facility]." It went on to state that "nothing in this memorandum constitutes an obligation on the company to maintain the ALS operation at its current location." (A.600; AE.199.)

C. Solutia Decides To Consolidate Testing Operations in August 2009

As early as July 2008, Solutia began considering the idea of consolidating or otherwise relocating certain WCL testing work into the Saflex Lab. (A.600; A.207, AE.65.) From that point until the end of February 2009, Solutia continued to analyze the operations and develop a plan to determine which union would have the rights to the consolidated work. (A.600; A.176, 210-13, 235-36, AE.66-67, AE.114-18.) Managers working on the plan projected that, through the consolidation, Solutia could reduce staffing levels, reduce labor costs, and possibly charge all the costs associated with the WCL to a guest third-party operator, called Cytec, which Solutia allowed to perform work in the west-side lab. Solutia ultimately decided the work would be performed in the east-side Saflex Lab, and

as a result, it concluded that the work would be accomplished by Local 288 members who worked there. (A.600; AE.437-38.)

During the same period, Solutia also concluded that there was no duty to bargain with Local 414C over the decision to consolidate and transfer the work. (A.600; A.214-15, 227-31.) Solutia's human resources director, Joseph Coppola, was the primary person on its leadership team who made the determination. Coppola reviewed the recognition clauses in each of the collective-bargaining agreements, and he interpreted Local 414C's clause to mean that the geographical location of the work controlled which union's members actually did the work, absent a specific agreement to the contrary. (A.600; A.216, 224, 228-31.) Other managers on the leadership team equally understood the recognition clauses in both collective-bargaining agreements to mean the physical boundaries of the former plants dictated which union's members would do the work. (A.600 n.6; A.109.)

Solutia first notified Local 414C of the planned consolidation of the testing work into the Saflex Lab the following month, at a meeting on March 4, 2009.[3] (A.601; A.238, 255, AE.97-98, AE.119-35.) The President of the Local 414C at the time, Robert Bellerive, responded at another meeting the following day, stating

[3] Unless otherwise stated, all dates herein refer to 2009.

that Local 414C did not believe Solutia had the right to consolidate the work. (A.601; A.257, AE.99-101.)

Despite Local 414C's protestations, in late April or early May, Solutia proceeded as planned. Solutia's managers explained that they were concerned about the economic downturn in the automobile and housing industries, and anticipated that the consolidation would help cut its overall costs, including total labor costs. They expected a net reduction of approximately three quality control analysts, for a savings of at least $249,000. They also anticipated that the consolidation would provide more work for the east side lab employees, who were being underutilized, as well as increase their skills. Additionally, Solutia's managers concluded that the consolidation could be accomplished simply by moving the existing equipment without needing to purchase any new capital equipment. (A.601; A.122-29, 140-42, 152, 174, 178-79, 183-86, AE.45-60, AE.119-35.)

On May 7, Local 414C then responded by sending a letter to Solutia requesting further information regarding the move, including the proposed date and the contract language Solutia relied on to move the work unilaterally. The letter further stated that "should the union agree with the company's decision to take this action after reviewing the information requested . . . the union demands to bargain

this issue with the company." Finally, the letter asked Solutia to "reconsider this breach of our bargaining agreement." (A.601; AE.441.)

At a meeting on May 27, Solutia's human resources director again advised Local 414C representatives that Solutia had made the decision to transfer the work out of the WCL. He told the union representatives that it would result in four Local 414C WCL positions being eliminated. He also stated that he did not believe Solutia needed to bargain over the work transfer. (A.601; AE.102-03.)

Two days later, on May 29, Solutia sent a formal, written reply to Local 414C's May 7 letter. The letter stated that testing of Solutia's products at the WCL would cease no later than August 31, and that, because the testing would be moved to the east-side Saflex lab, the work would "necessarily" be performed by members of Local 288 pursuant to the terms of the Local 288 collective-bargaining agreement. The letter additionally denied that Solutia's decision breached the Local 414C collective-bargaining agreement and went on to state that the decision to relocate the work to the Saflex Lab fell within Solutia's "management rights" to direct the operations of its facility as set forth in Article I, Section 4 of the agreement, and was not otherwise addressed or limited by the agreement. Finally the letter advised that Solutia had "no obligation to bargain with [Local 414C] regarding the location of the testing operations," but was "willing to discuss . . .

any reasonable proposals" regarding unit employees who may be "affected by" the decision. (A.601; AE.437-38.)

On June 2, Local 414C responded by filing an unfair labor practice charge with the Board's regional office alleging Solutia's decision to transfer the work violated the Act. And on June 3, it filed a grievance with Solutia asserting that the transfer of work violated the parties' collective-bargaining agreement. (A.601; AE.6, AE.136.)

On June 16, Solutia formally provided written notification to Local 414C representatives and directly to its members working in the WCL that the company had decided to "cutback four TA positions in the West Control Lab effective Sunday, August 2, 2009, at midnight," and that the affected employees would be placed on a list consistent with the seniority provisions of the collective-bargaining agreement. (A.601; AE.43.) Then, on June 19, Solutia sent another letter denying Local 414C's grievance, detailing essentially the same reasons it set forth in its May 29 letter.[4] (A.601; AE.439-40.) On June 25, Local 414C responded via letter, again disagreeing with Solutia's decision to remove the work, and explaining that its members were being forced to bid on jobs they otherwise would not have pursued. (A.601; AE.44.)

[4] Local 414C subsequently withdrew the grievance choosing to instead pursue the matter as an unfair labor practice under the Act.

Around the same time, in late June, Solutia and Local 288 began negotiations over a new collective-bargaining agreement to succeed their expiring 2006 agreement. A few weeks later, the two parties reached an agreement. The new collective-bargaining agreement became effective July 18, 2009. Among other things, the parties agreed to various changes to the qualifications and job descriptions of the Saflex Lab personnel in anticipation of the upcoming consolidation, including a new Saflex quality control technician position that had not existed prior to the negotiations. (A.601; A.102-03, 118-121, AE.376, AE.393-94, AE.397.)

As planned, Solutia implemented the consolidation the following month, during a regularly scheduled 2-week shutdown that began on August 3. During the shutdown, Solutia moved equipment from the WCL to the Saflex Lab. And in order to accommodate the consolidation, it made some construction modifications to enlarge the lab. (A.601; A.124, 160-61, 180-81, 229.)

Although Solutia transferred work out of the WCL, it did not actually terminate or lay off any WCL employees as a result of the consolidation. Some employees bid for and were hired into production jobs, which were considered less desirable, particularly by more senior lab employees. The jobs required substantially greater physical exertion. In addition, some employees exercised

their option to retire.[5] And others continued to perform testing work on adhesive products for another company that performed work at a different location on the site. Testing at the WCL ceased following the consolidation. (A.602; A.132-34, 154, 160, 191, 222, 233-34, 315, 322-24, 336, 355-57, 363-64, 410-18, 427, 434-35.)

Following the consolidation, in September 2009, Solutia and Local 414C commenced negotiations over a successor agreement to their 2006 contract. Although the parties reached a new agreement, no bargaining ever occurred over either the decision to transfer the WCL work or the effects of the decision. (A.602; A.260-61, 319-20, AE.201.) Solutia never wavered from its position that the decision was not negotiable, and Local 414C never directly responded to Solutia's offer, at the conclusion of its May 29 letter, to discuss proposals regarding employees affected by the consolidation. Local 414C maintained its position that Solutia did not have the right to consolidate in the first place. (A.602.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On July 15, 2011, a three-member panel of the Board (Chairman Liebman and Members Becker and Pearce) issued its Decision and Order. The Board found that Solutia violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(5) and (1))

[5] In early 2009, Solutia notified employees subject to the defined-benefit pension plan that the option of taking their pension as a lump-sum payout, rather than as an annuity, would be eliminated. (A.275-76.)

by failing and refusing to provide Local 414C with an opportunity to bargain over its decision to consolidate and transfer the work and the effects on unit employees of that decision. The Board further found, however, that when it consolidated its laboratory operations and transferred work out of the Local 414C unit in August 2009, Solutia did not modify the scope of the bargaining unit, or otherwise modify the contractual recognition clause during the term of its collective-bargaining agreement with Local 414C within the meaning of Section 8(d) of the Act Act (29 U.S.C. § 158(d)). (A.605.)

To remedy the violations, the Board's Order requires Solutia to cease and desist from failing and refusing to bargain with Local 414C over the decision to consolidate and transfer unit work from the WCL to the Saflex Lab, and over the effects of that decision on the unit employees. Affirmatively, the Board's Order directs Solutia to: rescind the unilateral consolidation and transfer of work from the WCL to the Saflex Lab and return to the status quo ante by restoring the WCL as it existed on or about August 1, 2009; offer to any current or former employees in the WCL who may have been reassigned, bid into other jobs, or opted to retire as a result of its unilateral consolidation/work transfer and elimination of unit positions immediate and full reinstatement to their former jobs; make whole, with interest, any such employees who may have lost earnings and other benefits as a result of its unlawful unilateral changes; remit all contributions it would have made on the

employees' behalf to employee retirement, 401(k), and/or health-care funds absent its unlawful unilateral changes, and reimburse the employees for any expenses they may have incurred as a result of its failure to make such benefit fund contributions; and reimburse Local 414C for any dues that it would have deducted from the employees and remitted to Local 414C under the parties' collective-bargaining agreement absent its unlawful unilateral changes. Solutia is also required to post a remedial notice. (A.606-07.)

SUMMARY OF ARGUMENT

This case involves Solutia's unilateral decision to consolidate the testing operations at its Indian Orchard plant by transferring the work from the WCL to the Saflex Lab. In doing so, Solutia ignored well-settled law, which requires an employer to first notify and bargain with the union prior to altering a mandatory term or condition of employment. And here, substantial evidence supports the Board finding that Solutia's transfer of work was a mandatory subject of bargaining. As the Supreme Court has found, such decisions, involving attempts to reduce labor costs, are particularly suitable to bargaining. The facts here demonstrated that Solutia's transfer of work was no exception.

Solutia incorrectly argues that it was privileged to refuse to bargain. But contrary to its claims, Solutia's transfer of historically performed testing operations to a different group of employees within the same plant did not involve a change in the nature or scope of its business that might otherwise have allowed Solutia to make such changes unilaterally. Solutia's alternative arguments, that Local 414C waived its right to bargain over the change, are equally unavailing. First, Local 414C did not sit on its rights by failing to request bargaining in a timely fashion. Solutia's unequivocally made its decision not to bargain with Local 414C over the consolidation before notifying Local 414C of its plans. And Solutia presented its decision as a *fait accompli*. Given the situation, the Board properly found that it

would have been futile for Local 414C to engage in attempts to bargain with Solutia. Next, Solutia mistakenly argues Local 414C waived its rights in the parties' collective-bargaining agreement. To this end, Solutia relies on the management rights clause, but the plain language in that clause has no application to any consolidations or transfers of work.

While finding Solutia violated the Act by failing and refusing to bargain over the change, the Board also found that the consolidation and transfer of work did not modify the scope of Local 414C's bargaining unit. As the Board has repeatedly recognized, not every work transfer constitutes a unit modification, and contractual clauses defining the scope of a bargaining unit are not the same as clauses concerning the assignment or allocation of work to unit members. Here, substantial evidence supports the Board's finding that Local 414C's bargaining unit was geographically defined as hourly employees working in the WCL. Contrary to Local 414C's arguments, Solutia's decision to adjust how it allocated the testing work at the Indian Orchard plant did not change how the unit was actually defined.

Additionally, the Board reasonably found that Solutia had a sound arguable basis in determining that the recognition clause did not contractually prevent Solutia from consolidating and transferring the work. Despite Local 414C's assertions, the plain language of the parties' collective-bargaining agreement

controls the situation. As the Board and courts have found, unless transfers are specifically prohibited by the parties' collective-bargaining agreement, an employer will not be prevented from transferring the work if it bargains in good faith to impasse. Here, the language in the recognition clause did not specifically prevent consolidations or transfers of work, so the contract did not prevent Solutia from transferring the work. But again, Solutia had an obligation under the Act to bargain before making the change.

Finally, the remedial portion of the Board's Order – requiring Solutia to rescind its unlawful, unilateral changes and return to the status quo ante by restoring the WCL and by offering reinstatement to the former employees – is presumptively appropriate. This Court has affirmed similar Board remedies, and Solutia's and Local 414C's arguments attempting to limit or expand upon the Board's remedy either have no merit or should be saved for the Board's compliance proceeding.

STANDARD OF REVIEW

When the Board "engages in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management . . . , the balance struck by the Board is 'subject to limited judicial review.'" *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)). In particular, "because 'classification of bargaining subjects as "terms

or conditions of employment" is a matter concerning which the Board has special expertise,' . . . its judgment as to what is a mandatory bargaining subject is entitled to considerable deference." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979) (quoting *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685-86 (1965)); *see also Pan American Grain Co. v. NLRB*, 558 F.3d 22, 26 (1st Cir. 2009). As such, the Board's construction of the Act should be upheld if it is "reasonably defensible." *Id*.

Under Section 10(e) of the Act, the Board's factual findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). A reviewing court "may [not] displace the Board's choice between two fairly conflicting views [of the evidence], even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Pan American Grain*, 558 F.3d at 26.

Finally, "the Act has granted the Board wide discretion in fashioning remedies." *Pan American Grain*, 558 F.3d at 26 (citing *NLRB v. Mt. Desert Island Hosp.*, 695 F.2d 634, 642 (1st Cir. 1982)). And this Court will not disturb a remedial order "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Pan American Grain*, 558 F.3d at 26 (citations and quotations omitted).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SOLUTIA VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING AND REFUSING TO PROVIDE LOCAL 414C AN OPPORTUNITY TO BARGAIN OVER ITS DECISION TO CONSOLIDATE AND TRANSFER THE TESTING OPERATIONS WITHIN ITS FACILITY AND OVER THE EFFECTS OF THAT DECISION ON LOCAL 414C EMPLOYEES

A. Applicable Principles

Under Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), an employer commits an unfair labor practice by "refus[ing] to bargain collectively with the representatives of his employees."[6] Section 8(d) of the Act defines "the duty to bargain collectively" as "the performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d); *see Pan American Grain*, 558 F.3d at 25 n.3. Bargaining is mandatory with respect to subjects that fall within the statutory language, *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342, 349 (1958), and an employer violates the Act by altering a mandatory term or condition of employment without giving the union

[6] An employer who violates Section 8(a)(5) also commits a "derivative" violation of Section 8(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights under the Act. 29 U.S.C. § 158(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

adequate notice and an opportunity to bargain. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743-48 (1962).

Courts have long held that "the allocation of work to a bargaining unit is a 'term and condition of employment.'" *NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 816 (5th Cir. 2009) (quoting *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982)); *Regal Cinemas, Inc.*, 317 F.3d 300, 311 (D.C. Cir. 2003); *Citizens Publ. & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3rd Cir. 2001). Because the allocation of bargaining unit work is a term and condition of employment under the Act, "an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling his statutory duty to bargain." *Road Sprinkler Fitters*, 676 F.2d at 831. Moreover, "[t]he employer must bargain with respect to the *decision* to remove work from bargaining unit employees, not merely its effects on the employees." *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1088 (1st Cir. 1981) (emphasis in original).

An employer's decision to allocate and transfer work, as the courts have recognized, is particularly suitable to bargaining, because a change in the employer's established use of its unionized employees in work assignments will almost always involve factors within the union's control." *Geiger Ready-Mix Co. v. NLRB*, 87 F.3d 1363, 1369 (D.C. Cir. 1996). This is true especially where, as

the Supreme Court has explained, the decision is motivated by economic considerations; measures aimed at reducing labor costs are "particularly suitable for resolution within the collective bargaining framework." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210-14 (1964). Naturally, a union is uniquely positioned to offer concessions regarding employee wages and benefits to help resolve the employer's labor-cost concerns without resorting to the elimination of jobs. *See Fibreboard*, 379 U.S. at 210-14; *NLRB v. Westinghouse Broadcasting & Cable, Inc.*, 849 F.2d 15, 23 (1st Cir. 1988). Thus, "industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of conflicting interests" that turn on labor costs. *Fibreboard*, 379 U.S. at 210-14.

Moreover, where the General Counsel proves that the employer made unilateral changes to the terms and conditions of employment, the burden is on the employer to prove an exemption from the duty to bargain. *See Cypress Lawn Cemetery Ass'n*, 300 NLRB 609, 628 (1990) (employer must demonstrate why refusal to bargain was privileged); *see also Van Dorn Plastic Machinery Co. v. NLRB*, 881 F.2d 302, 308 (6th Cir. 1989) ("It is an accepted proposition of law that the burden of proof on matters which relate to justification for the employer's actions rest with the employer.")

B. The Board Reasonably Found That Solutia's Consolidation Involved a Mandatory Subject of Bargaining

As an initial matter, all the elements necessary to show that Solutia's consolidation was a mandatory subject of bargaining are present in this case. Its consolidation and transfer of the testing operations directly affected the terms and conditions of work for the Local 414C employees involved in the testing operations at the WCL. Solutia transferred the very work that the Local 414C members were doing in the WCL to a different group of employees within its Indian Orchard plant, down the street to the Saflex Lab. As the Board noted, Solutia's transfer of work here is nearly identical to other cases where the Board found the decision was a mandatory subject of bargaining. *See Westinghouse Elec. Corp.*, 313 NLRB 452, 453 (1993); *Holmes & Narver*, 309 NLRB 146, 147 (1992).

The similarities to *Westinghouse* could not be more striking. Just like here, the case involved one plant where the employer's operations were located in several different buildings. The employer decided to transfer certain lab calibration work, previously done in the "West Building lab" to its more modern and efficient "East Building lab." The Board found that the employer's "reassignment of work from one group of calibration employees to another was akin to 'assignment of work among potentially eligible groups within the plant,' which is among those matters 'recognized as subjects of compulsory bargaining." *Westinghouse Elec.*, 313 NLRB at 453 (citing *Fibreboard*, 379 U.S. at 224

(Steward, J. concurring)). Following its own precedent, the Board reasonably found that Solutia's decision to consolidate and transfer the work from the WCL to the Saflex Lab was a mandatory subject of bargaining.

The fact that labor costs factored into Solutia's decision to move the testing work further supports the Board's findings that this type of transfer involved an obligation to bargain with Local 414C. As a result of the consolidation, Solutia expected, among other things, a reduction of approximately three analysts, for a savings of approximately $249,000. In meeting notes, Solutia states that "[t]his decision was made as part of our continuous cost improvement program at the site." And one manager at trial admitted that labor costs played a role in the decision. (A.601, 604; A.122-29, 140-42, 152, 174, 178-79, 183-86, AE.45-60, AE.63, AE.119-35.) Where labor costs are a factor in the employer's decision to transfer work such as this, it must bargain with the union. *Pan American Grain Co.*, 351 NLRB 1412 (2007), *enforced*, 558 F.3d 22, 29 (1st Cir. 2009); *Winchell Co.*, 315 NLRB 526, 526, (1994), *enforced mem.*, 74 F.3d 1227 (3rd Cir. 1995).

Solutia argues (Br. 26-27) that labor costs were not a factor and that, even if they were, Local 414C could not have offered any concessions which would have altered the decision to transfer the work. First, as shown, substantial witness and documentary evidence illustrates labor costs were a factor. Second, even if labor costs were not the only factor – Solutia argues (Br. 27) that it was attempting to

address the under-utilization of the Saflex Lab employees – the bargaining obligation does not disappear merely because the employer had an additional motive, such as modernization or elimination of inefficiencies. The Board and the courts have held, in circumstances similar to those presented here, that an employer must bargain over mixed-motive layoffs that are based in part on labor costs. *See, e.g., Winchell Co.*, 315 NLRB at 526, 527-36 (employer required to bargain over layoff decision motivated by business downturn and installation of new technology); *Vico Prods. Co. v. NLRB*, 333 F.3d 198, 206-07 (D.C. Cir. 2003) (employer obligated to bargain over relocation and layoff motivated by labor costs and, in part, by reconfiguration of production process).

Further, these cases hold that where the employer's economic reason for the elimination of jobs is separable from any change in the scope of its operations, that a layoff is a mandatory subject of bargaining.[7] *See, e.g., Winchell Co.*, 315 NLRB at 526 (requiring bargaining over decision that turned on labor costs rather than change in scope of operations); *Vico Prods.*, 333 F.3d at 206-07 (D.C. Cir. 2003) (same); *accord Fibreboard*, 379 U.S. at 210-14. But again, the evidence shows that labor costs were a factor. And Solutia's alternative argument that Local 414C

[7] Solutia argues (Br. 34) that none of the former WCL employees were actually laid off as some of the remained lab technicians on the west side, some bid into other jobs, and some retired. But there can be no dispute that the employee's jobs at the WCL were eliminated, and the cited cases describing layoffs additionally involved transfers work and are on point here.

could not offer any concessions illustrates that it had no willingness to bargain, regardless of what the Local 414C could possibly offer. It also flies in the face of the Supreme Court's admonition that measures aimed at reducing labor costs are "particularly suitable for resolution within the collective bargaining framework." *Fibreboard*, 379 U.S. at 210-14.

Solutia also asserts (Br. 15, 18-24) that the decision to transfer the testing work was a change in the scope or enterprise, and it was therefore not required to bargain with Local 414C. *See First Nat. Maint. Corp. v. NLRB*, 452 U.S. 666 (1981). Solutia's attempt to fit its decision to transfer the work into a recognized exception to the mandatory duty to bargain fails, as substantial evidence supports the Board's finding that there was no change in the nature, scope, or direction of the corporate enterprise. Solutia continued to test products as it had done in the past. It simply decided to do this line of work with fewer employees by shifting the testing work from one group to other. While the shift involved moving the work into a different building, the testing work was still going to be accomplished at the Indian Orchard plant. (A.603; AE.33.) This is not a change in scope or enterprise of the business and does not fall within the exception recognized by the Supreme Court in *First National Maintenance*.

Moreover, while *First National Maintenance* found a change in the scope of business in that case, the Supreme Court did not prescribe a particular formula for

addressing elimination and transfers of work – like those at issue here. After all, unlike the instant consolidation, which was motivated by considerations that are clearly amenable to bargaining (a desire to reduce labor costs), the partial closing at issue in *First National Maintenance* turned on concerns that were "wholly apart" from the employment relationship and completely beyond the union's control or authority, namely, a customer's refusal to pay a fee. 452 U.S. at 678, 687.

Solutia's additional reliance (Br. 21-22) on *NLRB v. Wehr Constructors, Inc.*, 159 F.3d 946 (6th Cir. 1998), is unavailing. In that case, the court found that the nature of the employer's business, that of being a general construction contractor, involved making subcontracting decisions on a continuing and routine basis. The subcontracted work was not already being performed by the union's employees, and it did not result in the elimination of any existing union employees' jobs. Specifically, the Sixth Circuit noted the case was not like *Fibreboard* because the work being contracted out in *Fibreboard* had previously been performed by the employer's union employees, and the contracting out was a one-time decision to replace employees with a different group of workers where the work still had to be performed within the plant. *Id*. at 954. Solutia's transfer of work – like in situation in *Fibreboard* and unlike the one in *Wehr* – involved displacing union employees who had previously performed the work and it was a one-time decision.

Solutia goes to lengths (Br. 18-24) attempting to distinguish the Board's decision in *Torrington Indus.*, 307 NLRB 809 (1992). Solutia (Br. 21-24) makes the same unavailing arguments as the employer did in *Regal Cinemas*, that "the Board's decision cannot be sustained due to its reliance upon *Torrington*, a decision that, in its view, creates a virtual '*per se*' rule that is incompatible with the test established in *First National Maintenance*." *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 310 (D.C. Cir. 2003) (internal quotations omitted). But the Board in this case never cites *Torrington*. Furthermore, the D.C. Circuit responded to those arguments by noting that where an employer "continue[s] to operate the same business at the same locations and the only change is in the identity of the employees doing the work," as is happening here, "[t]he allocation of work to a bargaining unit is a 'term and condition of employment'" and "an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling [its] statutory duty to bargain." *Regal Cinemas*, 317 F.3d at 310-11 (citing *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982)).

It follows that Solutia also fails in its claim (Br. 18, 24) that the Board had to apply *Dubuque Packing Co.*, 303 NLRB 386 (1991), *enforced*, 1 F.3d 24 (D.C. Cir. 1993). As shown above, the Board reasonably found that Solutia's decision here turned on economic considerations that were distinct from any change in the

scope of operations that may have resulted from modernization. It is settled that the Board is not required to apply *Dubuque* in these circumstances. *See Regal Cinemas*, 317 F.3d at 311-12 (declining to apply *Dubuque* or *First National Maintenance* to decision that turned on labor costs as opposed to change in scope of operations resulting from automation). *See also* R. Gorman, Labor Law: Unionization and Collective Bargaining 690-92 (2004) (noting that while the Board has applied *Dubuque* to relocations, it has declined to apply it to other types of decisions). At any rate, applying *Dubuque* here would not help Solutia. Rather, in applying *Dubuque*, the Board has found, with court approval, that an employer was obligated to bargain over a relocation decision that, like the consolidation here, was motivated by both labor costs and increased productivity resulting from the production process. *Pan American Grain Co.*, 558 F.3d at 29; *Vico Prods.*, 333 F.3d at 206-07. *See also Holmes & Narver*, 309 NLRB 146, 147 (1992) (noting the employer's lack of capital investment as a factor that weighed in favor of finding a bargaining obligation).

C. The Board Correctly Determined that Local 414C Did Not Waive Its Right to Bargain Over the Solutia's Transfer of Work, Particularly in Light of the Solutia's Explicit Position that It Did Not Have To Bargain Over the Changes

Solutia claims (Br. 27-31) that Local 414C waived any right to bargain over the decision to consolidate the testing work away from the WCL by failing to respond in a timely manner after Solutia's announced the plan at its March 4

meeting.[8] As explained by the Board, no specific demand to bargain by Local 414C was necessary because Solutia had already decided, even before notifying the union, that the decision was not negotiable. (A.604.)

Under longstanding Board and court precedent, where it is clear that an employer will not negotiate, a union is "not required to go through the motions of requesting bargaining, for the Board does not require futile gestures." *Gratiot Community Hosp.*, 312 NLRB 1075, 1080 (1993), *enforced in relevant part*, 51 F.3d 1255, 1259-60 (6th Cir. 1995). In particular, a union must only respond to a notice that "allow[s] a reasonable scope for bargaining." *International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C Cir. 1972) ("*ILGWU*"). Otherwise, "the notice constitutes nothing more than informing the union of a *fait accompli*." *NLRB v. Centra, Inc.*, 954 F.2d 366, 372 (6th Cir. 1992). And, as the Board and courts have recognized, "[n]otice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated." *ILGWU*, 463 F.2d at 919. *See also NLRB v. Roll & Hold Warehouse & Distr. Corp.*, 162 F.3d

[8] It should be noted that on March 4, Solutia's plan to consolidate the work was tentative; final approvals were needed, and the plan was still on the drawing board. (A.228, 230.) In any event, Local 414C's president responded the following day, by telling Solutia he did not believe Solutia had the right to consolidate the work. Solutia's argument also overly minimizes Local 414C's subsequent letter, dated May 7, which was sent well before the expected implementation of the consolidation, and in which the Union conditionally requested bargaining. (A.601; AE.441.)

513, 519-20 (7th Cir. 1998); *Gratiot Community Hosp.*, 51 F.3d at 1259-60 (6th Cir. 1995); *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

As a result, Solutia cannot deny that, even if Local 414C had requested bargaining following the announcement, any request to bargain over the decision would have been futile. From the beginning, Solutia maintained that it had no duty to bargain over the decision to consolidate the testing work. Solutia's human resources director Joseph Coppola stated at trial that, even before the March 4 notification, he had determined that Solutia did not need to bargain with the Local 414C. (A.604; A.230.) Solutia's manager David Lahr also testified that, as of at least May 7, the decision had already been made and the move was going to occur; it was just a matter of effectuating it at that point. (A.604; A.142.) At the May 27 meeting with the Local 414C, Coppola announced that it did not have to bargain over its decision to transfer the work, which included eliminating four WCL positions. (A.601, 604; AE.102-03.) In Solutia's May 29 letter to Local 414C, Solutia did not ask the Union to negotiate a counter-proposal to *the decision* to eliminate the testing work at the WCL, but instead merely described the path Solutia was taking. The letter also said very clearly that "[t]he company has no obligation to bargain with the union regarding the location of the plant's testing operations." (A.601, 604; AE.437-38.)

Other Solutia business documents dated around the same period mimicked that position: "the decision to relocate the work has been made by the company. The company is not obligated to bargain with the union over this decision." (AE.63-64.) Any qualifications to this position by Solutia are at best offers that it would listen to the Local 414C about how to make the transition, but it is clear that it was not willing to bargain about the ultimate decision of actually moving the testing work. Solutia's manager's statements and internal company documents squarely counter its assertions before this Court (Br. 29 n.7, 31) that the decision to transfer the work was only tentative.[9]

Solutia now also contends (Br. 31) that Local 414C waived its right to bargain as a result of the "management rights" provision in the parties' collective bargaining agreement. (AE.154.) But as the Board concluded (A.604-05), nothing in that clause demonstrates that Local 414C waived its right to bargain over Solutia's consolidation. Under this Court's contract coverage test, described in

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[9] Solutia's argument (Br. 31) that the Board erred in finding that it failed to bargain about the effects of the decision is misplaced. Solutia may have offered, for instance, to bargain over "how Local 414C will be affected by the company's decision." (AE.437-38.) But it never gave Local 414C any indication that it was open to negotiating over the decision itself. The offer to bargain over the effects does not suffice when there is a requirement to bargain over the decision. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1088 (1st Cir. 1981). Any offer to bargain about the effects was premature, as effects bargaining could only have take place after a lawful decision was made. Thus, Local 414C was within its rights to refuse to bargain over the effects. And the Board was right to find that the Local 414C was not given a chance to engage in proper effects bargaining. (A.604.)

Bath Marine, there is no arguable way to understand how the clause covers the type of action at issue in the case. *See Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007). The plain language of the provision certainly does not describe it. Nowhere, does the language specifically reserve the right to unilaterally consolidate operations, transfer work, or eliminate unit positions. (A.604; AE.154.) And there is no evidence that the parties considered the consolidation or transfer of work at issue here during negotiations that led to the executed agreement.

At best, as the Board described, the management rights provision provides general authorization to "operate" the plant, but the examples used to define this term all related to routine employment actions. The consolidation and transfer of all the testing work at the WCL to another building does not fit within these types of actions. (A.604-05.)

Indeed, the parties previously negotiated transferring a certain type of work within the Indian Orchard plant. This practice further shows that Local 414C had not waived its right to bargain when it negotiated the management rights clause with Solutia. For example, as the Board explains, Solutia negotiated the MOU involving the ALS "pre-lam" work, which addressed the right to move work and specifically included language that allowed Solutia to later transfer the work at its discretion. (A.605; AE.199-200.) It is noteworthy that this MOU became part of

the 2006 agreement which includes the management rights clause. If Local 414C had waived the right to negotiate such transfers of work, there would be no reason for Solutia to otherwise retain the right to "transfer . . .[the] operation or the specific equipment currently used . . . to another facility outside the geographical jurisdiction of Local 414C." (AE.200.) This is exactly what Solutia did when it transferred the WCL testing work to the Saflex Lab in 2009, except of course it failed to negotiate the right to make the transfer. There simply is no sound arguable basis to conclude that Local 414C waived its right to bargain over the consolidation and transfer of work based on the management rights clause in the 2006 collective bargaining agreement. (A.604-05.)[10]

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SOLUTIA'S CONSOLIDATION OF THE TESTING OPERATIONS AND THE TRANSFER OF WORK DID NOT MODIFY THE SCOPE OF THE BARGAINING UNIT OR THE CONTRACTUAL RECOGNITION CLAUSE DURING THE TERM OF ITS COLLECTIVE-BARGAINING AGREEMENT WITH LOCAL 414C

A. Applicable Principles

It is "well settled that the 'scope of the employees' bargaining unit" is a permissive subject of bargaining about which neither party may bargain to impasse

[10] While the Board analyzed whether Local 414C waived its right to bargain under this Court's "contract coverage" standard, it also considered the waiver argument under its traditional "clear and unmistakable waiver" standard. Under both tests, the Board found that Local 414C did not waive its right to bargain over the consolidation and transfer of work. (A.604.)

or unilaterally implement. *Local 666, International Alliance of Theatrical Stage Employees v. NLRB*, 904 F.2d 47, 50 (D.C. Cir. 1990); *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615, 619 (6th Cir. 1982). The scope of the unit does not come within the purview of the phrase "wages, hours, and other terms and conditions of employment," in Section 8(d) of Act. *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 602 F.2d 73, 76 (4th Cir. 1979) (citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). And an employer cannot modify the scope of the unit without the approval of the union or the Board. *See, e.g.*, *Wackenhut Corp.*, 345 NLRB 850, 852 (2005); *Beverly Enters.*, 341 NLRB 296, 307 (2004).

As the Board has recognized, however, not every work transfer constitutes a unit modification. Contractual clauses defining the scope of the bargaining unit are not the same as clauses concerning the assignment or allocation of work to union members that, for instance, a particular union could rely on to assert jurisdiction of certain work for its members. As discussed earlier, such work assignments are mandatory subjects of bargaining. And an employer must bargain with the union before making changes. If the parties bargain to an impasse, an employer may then unilaterally change the work jurisdiction and work assignments as long as the changes are consistent with the employer's last offer to the union. *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474 n.12 (D.C. Cir. 1988) (citing *Newspaper*

Printing Corp. v. NLRB, 692 F.2d 615, 619 (6th Cir. 1982)). *Accord Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982) ("allocation of work to a bargaining unit" is a mandatory subject). An employer is always free to negotiate transfers or reductions in work. *Local 666*, 904 F.2d at 51 (citing *Boise Cascade*, 860 F.2d at 474). This includes unilaterally requiring a union to surrender a portion of work it had traditionally performed to another union. *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615, 622-23 (6th Cir.1982).

Work assignment clauses and bargaining unit definitions "are not always easy to distinguish in practice." *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474-75 (D.C. Cir. 1988). Recognition clauses defining the scope of the bargaining unit "describe the workers to be represented by the Union." It refers to an "electoral unit . . . [and] demarcates those employees or classes of employees that form a union's constituency." *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1398 (D.C. Cir. 1988). In other words, the scope of the bargaining unit is determinative of what employees the union represents, not the type of work the members of the union are to perform. *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474 (D.C. Cir. 1988).

B. Solutia's Transfer of Testing Work Did Not Modify the Scope of Local 414C's Bargaining Unit

Local 414C argues (Br. 40-46, 49) that Solutia impermissibly modified the scope of Local 414C's bargaining unit when it consolidated and transferred the

testing work. But the Board reasonably concluded (A.602-03) that the scope of the unit *included employees at a certain facility* and did *not include the type of work* those employees were performing. Under the 2006 agreement, Solutia recognized Local 414C as the sole collective bargaining representative for a general group of hourly employees "for the then existing Bircham Bend Plant." (A.599; AE 36-37.) The Bircham Bend Plant is a reference to the building that came to be called the WCL, and thus the Board found that the unit was expressly defined by the geographical location of the employees working there. (A.602) The recognition clause said nothing about the type of work or positions covered or about covering all employees doing a certain type of testing work at the greater Indian Orchard plant. (AE 36-37.) Under the recognition clause, Local 414C certainly could not claim that it had the right to all testing work. Indeed, Local 288 members had performed similar testing work at the Saflex Lab for years on the east side of the plant.

Solutia did not attempt to change the definition of the unit (the people) that did the work in the WCL; rather it was a shift of the type of work (the function), from one building within the plant to another, where other testing work had also historically been performed. *See Newspaper Printing Corp. v. NLRB*, 692 F.2d 615, 622 (6th Cir. 1982) (the scope of the unit covers people not functions). Solutia's decision to transfer the testing work was an allocation of certain work.

As reasonably found by the Board (A.602), this was not a unit modification case in which the transferred jobs or positions had been specifically included in the Local 414C unit or one in which the same work was being transferred to a different group but done in the same location. *Cf. Wackenhut*, 345 NLRB 850, 852 (position specifically described in the recognition clause); *Facet Enters.*, 290 NLRB 152 (1988), *enforced in relevant part*, 907 F.2d 963, 975 (10th Cir. 1990) (proposal to shift bargaining-unit work to another group of employees who ended up doing the same work as before in the same location).

Accordingly, Local 414C's arguments (Br. 40-45, 49) that Solutia's decision to consolidate its testing operations and transfer work away from the WCL involved a permissive subject of bargaining are unavailing. At the center of its argument is its reliance (Br. 28, 40, 42-45) on *Antelope Valley Press*, 311 NLRB 459 (1993), and similar cases. The Board, however, distinguished these types of cases. (A.602-03.) In *Antelope Valley*, the employer, during negotiations for a successor collective-bargaining agreement with the union, proposed an addition to the recognition clause that would have allowed it the right to unilaterally transfer certain work out of the unit. The proposal neither defined the timing of when the displacement would occur nor the location of where the work would be transferred. Solutia's transfer involved a specific time and location. In addition, unlike the recognition clause in *Antelope Valley*, the scope of Local 414C's unit was defined

by geographical location, as was the work conducted by Local 288 at the Saflex Lab. Additionally, Solutia did not propose to delete or otherwise change parts of Local 414C's recognition clause or to deny Local 414C work that was performed in the WCL. *Cf. Bremerton Sun Publishing Co.*, 311 NLRB 467, 467 (1993).

Lastly, Local 414C incorrectly relies (Br.45-46) on *Idaho Statesman*, 281 NLRB 272, 276 (1986), *review granted in part*, 836 F.2d 1396 (D.C. Cir. 1988). In *Idaho Statesman*, the D.C. Circuit enforced the Board's finding that the employer's proposal to abolish a certain "trainee" classification from the contract modified the scope of the bargaining unit. 836 F.2d at 1405. Solutia never proposed to Local 414C that the parties modify the classifications as described in their contract. Additionally, the Board found that the employer in *Idaho Statesman* unlawfully attempted to modify the scope of the bargaining unit when it bargained to impasse a change to the parties' jurisdiction clause: from "all mailing room work" to "all mailing room work performed in the mailing room." 281 NLRB at 276-77. First, Local 414C's recognition clause, as described above, did not include positions or type of work performed. It only described "hourly employees . . . for the Bircham Bend plant." Second, while the comparison to *Idaho Statesman* here is flawed, the D.C. Circuit found that the Board erred in determining the emloyer's change modified the scope of the unit. 836 F.2d at

1405. In either circumstance, Local 414C's reliance on *Idaho Statesman* should be disregarded.[11]

C. There Is a Sound Arguable Basis that the Consolidation Language in Local 414C's Recognition Clause Did Not Prohibit Solutia's Transfer of Work to the Saflex Lab

Local 414C also variously asserts (Br. 46-49) that the consolidation language in the recognition clause prevented Solutia from making any midterm contractual changes regarding the testing work at the WCL. Similar to a unit modification, once an employer and union memorialize certain terms and conditions of work in a collective-bargaining agreement, an employer is not free to implement a midterm modification to that contract without the union's consent. 29 U.S.C. 158(d); *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 20 (1st Cir. 2007). But again, not every midterm unilateral change constitutes a contract modification.

In determining whether an impermissible contract modification has occurred, the Board applies a "sound arguable basis" standard. *Id.*; *Hosp. San Carlos Borromeo*, 355 NLRB No. 26, 2010 WL 1726816 (2010). The Board will not find an unfair labor practice if the employer's interpretation of its contractual rights has a sound arguable basis in the contract, and the employer was not

[11] Local 414C states (Br. 45-46) that Solutia and the Board failed to recognize the modification of the recognition clause, and thus the scope of the unit, by reading the term "at" in place of the term "for." This is a distinction without a difference and *Idaho Statesman* offers nothing to suggest otherwise.

motivated by union animus, acting in bad faith, or in any way seeking to undermine the union's status as a collective-bargaining representative. *Bath Marine*, 475 F.3d at 22 (citing *Westinghouse Elec. Corp.*, 313 NLRB 452, 453 (1993), *enforced mem. sub nom., Salaried Employees Ass'n v. NLRB*, 46 F.3d 1126 (4th Cir. 1995)).

The Board reasonably found that Solutia had a sound arguable basis for concluding the language of Local 414C's recognition clause did not prohibit the consolidation.[12] The consolidation language in Local 414C's recognition clause states that "[t]his recognition clause shall be unaffected by any future consolidation of the plants at the Indian Orchard Site." (A.599; AE.36-37.) The language does not prohibit unilateral consolidations. Indeed, previous consolidations and "crossing lines" involving Local 414C's membership had occurred as recently as 2006. As the Board found, the language, at most, prohibited Solutia from unilaterally modifying the unit pursuant to a consolidation. Again, the unit was defined as employees in a geographical location. Solutia did not modify this as a result of the consolidation. (A.603.)

Local 414C urges the Court to interpret the wording in the recognition clause as "protection language" and asserts (Br. 32) that the Board, in interpreting the language, should have first asked the question: did "the Clause prohibit[] the

[12] There has been no contention that Solutia was motivated by union animus in transferring the work. (A.603 n.14.)

transfer of Chemical Workers' lab work to Local 288 members, regardless of where at the Site Local 414C's work would be performed." Local 414C's framing of the question distorts what the clause says. (A.599; AE.36.) It says nothing about the transfer of work to other areas within the Indian Orchard plant. And again, the scope of the unit is defined with a geographical reference, and it is not based on the type of work that is performed.

Citing *Milwaukee Spring*, 268 NLRB 601, 602 (1984), Local 414C also claims (Br. 30-31) that the Board should have first asked whether the parties' collective-bargaining agreement permitted the transfer of work. But the Board in *Milwaukee Spring* merely stated that it first attempts to identify the specific term "contained in" the contract that an employer's decision is modifying. As here, the Board in *Milwaukee Spring* had a difficult time finding a provision in the parties' contract specifically preventing the employer from transferring the work, despite the union's attempts to get the Board to read additional preservation language into the contract. *Id*. As in *Milwaukee Spring*, the Board here was justified finding no midterm contractual modification. (A.603.)

Local 414C also incorrectly argues (Br. 26) that Solutia's interpretation is not consistent with the parties' bargaining history. It is true that, as the Board found, the fact that the parties had bargained over transfers of work and "crossing lines" in the past suggests that they believed bargaining was required. Indeed, for

a number of years, Local 414C was successful in maintaining the work that occurred on the historical west-side of the Indian Orchard plant by negotiating with Solutia. (A. 603.) However, this does not illustrate that Local 414C was entitled, vis-à-vis the consolidation language in the recognition clause, to a certain work as Solutia made its changes. At best, it shows that there was a practice of allocating work to the Union that had historically performed work in the geographical area.

Contrary to Local 414C's assertion (Br. 26), the parties' bargaining history furthers only the argument that, when there was a question over how work would be allocated, bargaining should occur. The bargaining history does not show that the so-called "protection language" required Solutia to obtain Local 414C's consent before shifting the work. If this were the case, Local 414C would have had no incentive to enter into the 2006 bargaining with Solutia that resulted in the MOU granting Solutia the ability to require employees from either Local 414C or Local 288 to perform work where the unions had historically been able to prohibit it. (A.603.) Because this was arguably a type of work consolidation, if the parties had already bargained over this, Local 414C could have simply rejected Solutia's offer.

Local 414C also argues (Br. 26, 35-36, 38, 41) that the Board's finding that Solutia had a sound arguable basis for its claim that the transfer of work did not violate the recognition clause, renders the consolidation language meaningless. As

described above, Solutia interpreted the consolidation language as preventing it from modifying the scope of the unit. As Solutia has asserted, one could imagine a different scenario where a consolidation involved work transfers into the WCL (the former Bircham Bend plant). (A.45.) In that instance, the consolidation language in Local 414C's recognition clause would clearly solve the question of who would get that work, regardless of what kind of work was sent there. The work would go to Local 414C. This may not be the perfect interpretation of the parties' recognition clause, but it does not require reading anything additional into the clause.[13]

Moreover, the Board is limited in its role in these situations. It is only tasked with determining whether Solutia, in considering the applicable provisions of its collective-bargaining agreement with Local 414C, had a sound arguable basis for its decision to consolidate and transfer the work – nothing more. The Board has repeatedly held that where the dispute involves "one of contract interpretation,

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[13] Local 414C also argues (Br. 31-32) that it insisted on the consolidation language, in an effort to protect work from leaving the WCL, during collective bargaining in 1982, because Solutia's predecessor was consolidating other salaried employees' jobs around that time. But, as the Board found (A.603), the plain language does not clearly create a jurisdictional guarantee of the work. As the courts have stated, "[u]nless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit," if the employer bargains in good faith to impasse and is not motivated by union animus. *See Boeing Co. v. NLRB*, 581 F.2d 793, 797 (9th Cir. 1978) and *University of Chicago v. NLRB*, 514 F.2d 942, 949 (7th Cir. 1975) (both cited in *Milwaukee Spring*, 268 NLRB 601, 602 (1984)).

and there is no evidence of animus, bad faith, or an intent to undermine the Union, [it] will not seek to determine which of two equally plausible contract interpretations is correct." *Westinghouse Elec.*, 313 NLRB at 452 (quoting *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988)); *see also Bath Marine*, 475 F.3d at 22. Given the plausible range of scenarios, the Board reasonably found that Solutia's interpretation did not render the consolidation language in the recognition clause meaningless.[14]

III. THE BOARD APPROPRIATELY ORDERED SOLUTIA TO RETURN WORKING CONDITIONS TO THE STATUS QUO ANTE AND MAKE EMPLOYEES WHOLE FOR THEIR LOSSES

As a remedy, the Board ordered Solutia to rescind its unlawful, unilateral changes and return to the status quo ante by restoring the WCL as it existed on or about August 1, 2009. As part of that order, Solutia must reinstate and make whole the employees whose testing jobs at the WCL were eliminated as a result of the changes. (A.605.) There is no merit in either Solutia's contentions (Br. 34-39) that this order was inappropriate, punitive, or otherwise inconsistent with the Act

[14] In its argument that a midterm modification of the contract occurred, Local 414C also argues (Br. 46-47) that this Court should remand the case to the Board because it erred in adopting the administrative judge's understanding that Section 8(d) of the Act, 29 U.S.C. § 158(d), does not extend to permissive subjects of bargaining, such as modification of the scope of the unit. But Local 414C appears to ignore that this Court similarly has found that Section 8(d) "applies only to mandatory, not permissive, subjects of bargaining." *Bath Marine*, 475 F.3d at 20 (citing *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 184 (1971)).

or in Local 414C's claims (Br. 50-55) that the Board did not do enough within its powers under the Act.

Section 10(c) of the Act (29 U.S.C. § 160(c)) directs the Board, if it concludes that a party before it has engaged in an unfair labor practice, to order the party "to cease and desist from such unfair labor practice . . . ." It further empowers the Board to order the party "to take such affirmative action . . . as will effectuate the policies of [the] Act." *Id*. This statutory command "vest[s] in the [Board] the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *see also Visiting Nurse Servs. v. NLRB*, 177 F.3d 52, 61-62 (1st Cir. 1999).

In a bargaining case, restoration of the *status quo ante* relieves the Board of the need to speculate about what would have happened had the employer engaged in the timely bargaining that was its duty under the Act. *Southwest Forest Indus.*, 278 NLRB 228, 234 (1986), *enforced*, 841 F.2d 270 (9th Cir. 1988). At the very least, the Board is not required to assume that an employer would have summarily implemented new terms of employment had bargaining taken place. It is possible that alternatives could have been arranged with the union's cooperation. *Id*., 278 NLRB at 234.

As part of restoration order, the customary remedy aims to return the affected employees to the economic status quo that existed prior to the employer's unlawful unilateral action. This includes reinstatement and full back pay, and such remedies are considered "presumptively valid." *Pan American Grain Co., Inc. v. NLRB*, 558 F.3d 22, 29 (1st Cir. 2009). If any uncertainty remains as to the exact amount of back pay that is owed, the "'consequences of [the employer's] disregard of its statutory obligation [to bargain] should be borne by the [employer], the wrongdoer herein, rather than by the employees.'" *Id.* at 966 (quoting *Hamilton Electrs. Co.*, 203 NLRB 206 (1973)). *Accord Plastonics, Inc.*, 312 NLRB 1045, 1048-49 (1993); *Farina Corp.*, 310 NLRB 318, 322 (1993). Board orders requiring reinstatement and backpay to remedy unlawful refusals to bargain also meet with judicial approval. *See, e.g., Fibreboard Paper Products Co. v. NLRB*, 379 U.S. 203, 208, 215-16 (1964) (approving reinstatement and make-whole order to remedy unlawful unilateral subcontracting of unit work); *NLRB v. Sandpiper Convalescent Center*, 824 F.2d 318, 321 (4th Cir. 1987), *enforcing*, 279 NLRB 1129 (1986) (layoffs); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090-91 (7th Cir. 1987) (same).

It also should be noted that the employees' expectation of having union representation is defeated by the unlawful unilateral action of an employer, as the stability of the bargaining relationship is impaired. The effect of such instability is

to create perceptions of unfairness and of union weakness; the reaction to these perceptions is labor instability. Thus, courts have concluded that Board remedies correcting a unilateral change in a term or condition of employment are consistent with an important policy behind the Act. *See NLRB v. Keystone Steel & Wire, Div. of Keystone Consol. Indus., Inc.*, 653 F.2d 304, 307 (7th Cir. 1981) (citing *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 429 n.15 (1967) ("For the real injury in this case is to the union's status as bargaining representative")).

A. The Court Should Disregard Solutia's and Local 414C's Attempts To Alter the Board's Remedy as They Relate to Issues They Agreed Would Later Be Addressed During a Future Compliance Proceeding

Solutia (Br. 35-39) and Local 414C (Br. 50-54) both raise many arguments effectively seeking to limit what can possibly be presented in a potential future compliance proceeding before the Board.[15] As the Board noted in its decision, however, many issues during the hearing were specifically left to the later stage: specifically, "all parties agreed to defer fully litigating which, if any, employees are entitled to these remedies to the compliance proceeding." (A.606 n.20; A.26-31, 386-90, 441-43, 451-52.) In addition, Solutia will have the opportunity to

[15] It is the Board's normal practice to leave the particulars of reinstatement and back pay obligations to a separate set of proceedings known as the compliance stage. This bifurcated procedure has met with judicial approval. *See Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 308 (1st Cir. 1993); *NLRB v. Plumber & Pipefitters Local 403*, 710 F.2d 1418, 1420-21 (9th Cir. 1983). *See also NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 260 (1969).

present any new or previously unavailable evidence that would show that, since the unfair labor practice hearing, restoration of the WCL has become unduly burdensome.[16] (A.605 n.19.) Thus, it is premature for the Court to address these issues now, even though Solutia and Local 414C raise them in their briefs.

B. Nothing in Solutia's or Local 414C's Remaining Arguments Requires Overturning the Board's Remedial Order

Solutia incorrectly argues (Br. 34) that the Board applied the wrong standard for potential reinstatement because the employees who worked in the WCL prior to the consolidation either remained lab technicians on the west side, bid into other jobs, or retired. While Solutia may not have ultimately laid-off the employees, it is undisputed that their former jobs at the WCL were eliminated as a result of the transfer of work. While a few employees bid into new positions, they were considered less desirable and required substantially greater physical exertion. (A.602.) The fact remains: the employees were removed from their positions without the benefit of lawfully required mandatory bargaining. As a result, the Board ordered its customary remedy of reinstatement and backpay for an

[16] Contrary to Local 414C (Br. 53-54), there is no support for Solutia having waived this right to later provide new evidence. As it stands, it is true that Solutia did not present evidence of undue hardship, and the Board was well within its power to order the restoration of the work. *Pan American Grain*, 558 F.3d at 29. But as in *Pan American Grain*, this Court upheld the Board's restoration order in part relying on assurances that the employer would get an opportunity later to provide new evidence that returning the operations to the status quo ante would be unduly burdensome.

employer's failure to bargain over a decision to lay off employees. *See Regal Cinemas, Inc.*, 317 F.3d 300, 315 (D.C. Cir. 2003) (recognizing reinstatement as the "presumptively valid remedy where the employer violates its duty to bargain"); *see also Geiger Ready-Mix Co. v. NLRB*, 87 F.3d 1363, 1371 (D.C. Cir. 1996) (approving a make-whole remedy for failure to bargain over layoff); *NLRB v. Sandpiper Convalescent Center*, 824 F.2d 318, 324 (4th Cir. 1987) (same).

Citing *Borden, Inc.v. NLRB*, 19 F.3d 502 (10th Cir. 1994), Solutia also argues (Br. 35) that a constructive discharge standard should have been required by the Board. But, *Borden* need not be read as requiring the Board to go through a constructive discharge analysis to determine which employees will be offered reinstatement or part of the make-whole remedy. And, even f it did, the *Borden* does not suggest that analyzing a case vis-à-vis a constructive discharge standard requires some heightened scrutiny. In *Borden*, the court briefly considered employees who opted for retirement rather than continue employment with fewer benefits. *Borden*, 19 F.3d. at 514 (citations omitted). Without a detailed analysis, the court simply explained, "[w]hen an employee leaves his job as a result of such an unlawful condition, the employee is considered to have been constructively discharged." *Id.*

Similarly, in citing *Borden*, the Board did not imply that some sort of heightened standard should be used. Rather, the Board referred to the case to

illustrate an instance where similar issues were appropriately left to the compliance stage. The Board noted that there was a sufficient evidentiary foundation to litigate the reinstatement and back pay in compliance, as the parties agreed, based on the undisputed elimination of certain positions and the evidence of employees who were reassigned, bid into less desirable jobs, or possibly opted to retire as a result of the consolidation. (A. 606 n.20.)[17]

Solutia also errs in arguing (Br. 38) that there is something inappropriate about the Board's order to reimburse the benefit funds. The Board's Order (A.606) requires the reimbursement to be made in accordance with its decision in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn.6 (1979), which multiple courts have found acceptable. *See NLRB v. Refrigerator Service, Inc.*, 8 F. App'x 369, 370 (6th Cir. 2001); *NLRB v. G & T Terminal Packaging Co., Inc.*, 246 F.3d 103 (2d Cir. 2001). The Board has ordered similar remedies with this Court's approval, and Solutia offers nothing to suggest the order would be punitive or that it otherwise should be overturned here. *NLRB v. Harding Glass Co.*, 500 F.3d 1, 7-8 (1st Cir. 2007).

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[17] Further evidence is required to fully assess various matters, including why certain employees affected by the Board's decision chose to retire. Only two employees choosing retirement testified at trial. Based on their limited testimony, Solutia argues (Br. 36-38) that a higher level of scrutiny should be applied to others possibly deserving of the make-whole remedy. As a full record on these matters was not developed, the circumstances of the two employees should not taint the opportunity of the other employees to make their case before the Board.

Lastly, Solutia argues (Br. 38-39), without citing any case on point, that the make-whole remedy should not include reimbursements to Local 414C for the union dues that would have been paid by employees had they remained employed. Applicable case law, however, supports such reimbursements to remedy Solutia's unlawful conduct. *In re Baltimore Sun Co.*, 335 NLRB 163, 170 (2001); *Ogle Protection Service, Inc.*, 183 NLRB 682, 682-83 (1970), *enforced*, 444 F.2d 502 (6th Cir. 1971). *See also NLRB v. Sheridan Creations, Inc.*, 384 F.2d 696, 696-97 (2d Cir. 1967).

As for Local 414C, it first claims (Br. 50) that the Board improperly failed or refused to give reasons for its refusal to grant additional relief. But again, the Board here gave traditional, court approved, remedies to effectuate the purposes of the Act. It tailored its Order where appropriate – for instance, where Solutia did not oppose Local 414C's request either to post the remedial notice at the Saflex Lab or to mail it to retirees. (A.598 n.2.) Further, as a result of the parties' agreement to defer many issues for the Board's compliance stage, it was premature for the Board to address Local 414C's remaining attacks on the remedial part of the Order. Local 414C's reliance on *UAW v. NLRB*, 455 F.2d 1357, 1369-70 (D.C. Cir. 1971) is inapposite because the parties in *UAW* did not specifically agree to save such issues for the compliance stage.

Local 414C repeatedly argues that the Board's remedial order was not specific enough. But none of these arguments has merit. For example, Local 414C argues (Br. 51-52) that it asked for a more specific "make whole" remedy that would provide for possible tax "or other" consequences suffered by the employees. But the Board, without more evidence, is unable to predict every scenario in which an employee may have suffered. Accordingly, such matters are typically left to a compliance proceeding, as they were here, where testimony and evidence can be presented showing specific adverse consequences as result of a Solutia's unlawful action.

Other specificity arguments raised by Local 414C appear to ask for nothing more than what the Board already ordered. Local 414C demands (Br. 53) that the Board make clear that the remedy includes "restoration of the unit to what it would have been without the unlawful changes." But the Board's Order requires Solutia to "[r]escind the unilateral consolidation and transfer of work . . . and return to the status quo ante by restoring the West Control Lab as it existed on or about August 1, 2009." (A.606.)

Local 414C also speculates (Br. 52, 54) about changes that have occurred since the hearing and argues that the Board should have required bargaining before Solutia attempts to effectuate the restoration order. First, this is not part of the customary remedy in a unilateral change case. *See Pan American Grain*, 558 F.3d

at 29. Second, it would be inappropriate to entertain such an extraordinary remedy absent more concrete evidence. Thus, such a request, based on speculative evidence, without more, should be disregarded. The extent of Local 414C's remedial concerns largely depends on evidence that has not yet been adduced. Any claim of potential adverse effect on the employees is therefore purely hypothetical, and the Court lacks jurisdiction to entertain Local 414C's challenge at this time. *See Sheet Metal Workers Int'l Ass'n, Local 270 v. NLRB*, 561 F.3d 497, 501 (D.C. Cir. 2009); *Int'l Bhd. of Boilermakers v. NLRB*, 377 F. App'x 125, 27-28 (2d Cir. 2010).

Finally, Local 414C claims (Br. 54) that a bargaining order should have been issued. But after Solutia restores the work, returns the WCL to the status quo ante, and makes the employees whole, it already would be an unfair labor practice for it to then unilaterally transfer the work without bargaining, as the Board's decision states. (A.598-607.) It is possible, despite declarations by Solutia's counsel (see Local 414C Br. at 54), that, once Solutia complies with the Board's Order, it will not want to transfer the work. And even if Solutia wanted to transfer the work, a similar transfer in this case would continue to be a mandatory subject of bargaining under Section 8(d) of the Act, and Solutia would be required to offer to bargain in good faith. Even with a bargaining order, contrary to what Local 414C now

implies, Solutia could bargain to a good faith impasse and then implement its final offer.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court grant the Board's application for enforcement against Solutia, deny Solutia's and Local 414C's petitions for review, and enter a judgment enforcing the Board's Order against Solutia in full.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,889 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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