United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 14, 2005

TO : Alan B. Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sabek Transportation, Inc.
Case 32-CA-21857

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This case was submitted to Advice as to whether the Employer constructively discharged three employees who resigned in response to discriminatory changes in their terms and conditions of employment, including a pay reduction and an improved medical benefits plan.

We conclude that the Region should dismiss the instant charge, absent withdrawal. Where the employees were not low wage earners, and the pay reductions were significantly offset by improved medical benefits which otherwise addressed a key employee concern, these changes were not so onerous or unpleasant that the Employer should have known or foreseen that they would force the employees to resign.

FACTS

Sabek Transportation, Inc. (Employer) transports gasoline in the San Jose, California area. It maintains one facility in San Jose and another in King City, approximately 100 miles south of San Jose. Before the relevant events herein, the Employer employed five drivers at San Jose and seven at King City.

King City drivers report to work in King City, drive empty fuel trucks to a fuel supply point in San Jose, make fuel deliveries in San Jose, and at the end of a shift return their trucks to King City before going off duty. The Employer paid King City drivers $0.32 per mile, which included their 200 roundtrip commuting miles between King City and San Jose. It appears that all drivers earned around $30 per load and delivered an average of around four loads per day. Applying these figures to the number of shifts they worked, King City drivers Jose Gonzalez and Pete Gonzalez each had earned approximately $59,124, and King City driver Recio had earned roughly $45,552, per year.

On August 2, 2004,[1] Teamsters Local 287 (Union) filed a petition to represent Employer drivers at both facilities. On September 8, while the representation case was still pending, the Employer announced it would only keep one truck at the King City facility and that henceforth, King City drivers would have to commute uncompensated to its San Jose facility to report to work. The Employer also approached King City drivers Jose and Pete Gonzalez to discuss improved terms and conditions if the Union withdrew its petition. The next day, September 9, the Union withdrew its petition at the employees' request.

On September 13, Jose and Pete Gonzalez again met with Employer representatives to discuss new terms and conditions. The employees asked about various subjects, including a 401(k) plan and better health insurance, which had been a major factor behind the employees' seeking Union representation.[2] The Employer proposed a 401(k) plan, said it would look into better medical insurance benefits, and offered to continue paying the drivers to commute to San Jose, but not to reimburse them for that trip home at the end of the day. The employees responded that it would be illegal to force them to commute without compensation because they were still driving the Employer's trucks. The Employer also said it wanted to eliminate an annual $1000 safety bonus for employees who remained accident-free for a year. By September 14, an Employer representative had communicated with the health insurer that would later provide new medical benefits to King City drivers.

On September 21, Jose and Pete Gonzalez again spoke with an Employer representative, who explained that the Employer would offer a 401(k) plan, a medical plan with no deductible, and a pay reduction to $0.16 per mile for the first 200 daily miles, i.e. commuting from King City to San Jose, in order to pay for the new medical plan. Jose Gonzalez asserted that they would not work for that mileage rate, or on nights or weekends.

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[1] All dates are in 2004 unless otherwise indicated.

[2] Under the then-existing employee medical insurance benefit, employees would pay an annual deductible of around $4500 per employee family and $2500 per individual employee as well as a 20% co-payment for most services. That plan also had an out-of-pocket maximum expense of $10,000 per employee, which the Employer asserts covered only "catastrophic" expenses.

On that same day, the Employer placed the following memo in the drivers' room at the King City facility regarding changes in terms and conditions of employment:

> **Terms of Employment**
> All drivers will receive medical insurance for themselves and their spouse at company expense unless the spouse is covered through his or her employer through another insurance company.
>
> A retirement plan (401(k)) will be set up by the company for participating employees. The company will invest .50 cents for each dollar the employee invests in the plan based on a 5% investment of employees gross pay. All money invested will become the employees after a 5 year vesting period.
>
> King City drivers will be paid at a rate of .16 cents per mile for the first 200 miles daily (from King City to San Jose and San Jose to King City) then .33 cents per mile after the first 200 and $15.00 per hour for loading and unloading.
>
> Drivers schedules will be on a rotating basis. All King City drivers will be required to work a night shift for a 2 week period.
>
> A new drivers schedule will be available no later than Sept. 27, 2004.
>
> Drivers who do not comply with these new terms may be subject to termination.

The new medical and 401(k) plans applied to both San Jose and King City drivers, but the new schedule and mileage rates applied only to King City drivers. The schedule change reduced work from ten to nine shifts every two weeks. The Employer also eliminated the safety bonus on September 21. The Region found insufficient evidence to establish that the September 21 wage reductions were intended by the Employer to force any employees to resign.

On September 23, King City driver Recio informed the Employer that he planned to quit because he could not afford to live on the pay rate listed in the Employer's September 21 memo, and because the Employer was only giving him one load a day. Recio indicated to the Region, but not the Employer, that the elimination of the safety bonus further affected his decision to quit. Prior to the September 21 announcement, Recio had been working four shifts per week,

as well as night shifts. Thus, the reduced schedule of one shift every two weeks, and inclusion of mandatory night shifts, were not changes for him. The Employer granted Recio a requested week off to search for new employment.

On September 24, the Union filed Case 32-CA-21635 alleging a wide range of Employer violations. On November 30, the Region issued a complaint and a partial dismissal of the allegations in that case.[3]

On September 27, Recio resigned from the Employer and then found employment in Arizona. He recently returned to King City, where he is unemployed and seeks reinstatement with the Employer.

On October 1, the new medical benefits plan took effect. The primary improvement of this plan is the elimination of employee payment of the $4,500 family and $2500 individual deductibles. The medical plan summary indicates that employees have only a $25 co-pay for visits to primary care and specialist physicians, and a 30% co-payment for most other services. The plan also reduced the maximum employee out-of-pocket payments from $10,000 to $3,000.

On October 2, King City driver Jose Gonzalez submitted the following letter of resignation:

> Since we started to organize the Union, I got my wages lowered, my regular days off changed, my regular shift changed and I have gotten less work, making my job unacceptable. Under [these] conditions, I [am] forced to resign my position as truck driver after 15 years.

On October 5, King City driver Pete Gonzalez also quit, submitting the following resignation letter:

> Please accept this as official notice of my resignation. As you know, over the last three to

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[3] The complaint allegations included the imposition of the September 21 terms on King City drivers, as well as unlawful interrogations, threats to sharply reduce compensation in retaliation for Union support, conditioning improvements in terms of employment on withdrawal of the representation petition, and discriminatorily disciplining two of three employees who are the subject of the instant constructive discharge charge. The Region dismissed the allegations that the Employer unlawfully reduced drivers' loads to one load per day by contracting out that work in September 2004.

> four months, we have had many differences in opinion regarding health benefits, work schedules, and decreased pay. Our conflict has affected my ability to perform my job duties due to stress and has left me feeling uncertain about my future employment. It is clear to me that you and I will not be able to resolve our difference. Therefore, I feel that resigning is the best option for me at this time.

Thus, both Jose and Pete Gonzalez resigned due to the cut in pay and schedule changes. They would have earned around $45,255.60 under the new salary plan, which is 24% less than their pre-September 21 salary. However, factoring in maximum use of their $4,500 deductible under the old medical plan, their overall financial wage and benefit package would reduce by around 16% of their pre-September 21 salary.[4] Before Jose Gonzalez quit, he actually used the new medical benefit plan, paying only $47.80 of a $260.00 medical bill. Under the Employer's prior medical insurance benefit, Gonzalez would have had to pay the entire $260 charge assuming he had not yet reached his deductible.

Recio would have earned roughly $38,480 per year applying the new salary pay rate. This income is around 16% less than his previous salary of around $45,552. Recio would have earned around 10% less than his previous wage package after factoring in maximum use of his $2500 individual deductible under the old medical plan.[5]

Regarding schedules, neither Jose nor Pete Gonzalez wanted to work nights or weekends apparently because of inconvenience. They also both apparently determined that any benefits from the new medical insurance and 401(k) plan would not outweigh their reduced earnings.[6] They resigned without securing new employment, but later accepted new jobs

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[4] This assumes use only of primary care and specialist physicians which require only a $25 co-payment. Factoring in the 30% co-payment for most other services might make the reductions in earnings slightly greater.

[5] Recio had only individual coverage under the previous medical plan. This calculation also assumes use only of primary care and specialist physicians.

[6] Before the Gonzalezes resigned, they received a package explaining the new medical benefits plan coverage and completed plan enrollment forms. Recio resigned before he received any information on the new medical insurance plan.

hauling gas, working nights and making slightly less than their pre-September 21 earnings at the Employer.

ACTION

We conclude that the Region should dismiss the instant charge because the unlawful reductions of the drivers' wages were offset by improved medical benefits and thus were not so onerous that the Employer should have foreseen that its changes would force the employees to resign.

The Board has held that in order for an employer's conduct to amount to a constructive discharge, "[f]irst, the burdens imposed on the employee must cause and be intended to cause, a change in the working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activity."[7] The General Counsel need not prove that the employer "intended to cause" the employee to resign if the employer reasonably could have foreseen that its action would have resulted in a forced resignation.[8]

The Region has determined that the wage reductions here were not actually intended by the Employer to force these employees to resign. However, the Board has held that an employer should have foreseen that employees would be forced to resign where the employer significantly reduced employee income for an indefinite period of time.[9] The Board will find a constructive discharge in these circumstances because

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[7] Crystal Princeton Refining Co., 222 NLRB 1068, 1069 (1976).

[8] See American Licorice Co., 299 NLRB 145, 148-49 (1990) (when employee informed employer that she needed to transfer to another shift because she could not afford child care, the employer reasonably should have foreseen that refusing to grant the employee's transfer request would force her to resign).

[9] See Consec Security, 325 NLRB 453, 453 (1998), enfd. 185 F.3d 862 (3d Cir. 1999)(reduction of wages by nearly 25% "clearly meets this test"); PPP Insulation Co., 320 NLRB 953, 953 (1996) (constructive discharge where employer, angered by employee's filing prevailing wage claim under state law, reduced employee's hours from 40 to 32 per week, and rebuffed employee's protest that he could not live on that, thereby causing employee to quit); La Favorita, 306 NLRB 203, 205 (1992), enfd. 977 F.2d 595 (10th Cir. 1992) (senior employee's hours were discriminatorily reduced to working on one instead of two production lines, resulting in constructive discharge).

"it can be reasonably inferred that such a large reduction in income would impair an employee's ability to meet living expenses to such an extent that employee would be compelled to seek alternative employment."[10] The Board has found constructive discharges resulting from income reductions as low as 17% and 18% in circumstances where the employees already were earning low wages.[11]

Here, the amounts of the unlawful reductions in pay, standing alone, may in some circumstances suffice to constitute "significant reductions" in income to cause a constructive discharge.[12] The post-reduction wage incomes of Jose and Pete Gonzalez decreased around 24%, which falls within the range of income reductions causing a constructive discharge. See fn. 11 above. Recio's income decreased around 16%, an amount only slightly less "significant" than the 17% and 18% reductions found sufficient in the above Board cases.

We conclude that this case is distinguishable from those cases cited above because the salaries here are significantly above minimum wage earnings. In Kime Plus, the ALJ emphasized that 18% to 28% reductions in earnings are a "shock condition" particularly for people making under $6 per hour. In Holiday Inn of Santa Maria, the employer reduced wages 17% to just above the then-minimum wage. In contrast, the post-reduction hourly earnings here would have been around $23-24 per hour for the Gonzalezes, and around

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[10] See Consec Security, 325 NLRB at 453 n.4 (evidence concerning the actual impact of the reduction on the employee's livelihood is not required) (citations omitted).

[11] Kime Plus, Inc., 295 NLRB 127, 146 (1989) (constructive discharge where employer reduced employee's schedule causing a 28%, and then an 18%, decrease in earnings; such a loss in income "must be viewed as a shock for anyone, but particularly for someone earning less than $6 an hour"); Holiday Inn of Santa Maria, 259 NLRB 649, 662 (1981) (17% reduction from $4.33/hour to $3.60/hour where minimum wage at the time was $2.90/hour).

[12] Because the Region concluded that the Employer lawfully reduced the amount of drivers' loads in September 2004, we would not include any related reduction in pay to support a constructive discharge allegation. See KFMB Stations, 343 NLRB No. 83, slip. op. at 5 (2004) (since employer's treatment of employee was lawful, employer could not have constructively discharged the employee by reducing his salary).

$19-20 per hour for Recio. These are substantial wages, more than three times California's minimum wage of $6.75 per hour. Thus, the reduction in wages here clearly was not as onerous as in the above Board cases.

Even assuming that, standing alone, these pay reductions are "significant" enough to cause a constructive discharge, the Employer concurrently granted employees an improved medical benefits plan. The Board has found a constructive discharge where an income reduction resulted from the loss of employee medical insurance, a "major employee" benefit.[13] In our view, an employer's increase in such a benefit can also impact the constructive discharge analysis. Therefore, if the Employer here simultaneously offered the increased benefits package and reduced pay rates, we would proceed to determine whether the benefits were a sufficient offset to preclude a finding that the Employer constructively discharged the employees.

We conclude that the medical benefits can be used as an offset because the evidence indicates that the Employer simultaneously and without delay provided information to and enrolled employees in the new medical plan. The employees thus did not have to speculate as to whether the Employer would offer the new plan, or how it would likely benefit them. First, the Employer communicated with its new health insurer as early as September 14, just after the Union withdrew its petition. Moreover, Employer representatives met with employees to discuss possible new terms and conditions of employment and also distributed benefit plan packages to employees. There is no dispute that the Gonzalezes and some other employees received a package detailing the benefits of, and enrolled in, the plan. In fact, Jose Gonzalez filed a claim for reimbursement under the new plan.

In these circumstances, we conclude that the Employer did not constructively discharge the employees here because it should not have reasonably foreseen that the employees would quit in response to its simultaneous pay reduction and granting of the improved medical benefits package. The impact of the benefits plan, i.e., the reduced out-of-pocket cap ($3,000 from $10,000) in maximum employee payments, the minimal employee co-payments for primary care and specialist physician visits, and especially the elimination of employee

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[13] See National Wholesale Co., 244 NLRB 187, 187 (1979) (the elimination of medical insurance served to end the employee's employment relationship with the employer and must be viewed as a constructive discharge).

deductible payments, all considerably cushioned the impact of the reductions in salary. For example, if the Employer made the maximum insurer payment of deductibles previously paid by employees, the reductions in earnings after September 21 for the Gonzalezes and Recio would be approximately 15-16% and 10% respectively. These are less than the reductions of earnings in cases like Holiday Inn of Santa Maria and Kime Plus, which represent the lowest percentage decreases yet found by the Board to have resulted in a constructive discharge.

Especially significant to our conclusion that the Employer should not have reasonably foreseen that employees would resign in response to these changes is that its simultaneous adoption of an improved medical plan squarely addressed the main subject of concern to employees in seeking Union representation. Medical benefits also was one of the key subjects of concern raised by employees in discussions with Employer representatives after the Union withdrew its petition. The increased medical benefit thus not only significantly reduced the financial impact of the wage reduction, it improved a key benefit that had been of long-standing employee concern.[14]

In sum, where the employees were not low wage earners and the wage reduction was significantly offset by the improved medical benefit, which itself addressed a key employee concern, we conclude that the Employer should not

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[14] Jose and Pete Gonzalezes' refusal to work night or weekend shifts does not affect our conclusion that they were not constructively discharged. Although they understandably preferred to keep their daytime weekday schedules, they neither told the Employer nor otherwise presented evidence that they were unable to work nights or weekends. In fact, they both work nights at their new jobs. Thus, they appear to have merely preferred to work those shifts, which would not support an allegation that the schedule changes were so onerous as to cause a constructive discharge. See Dillingham Marine & Mfg. Co., 239 NLRB 904, 915 (1978), enfd. 610 F.2d 319 (5th Cir. 1980) (no constructive discharge where employee's primary motivation for leaving his job was that he preferred the day shift because he was tired of working nights and his wife did not want to be left alone at night with the children). Compare Bennett Packaging Co., 285 NLRB 602, 607 (1987) (constructive discharge where employer directed employee to report to work one hour earlier knowing employee could not work at that time due to childcare responsibilities); General Baptist Nursing Home, 259 NLRB 982, 984-85 (1982) (constructive discharge where employee told employer that the change in hours caused her transportation problems).

have foreseen that these unlawful changes would have forced these employees to resign.

B.J.K.