

Solutia, Inc. and International Brotherhood of Electrical Workers, Local Union No. 676, AFL-CIO.
Case 15-CA-16604

May 19, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND ACOSTA

On December 4, 2002, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

In affirming the judge's conclusion that the Respondent violated Section 8(a)(1) by barring off-duty employees from distributing literature in the employees' parking lot, we find no merit in the Respondent's contentions that its misconduct, which occurred on May 11, 2002, was *de minimis*.²

The Respondent claims that the effect of the violation was limited to that date. But the Respondent never effectively repudiated its misconduct. Nor can the misconduct be regarded as *de minimis*, given the reasonable inference that it did have a continuing chilling effect on employees' exercise of their Section 7 rights. Parking-lot distributions were not attempted again for at least the following week. There was then only a single instance

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² With respect to *Tri-County Medical Center*, 222 NLRB 1089 (1976), we agree that the Respondent has not established a business justification for prohibiting the handbilling. We disavow any suggestion that the business-justification defense under *Tri-County* is unavailable if the employer lacks a specific no-solicitation rule. See *Nashville Plastic Products*, 313 NLRB 462 (1993) (rule nonexistent prior to handbilling).

Chairman Battista and Member Acosta do not pass on the Respondent's argument that the Board should return to the standard established in *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973). Even under the *GTE Lenkurt* standard, the Respondent's conduct violated Sec. 8(a)(1) of the Act. The record evidence shows that the Respondent discriminated against the off-duty employees by permitting spouses and outside vendors access to the parking lot, while excluding the off-duty employees involved here.

of distributions, by unidentified individuals, on May 19. Not until May 28, in turn, did the Union and the Respondent reach agreement on the conditions for further parking lot distributions.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Solutia, Inc., Cantonment, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Christopher J. Doyle, Esq., for the General Counsel.
Timothy J. Sarsfield and *Stephen D. Smith, Esqs.*, for the Respondent.

Reagan L. McDaniel and *Rick D. Tira*, for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Pensacola, Florida, on November 12, 2002. The charge was filed on May 14 and was amended on August 21, 2002.¹ The complaint issued on October 7. The complaint alleges that the Respondent, Solutia, Inc., on May 11, required off-duty employees to stop distributing union literature in violation of Section 8(a)(1) of the National Labor Relations Act. Respondent's timely answer denied any violation of the Act. Counsel for the General Counsel requested that I issue a bench decision. The Respondent presented a brief at the beginning of the hearing. At the conclusion of the hearing, after hearing oral argument, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

Consistent with the allegations of the complaint, I found that the Respondent did require off-duty employees to stop distributing union literature on May 11 and that, in so doing, the Respondent violated the Act. Prohibiting off-duty employees from distributing union literature in nonworking areas outside of a facility on the employees' own time, absent a legitimate business justification, unlawfully interferes with employees' Section 7 rights and violates Section 8(a)(1) of the Act. See *Valeo Sylvania, L.L.C.*, 334 NLRB 133, 140 (2001), *Nashville Plastic Products*, 313 NLRB 462, 463 (1993); and *St. Luke's Hospital*, 300 NLRB 836, 837 (1990). Notwithstanding the absence of interference after May 11, I found that the Respondent never repudiated its unlawful action of May 11. See *Pas-savant Memorial Hospital*, 237 NLRB 138 (1978).

The Respondent, Solutia, Inc., is a corporation, engaged in the manufacture of chemical products at its facilities in Cantonment, Florida, where it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹ All dates are in 2002 unless otherwise indicated.

The Respondent admits, and I find and conclude, that International Brotherhood of Electrical Workers, Local Union No. 676, AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

I certify the accuracy of the portion of the transcript that sets out my decision, attached as appendix A, page 180, line 19, through page 188, line 12.²

REMEDY

Having found that the Respondent has engaged in unfair labor practices by prohibiting employees from distributing union literature in nonworking areas during nonworking time, I find that it must be ordered to cease and desist therefrom and to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Solutia, Inc., Cantonment, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting its employees from distributing union literature in nonworking areas during nonworking time.

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

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

(a) Within 14 days after service by the Region, post at its facilities in Cantonment, Florida, copies of the attached notice marked "Appendix B."⁴ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 2002.

² App. A has been corrected. The corrections are reflected in app. C [omitted from publication].

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

APPENDIX A

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BENCH DECISION

The facts are really not in substantial dispute. Seven employees met with Business Agent Reagan McDaniel on the morning of May 11. Mr. McDaniel confirmed, as did employee Wayne Steeley, that all were wearing their Solutia employee identification badges. Each employee also placed an IBEW organizing badge on their person and then headed to their

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respective gates for the purpose of handing out union literature. It appears that the employees at the yarn gate who arrived at approximately ten minutes of 5 a.m. were the first to be asked to leave, and that that occurred at approximately 5:05. With regard to the yarn gate, employees Chris Fontenot, John Streaty, Gary Shemp, and Wayne Steeley were present. Consistent with the testimony of Mr. Steeley, as well as Security Guard Bruce Webb, an admitted agent of the Company, the employees were asked to leave. Mr. Steeley recalls Mr. Webb asking what the employees were handing out, that he, as spokesman for the group, responded union literature, and that Mr. Webb said that they couldn't do that on private property. Mr. Webb testified that he acted upon the instructions of Plant Shift Leader Kathy Clark, but that, even prior to this, it was his understanding that no solicitation or distribution was allowed on company property, and that, when he reported what he observed was occurring, after an employee had informed him of what was happening, he informed the employees that they couldn't pass out literature and to leave, which they did. Mr. Webb did testify that he did not observe any identification on the employees. By the same token, Senior Safety Engineer Kenneth Gillis testified that standard procedure, when unidentified persons are observed, is to ask

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them to identify themselves and to ask them what they are doing. If, in fact, that did not happen, the question in my mind is why not. The answer is that Mr. Webb already knew what they were doing. An employee had indicated that they were distributing union literature. When Webb asked Mr. Steeley what they were doing, Steeley replied that they were handing out union literature. And Webb knew who they were because they were wearing their identification badges that Mr. Steeley credibly testified they were wearing. After having heard that distribution was occurring at the yarn gate from Mr. Webb, Plant Shift Leader Clark went to the intermediate gate. As Counsel for Respondent correctly and sympathetically argues, Ms. Clark was caught flatfooted. She had never been involved in a situation like this before, as she testified. And here people were standing at the gate handing out something. Her testimony does not establish that it was union literature. By the same token, they were clearly handing out something. Ms. Clark

acknowledges that she asked the employees to leave, which is consistent with the testimony of employee Charles Turner, the spokesperson for that group, which included himself, Mr. John Hote, and Perry Ellis. Mr. Turner credibly testified, just as did Mr. Steeley, that all of the employees with him were, in fact, wearing both company identification badges, as well as IBEW organizer badges,

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and that Ms. Clark came out and said simply that “We need to leave the premises,” just as Webb had said at the yarn gate. Ms. Clark did not ask the employees that she didn’t recognize to identify themselves. She looked and saw the back of what appeared to be a company identification badge. As Company Counsel correctly argues, it wasn’t necessarily a Solutia identification badge, but Clark didn’t ask him to show it to her. Ms. Clark knew Mr. Ellis, she didn’t ask Mr. Hote to identify himself, and she didn’t ask the employees what they were doing. She simply asked them to leave because, “We didn’t do that,” with regard to distributing material. The complaint, in paragraph 7, alleges that on or about May 11 the Respondent, by Ms. Clark, required off-duty employees to stop distributing union literature. As I’ve indicated, the evidence does not clearly establish that she was aware that what she was stopping was union literature, but it was clearly distribution—that is, it was clearly a concerted action engaged in by three employees who were, in fact, together. I’m mindful that the testimony appears to be somewhat in conflict as to exactly where the employees were standing. But the basis for asking them to leave was, “We didn’t do that,” i.e., distribute literature. There was no conversation relative to blocking the entrance.

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To the extent that Mr. Turner placed the employees some 10 to 15 feet from the gate and Ms. Clark placed them, “right at it,” I would find that it was probably somewhere in between—perhaps a little bit closer than Mr. Turner wanted to acknowledge, but perhaps a little further away than Ms. Clark recalls. In any event, the direction to leave was not related to blocking ingress or egress. It was because, “We don’t do that,” i.e. distribute literature. With regard to paragraph 8, the allegation is that, on May 11, the Respondent, by Bruce Webb, required off-duty employees to stop distributing union literature. There is absolutely no question that Mr. Webb was fully aware that union literature is, in fact, what was being distributed. Crediting Mr. Steeley, Webb asked the employees what they were doing, and that’s the response that he received. Section 7 of the Act grants the employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act makes it an unfair labor practice to interfere, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. There is no evidence that the Respondent had a no-access rule, valid or otherwise, restricting the distribution of literature by off-duty employees. With regard to an application of *Tri-County Medical*,

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Center, Inc., 222 NLRB 1089 (1976), relative to *GTE Lankurt*, 204 NLRB 921, cited by the Respondent, I see no basis for a legal argument in this instance since there was no rule for which there was a business justification. Rather, relative to the Respondent’s argument of deminimus or mootness, there was a single direction to leave. Furthermore, the accommodation which Mr. McDaniel made with Plant Manager Joe Ochsner establishes that there is no business justification for prohibiting access by off-duty employees. The accommodation, in fact, permitted distribution by off-duty employees with the simple requirement, to which Mr. McDaniel agreed, that prior to commencing distribution the employees would notify the security personnel of their presence. There’s no question that, given the nature of this facility, consisting of some 2,300 acres, that security is necessary, both given the size of the facility, as well as the chemicals that are present at it. With regard to that security, the Respondent has fenced the critical areas and has controlled gate access by means of the employee identification cards. The fact that the parking lot is not subject to controlled access certainly would appear to be prima facie evidence that, whatever security concerns the Respondent might legitimately have, they are not sufficiently pressing to have altered procedures in the parking lot insofar as the employees themselves are concerned.

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I am mindful that Mr. Gillis noted that there were more patrols and inspections than there had been in the past. But there’s still no I.D. system with regard to vehicles. The employees come into the parking lot. They don’t have to go through the gate to get to the parking lot. They park their car, and then they go through the gate. Certainly on the morning of May 11, whatever security concerns the Respondent might have had with regard to the presence of employees on their property could have been alleviated simply by asking them what they were doing. Of course, that is exactly what Mr. Webb did. And when Mr. Steeley responded, “We’re handing out union literature,” he was told to leave. If the concern was security surely both Mr. Webb and Ms. Clark would have sought to identify who the individuals were. I have credited the testimony of Steeley and Turner that all the employees were wearing their badges. But, even if they weren’t, neither Mr. Webb nor Ms. Clark followed Mr. Gillis’ mantra with regard to how unauthorized persons on company property are handled. They’re asked to identify themselves and then they’re asked what they’re doing. The testimony is clear, as confirmed by the record, that on the morning of May 11 the Company’s concern was

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distribution—at least concerted distribution at the intermediate gate, and, clearly, distribution of union literature at the yarn gate. Mr. Webb’s understanding that distribution was not allowed was at some point, shortly after this incident, apparently corrected where he was specifically told by his chief of security that it was okay for employees to do exactly what these employees had been doing on the morning of May 11. As I have

indicated, the Company has presented no compelling security reason for prohibiting off-duty employees from distributing union literature. And, indeed, as a result of the exchange of correspondence between Mr. Ochsner and Mr. McDaniel, that was permitted. The question that raises is whether the Union's agreement to notify security personnel that the Union was present waived its objection to the company's conduct on May 11. As counsel for General Counsel correctly points out, there was no repudiation of that conduct to the employees who had been ordered off the property, nor, as is required in *Passavant*, was there notification to all employees of what had occurred, a disavowal of that conduct, and an affirmative pledge not to let it happen again. I cannot find on this record that the Union's agreeing to

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assure the absence of interference with employees' distributing union literature by giving advance notification altered the right of those employees to do so without notification insofar as they were not in violation of any valid rule established by some substantial business justification. Both parties are commended for having come to that accommodation, but it does not alter what the employees' basic rights were. In view of the foregoing and the entire record I find that the Respondent on May 11, by directing off-duty employees who were distributing union literature to leave the company's premises, did violate Section 8(a)(1) of the Act. This concludes the bench decision.

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from distributing literature supporting International Brotherhood of Electrical Workers, Local Union No. 676, AFL-CIO, in nonworking areas on nonworking time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SOLUTIA, INC.