

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THESIS PAINTING, INC.

and

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51

CASE NO. 5-CA-167137

RESPONDENT THESIS PAINTING’S MOTION FOR RECONSIDERATION

Respondent Thesis Painting, Inc. (“Respondent” or “Thesis”) hereby moves pursuant to Board Rule 102.48(c) for reconsideration of the Board’s October 13, 2017 Decision and Order in this case. As grounds for this motion, Respondent asserts that the Decision is arbitrary, capricious, internally inconsistent, and departs from Board precedent without adequate explanation. Though the Board states at page 1 of the Decision that it “has decided to affirm the judge’s rulings, findings, and conclusions,” the Decision then proceeds to disavow or narrow many of the judge’s findings without substituting any rational basis for the ultimate holding. The end result is an opinion that is “incomprehensible” within the meaning of *NBC Universal, LLC v. NLRB*, 815 F.3d 821 (D.C. Cir. 2016) (Remanding to the Board because “[t]he [NLRB’s] conclusion may or may not be right, but the reasoning supporting the Board’s judgment ... is incomprehensible.”).¹ Specific arbitrary or unexplained findings include the following:

¹ As the D.C. Circuit further stated: “When an agency’s decision lacks adequate justification because it is neither logical nor rational, or because it fails to offer a coherent explanation of agency precedent, the judgment under review is wanting for lack of reasoned decision making.” *Id.*

1. Contrary to express findings of the judge, the Board’s opinion states that “we do not pass on whether a defense [of economic exigency] is available to an employer that is testing the validity of a union certification by refusing to bargain. (Bd. Dec. at 1, n.2). In the next sentence, however, the Board states that “we consider such a defense here in the absence of exceptions to its application.” But in the next sentence after that the opinion states that one member believes that the Respondent bears a “heavier burden” than proving economic exigency for expedited bargaining, citing *RBE Electronics of S.D.*, 320 NLRB 80, 81-82 (1995). And in the next sentence after that, the opinion inexplicably states that “we do not rely on the judge’s discussion of *RBE Electronics* (or *Bottom Line Enterprises*). Finally, the opinion states that another Board member recognizes the foregoing cases as “extant precedent,” though he “expresses no view on the soundness of those decisions.” (Bd. Dec. at 1, n.2).²

The Board’s opinion thus ignores altogether the holdings of *Angelica Healthcare Services*, 284 NLRB 844, 852-53 (1987); and *RBE Electronics*, 320 NLRB 80 (2004), which clearly state that an employer is excused from bargaining with a Union whenever it is faced with “extraordinary events which are an unforeseen occurrence, [that] have a major economic effect [requiring] the company to take immediate action.” *Id.* The Board’s opinion also fails to address the Seventh Circuit’s holding in *Sundstrand Heat*

² The judge found that “notification and an offer to bargain over layoffs may be excused by extraordinary circumstances.” (ALJD at 1, citing *Angelica Healthcare*). The judge further “assumed,” “in the absence of precedent to the contrary,” that “the defense of economic exigency is available to an employer who has no intention to notify or bargain with the union under any circumstances.” (*Id.*). The judge then referred to longstanding Board precedent, *Bottom Line Enterprises*, 302 NLRB 373 (1991), *enf’d*, 15 F.3d 1087 (9th Cir. 1994), and *RBE Electronics of S.D.*, 320 NLRB 80, 81-82 (1995), both of which set forth the standard for “exigent circumstances,” only to inexplicably hold that “these decisions have little or no applicability in the instant case.”

Transfer, Inc. v. NLRB, 538 F.2d 1257 (7th Cir. 1976), which expressly applied the foregoing standard to an employer who was testing union certification status when a similarly unforeseen economic exigency required immediate layoffs, citing *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703 (1974). In that case, after noting that the Board itself did not find the unilateral post-election layoffs to be unlawful because compelling economic considerations exempted the decision from the *Mike O'Connor* “at its peril” doctrine, the court went on to say: “It seems to us highly illogical to apply the ‘at its peril’ doctrine” to a failure to bargain which was “compelled by economic necessity.” *Id.* at 1259.³

2. The Board’s opinion also expressly contradicts the ALJ’s finding, which was compelled by the undisputed record evidence, that Respondent “was certainly faced with an economic emergency requiring prompt action.” Board Dec. at 1, n.2, disavowing ALJ Dec. at 5. The Board opinion offers no explanation for rejecting the ALJ’s finding. Member Pearce, writing individually, states in the footnote that the layoffs were “staggered” and did not begin until 5 days after the Respondent learned of cancellation of what would have been its largest contract. He ignores the record evidence that the initial layoffs occurred only 3 days after Respondent’s owners were told by their financial advisor that immediate layoffs were required to avoid bankruptcy. (Tr. 121, 136-141). Member Pearce (and the Board) also fails to differentiate between the initial round of six layoffs of individuals whose work on another project was finishing up that first week, and

³ See also Member Miscimarra’s dissent in *Ardit*, 364 NLRB No. 130, slip op. at 11, n.5, finding that the compelling circumstances defense should take on greater force in the *Mike O'Connor* context.

the later “staggered” layoffs that occurred when other employees no longer had any work that they could be assigned.⁴

Member Pearce, again not speaking for the Board majority, adds that in his individual view there were no unreasonably unforeseeable events requiring immediate layoffs “given that the Respondent’s financial condition had been deteriorating for months, that its workload had often fluctuated, and that it had known for some time of a possible contract postponement.” These findings all are contradicted by undisputed record evidence that Respondent’s financial condition, while difficult, would not have required layoffs in December 2015 but for the completely unforeseeable cancellation of what would have been Respondent’s largest project. (Tr. 137-38). Further, the project that Member Pearce alludes to as being a “known, possible contract postponement” was a different project, and no postponement of that second contract beyond one previous postponement in September was known or foreseeable in December, when the layoffs occurred. (Tr. 121-22). Member Pearce further relied on cases whose facts were distinguished in Respondent’s Brief in Support of Exceptions: *Ardit Co.*, 364 NLRB No. 130 (2016); and *Farina Corp.*, 310 NLRB 318 (1993).

Worst of all, Member Pearce asserts that there is “no evidence” that “bargaining over the Respondent’s need for cost savings,...would have been futile.” Board Dec. at 1, n.2. To the contrary, the undisputed evidence was that there was no alternative to immediately laying off employees in order to avoid the immediate bankruptcy of the Company and that there was no longer any work to which the laid off employees could

⁴ See also *Sundstrand Heat Transfer, Inc.*, 221 NLRB at 547 (applying exigent circumstances exception to layoffs occurring between 10 days and three weeks after a major customer unforeseeably cancelled its business).

have been assigned. It must be recalled that two union witnesses testified at trial, and neither one of them suggested that they would have proposed any alternative to the immediate layoffs if they had been consulted in December (or January). Member Pearce again ignored the holding of *Sundstrand Heat Transfer, Inc. v. NLRB*, 538 F.2d at 1260, in which the court found the assumption that bargaining would have kept the employees on the job under very similar circumstances was “wholly improbable.”

In any event, the statements of an individual Board member do not constitute a finding by the Board. The Board’s opinion is unsupported by any findings based upon substantial evidence and contradicts the ALJ’s findings and the un-contradicted evidence as to the unforeseen economic emergency confronting Respondent in December 2015.

3. The full Board did make the final finding of footnote 2, rejecting the Respondent’s argument that the layoffs were consistent with past practice, on the incorrect ground that Respondent did not raise the argument to the ALJ. The Board decision on this point ignores that the ALJ himself made the finding that Respondent had a past practice of “reducing work hours,” as opposed to layoffs, for the first time in his opinion based on evidence submitted by the General Counsel over Respondent’s objection. Only after the ALJ made that finding was it necessary or appropriate to bring to the Board’s attention as an exception to that finding, the facts contained in the exhibit relied on by the ALJ (GX 14), which contradicted the ALJ’s finding of past practice by showing that Respondent had in fact laid off 14 employees during the previous two year period due to fluctuations in work. The cases cited in the Board’s footnote, by contrast, did not deal with the right of a party to except to findings that appeared for the first time in an ALJ decision. Clearly, Respondent did not waive its right to argue that the ALJ’s

finding of a past practice of “work hour reductions” was false and that instead there was a past practice of layoffs.

Member Pearce, again writing as an individual, states that he would find a duty to bargain over layoffs even if a past practice existed. The case he cites is distinguishable on its facts and in any event a majority of Board members did not join Member Pearce’s statements in this regard.

4. The Board’s opinion further errs by stating that “the Respondent has implicitly excepted to some of the judge’s credibility findings.” Board Dec. at 1, n.1. To the contrary, the ALJ made no credibility findings at all; indeed the testimony elicited at trial was undisputed and uncontradicted. The Board’s reliance on *Standard Dry Wall Products*, 91 NLRB 544 (1950) is thus clearly erroneous, as is the Board’s claim to have “carefully examined the record” including credibility findings that do not exist.

5. The Board’s Decision and Order fails to address numerous additional defenses set forth in Respondent’s briefs in support of exceptions. Those arguments are incorporated by reference and will not be repeated. But it is noteworthy that the Board does not cite a single case in which the compelling circumstances defense has been rejected, where the undisputed facts establish the sudden loss and postponement of contracts so large in proportion to the Company’s small size and weakened financial condition, that the Company’s owners reasonably believed they were facing imminent bankruptcy if the layoffs did not immediately occur.

The record is undisputed here that Thesis would have been forced out of business in December 2015, causing *additional* job losses, if it had not acted as promptly as it did to cut its losses by laying off workers who could no longer be assigned any work. The

Union has never contended that it could have somehow enabled the Respondent to avoid bankruptcy without the layoffs that occurred or that any other work was available for the employees to perform. Both the ALJ and the Board committed further error by failing to draw an adverse inference against the Union based on the testimony (or lack thereof) at trial. Likewise, the Board and the ALJ committed error by failing to find that a waiver of bargaining occurred as a result of the Union's failure to request bargaining at any point in the layoff process or to suggest the remotest possibility that the layoffs could have been avoided.

6. The Board also failed to address the punitive aspects of the ALJ's remedy, and instead affirmed the entirely unsupported assumption that reinstatement and back pay are necessary to restore the situation to that which would have obtained but for the allegedly illegal layoffs. *See Sundstrand Corp. v. NLRB*, 538 F.2d at 1260 (finding an abuse of discretion to impose a back pay remedy in the absence of proof that bargaining over layoffs in the face of exigent circumstances would have kept the employees employed in the first place).

7. It remains undisputed that the Respondent saved its business from bankruptcy in December 2015 by acting as it did. Yet the Board's punitive order greatly increases the chances that the Respondent will be put out of business now, due to the excessive payments that the Board order potentially requires. The Respondent made reinstatement offers to all of the laid off employees as soon as sufficient work became available in May 2016, and the Respondent subsequently recognized the Union and has bargained in good faith since enforcement of the Board's previous order in May 2017. Still, it is anticipated that the Board's unjustified back pay award will very likely exceed

the Respondent's ability to pay. The Board's decision thus sends a perverse message to unionized small businesses who may confront similar unforeseen economic disasters in the future, by telling them that they have no choice but to declare bankruptcy in the face of catastrophic and unforeseen economic circumstances, because taking prompt action to save their business will be deemed an unfair labor practice, if they do not first engage in utterly futile acts of bargaining with a union. The Board's Decision renders the "compelling circumstances" defense a dead letter, contrary to longstanding precedent, and the Board's Decision does all this without any rational explanation. These are extraordinary circumstances that call for reconsideration by the full Board.

CONCLUSION AND REQUEST FOR DECISION BY THE FULL BOARD

For the reasons set forth above and in Respondent's previously submitted briefs in support of exceptions, this Motion for Reconsideration should be granted and the Complaint should be dismissed or the remedy should be set aside in whole or in part. Due to the apparent departures from precedent and disagreements among the Board members as to the rationale for the outcome, a decision by the full Board is hereby requested.

Respectfully submitted,

/s/ Maurice Baskin

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Reconsideration are being served on the following by email this 13th day of November, 2017:

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