UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THESIS PAINTING, INC.

and Case 05-CA-167137

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

COUNSEL FOR THE GENERAL COUNSEL'S
OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION

Counsel for the General Counsel respectfully submits this Opposition to Respondent's Motion for Reconsideration of the Board's decision in the above-captioned matter, reported at 365 NLRB No. 142 (2017). The Board properly found that Respondent unlawfully laid off 10 employees over the course of two months without providing notice or an opportunity to bargain to their exclusive bargaining representative, the International Union of Painters and Allied Trades, AFL–CIO, District Council 51 ("the Union"). Respondent now requests the Board undertake yet another review of the record and reconsider its decision. Counsel for the General Counsel opposes that request.

I. Legal Standard

A party can move for reconsideration of a Board decision only "because of extraordinary circumstances." Board's Rules and Regulations, Sec. 102.48(d)(1). In so moving, the party must "state with particularity the material error claimed." *Id*. Merely repeating arguments already presented to the Board does not constitute extraordinary circumstances. *See, e.g., Raven Gov't Services, Inc.*, 336 NLRB 991, 992 (2001) (denying motion to reconsider "because it represents an untimely attempt to relitigate an issue previously decided by the Board"); *Six Star*

Cleaning & Carpet Svcs., Inc., Case 28-CA-023491 *et al.* at 3 (2014) (not reported in Board volumes) ("reconsideration of [respondent's] arguments is not warranted, as they raise nothing not previously considered in the underlying case"); *Triple A Fire Protection, Inc.*, Case 15-CA-11498 at 3 (2011) (not reported in Board volumes) ("Respondent reiterates arguments that, because they were previously considered and rejected by the Board, fail to establish adequate grounds for reconsideration").

II. Argument

For the reasons discussed below, Respondent fails to raise new issues not already considered by the Board or otherwise demonstrate that extraordinary circumstances warrant reconsideration. As such, Respondent's motion should be denied.

A. The Board's Holding is Clear

Respondent appears to argue the Board holding is either unclear or contradictory, focusing on Footnote 2 of the decision. *See* Respondent Thesis Painting's Motion for Reconsideration ("Respondent's Motion") at 2. The holding and footnote are clear and consistent, however. The footnote is to the Board's unanimous holding, which is that "Respondent did not carry its burden of establishing that an 'economic exigency' or any other related factors excused its admitted failure to bargain over the layoffs." *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 1 (2017). In the footnote, the Board limits the holding to the facts of this case, which failed to establish that an economic exigency excused Respondent's failure to bargain. The Board then explains that it will not address the broader issue of whether such a defense is available to an employer that is testing the validity of a union's certification, because no party took exception to the defense's general applicability in a test of certification case. In short, the Board found that it is unnecessary to decide whether an economic exigency defense is

available to Respondent, because even if so, Respondent failed to carry its burden of proving its applicability in this case.

After the Board explains the limit to its unanimous holding, the three Board Members express individual views regarding certain aspects of the Administrative Law Judge's ("ALJ") decision outside of the holding. Respondent takes issue with these individual opinions, but they constitute dicta and do not undermine the Board's unanimous decision—that Respondent failed to prove an economic exigency excused its failure to bargain. Respondent spends much of its brief arguing with the dicta of individual members, *see* Respondent's Motion at 3-6,[1] but fails to explain how such dicta constitutes extraordinary circumstances warranting reconsideration by the Board. Respondent's conflation of dicta from individual members with the unanimous holding should therefore be rejected.

B. The Board's Decision Follows Applicable Precedent

Respondent claims the Board "ignores altogether" the holdings of *Angelica Healthcare Services*, 284 NLRB 844 (1987) and *RBE Electronics of S.D.*, 320 NLRB 80 (1995). Respondent's Motion at 2. In *Angelica Healthcare Services*, however, the Board rejected the economic exigencies defense, concluding on similar facts to here that the sudden loss of a significant contract does not justify unilateral layoffs. 284 NLRB at 852-53. In *RBE Electronics of S.D.*, the Board emphasized its limitation of the economic exigency defense "only to those exigencies in which time is of the essence and which demand prompt action," and made clear "we will require an employer to show a need that the particular action proposed be implemented promptly," 320 NLRB at 82, which is what the ALJ and Board found Respondent failed to do here. The Board's decision is thus in line with the cases cited by Respondent, as well as the

[1] Indeed, the longest argument in Respondent's Motion is the argument against Member Pearce's dicta, where Respondent repeats arguments the ALJ and Board rejected.

many others addressing the economic exigencies defense, in which the Board has maintained a narrow view of the defense and consistently rejected its application on facts similar to here. *See, e.g., The Ardit Co.*, 364 NLRB No. 130, slip op. at 6 (2016); *Becker Group, Inc.*, 329 NLRB 103, 111 (1999); *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995); *Farina Corp.*, 310 NLRB 318, 321 (1993); *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 954-55 (1988).[2] The Board's ruling in this case is thus consistent with its precedent regarding the economic exigency defense.

Respondent argues the Board also fails to address *Sundstrand Heat Transfer, Inc. v. NLRB*, 538 F.2d 1257 (7th Cir. 1976). Respondent's Motion at 2-3. This argument fails for three reasons. First, the Board's decision not to analyze a Seventh Circuit decision for a case arising out of the Fourth Circuit does not constitute legal error, let alone the extraordinary circumstances required for reconsideration. Indeed, even if *Sundstrand* were a Fourth Circuit decision, the Board still need not address it because "[i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise." *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963).

Second, Respondent already presented *Sundstrand Heat Transfer* to the ALJ and the Board. *See* Respondent Thesis Painting's Post-Hearing Brief ("Respondent's Post-Hearing Brief") at 8; Respondent Thesis Painting's Brief in Support of Exceptions ("Respondent's Exceptions Brief") at 10. Both the ALJ and the Board properly refused to address this

[2] Counsel for the General Counsel has already discussed these cases and rather than repeat that discussion here, refers the Board to Counsel for the General Counsel's Answering Brief to Respondent's Exceptions ("CGC's Answering Brief"), Counsel for the General Counsel's Cross-Exceptions and Brief in Support ("CGC's Cross-Exceptions"), and Counsel for the General Counsel's Post-Hearing Brief ("CGC's Post-Hearing Brief"), where the cases are discussed.

distinguishable and non-precedential case, relying instead on applicable Board law. Respondent's attempt to relitigate its argument therefore fails to constitute the extraordinary circumstances necessary for reconsideration.

Third, even if *Sundstrand Heat Transfer* were precedent, it is distinguishable from this case because in *Sundstrand* there was no dispute over whether the layoffs at issue were compelled by Respondent's economic circumstances. In holding that the employer did not fail to notify the union prior to the layoffs, the Seventh Circuit relied on the fact that "[a]ll parties seem to concede that the layoffs were compelled by a sudden and unexpected loss of business." *Sundstrand Heat Transfer, Inc.*, 538 F.2d at 1259. The parties in that case thus agreed that economic exigencies justified the layoffs at issue, which excused the employer from its obligation to notify the union prior to the layoffs.

Here, on the other hand, the parties do not agree on any of the elements of the economic exigencies defense, which is Respondent's burden to prove. As counsel for the General Counsel argued in its briefs to the ALJ and the Board, Respondent failed to prove it was faced with a dire financial emergency, that the emergency was unforeseen, that it required layoffs, and that it required layoffs so immediately that notifying the Union was impossible. The ALJ then found, and the Board affirmed, that Respondent failed to establish that it was necessary to implement layoffs as the result of an alleged financial emergency. *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 5. In the affirmed portion of the decision, the ALJ explained that Respondent had time to notify and bargain with the Union because the record evidence showed that Respondent scheduled employees on a daily basis by having them call in to see if there was work that day, and would simply not schedule—or pay—employees when there was no work. *Id*. This scheduling practice provided time to notify the Union, yet Respondent chose to lay off

employees unilaterally anyway. The ALJ also explained that Respondent's claim of insufficient time was undermined by the fact that it nevertheless had time to notify and consult with an out-of-state consultant prior to implementing layoffs, and by the fact that some layoffs occurred as late as December 28, 2015 and January 18, 2016—three weeks to over a month beyond when Respondent's alleged financial emergency was known. Finally, the ALJ found that Respondent failed to provide the Union an opportunity to bargain over the effects of the layoffs as well. These findings, based on the clear record evidence, as explained by the ALJ and affirmed by the Board, distinguish this case from *Sundstrand Heat Transfer* and warrant the conclusion under extant Board precedent that Respondent failed the burden of proving its defense.

C. The Board's Remedy is Appropriate

Respondent argues the Board erred by ordering reinstatement and backpay as a remedy, but the Board already considered and rejected this argument. In its exceptions, Respondent argued the ALJ erred in awarding backpay and reinstatement and in requiring it file a report with the Social Security Administration and compensate employees for adverse tax consequences. *See* Respondent Thesis Painting's Exceptions to the Decision of the Administrative Law Judge, at 6. The Board considered the argument, amended the ALJ's recommended tax compensation and Social Security reporting remedy in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and rejected the rest of the argument, awarding backpay and reinstatement. *See Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 1 n.3. Respondent raises no new issues regarding the decision, and therefore fails to show extraordinary circumstances warranting reconsideration.

Moreover, Board law is clear that reinstatement and backpay are appropriate remedies here, where an employer undertakes economically-motivated unilateral layoffs and

unsuccessfully raises an economic exigency defense. *See, e.g.*, *The Ardit Co.*, 364 NLRB No. 130, slip op. at 6 (rejecting economic exigency defense and awarding reinstatement and make-whole remedy for economically-motivated unilateral layoffs); *Farina Corp.*, 310 NLRB at 318 (same); *Lapeer Foundry & Mach.*, 289 NLRB at 955 (same); *Angelica Healthcare Services*, 284 NLRB at 845-46 (same); *Clements Wire*, 257 NLRB 1058, 1059 (1981) (awarding backpay as part of *status quo ante* remedy for economically motivated unilateral layoffs made prior to union certification). In the face of such Board law, Respondent relies on *Sundstrand Heat Transfer*, which, as discussed above, is non-precedential and distinguishable. The Board's remedy in this case is thus ordinary and appropriate.

D. The Board Properly Found Respondent Waived Its Past Practice Argument

Respondent claims the Board erred in finding Respondent waived the argument that layoffs were consistent with past practice by failing to raise it in any form before the ALJ. Respondent's Motion at 5-6. Respondent does not dispute it failed to raise the issue to the ALJ. Instead, Respondent argues it was not "necessary or appropriate" to raise the issue until the ALJ found that Respondent's daily scheduling practice—where employees called in for work schedules on a daily basis—demonstrated Respondent had the option of not working employees for the short time necessary to bargain rather than laying them off. Respondent's argument fails for five reasons.

First, Respondent's argument fails because it misunderstands the ALJ's finding. Respondent has the burden of proving that economic exigencies compelled the layoffs *immediately*, such that it had no alternative to immediate layoffs to stave off financial disaster. *Angelica Healthcare Services*, 284 NLRB at 852-53. The ALJ found that because Respondent's scheduling practice was "to have employees call in and discover that there was no work for them

on a daily basis," Respondent had the option of immediately removing them from the work schedule until it bargained with the Union, and thus could not prove that its only option was to lay off employees. *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 5. Respondent claims GC Exhibit 14 contradicts the ALJ's finding by showing that Respondent laid off employees in response to fluctuations in work. Respondent's Motion at 5. That claim misses the mark, though, because even if it were true that Respondent laid off employees in the past due to work fluctuations, it still had to prove that *immediate* layoffs were financially necessary in this case, despite the viable option of not working the employees at issue until Respondent bargained with the Union. As the ALJ found and the Board affirmed, that viable option, based on undisputed evidence of Respondent's daily scheduling practice, undercut Respondent's defense regardless of past layoffs.

Second, Respondent's argument fails because its scheduling practice was an obvious issue of which Respondent had notice well before, and at, the hearing. As discussed above, Board law is clear that for an employer to meet its burden of proving the economic exigencies defense, it must show that its unexpected economic circumstances compelled the action at issue (i.e., layoffs) *immediately*. Respondent's daily scheduling practice, which allowed it to simply not work or pay employees for the few days necessary to notify and bargain with the Union, was therefore clearly relevant to Respondent's defense that layoffs were necessary immediately to stave off financial disaster, as the ALJ found. Such relevance should have been apparent to Respondent well before the hearing. That it was not is a failure of Respondent's, not the ALJ's or the Board's.

Even though Respondent did not realize the import of its daily scheduling practice in preparing for the trial, the issue became clear at the hearing, where an employee of Respondent

testified about the scheduling practice. (Tr. 32-33). Respondent's owner and sole witness was in the hearing room during that testimony, and had an opportunity to dispute it when she later testified, but chose not to address the issue at all. Now, apparently realizing its error, Respondent tries to retroactively dispute the issue by claiming it objected to the evidence of its scheduling practice. Respondent's Motion at 5. The record shows, however, that Respondent did not object to that testimony. (Tr. 32-33). Clear Board law and the undisputed record evidence thus demonstrate that Respondent had plenty of notice, both in advance and at the hearing, that its scheduling of employees on a daily basis would be relevant to its defense. It was thus necessary and appropriate to raise the issue to the ALJ.

Third, even absent waiver, Respondent's argument fails as a matter of law. Where an employer has a past practice of instituting economic layoffs due to lack of work, once a union is certified, the employer can "no longer continue unilaterally to exercise its discretion with respect to layoffs." *Adair Standish Corp.*, 292 NLRB 890, 890 fn.1 (1989), enfd. in relevant part, 912 F.2d 854 (6th Cir. 1990). Respondent's reliance on an alleged past practice of laying off unrepresented employees thus does not apply to the represented employees it laid off in this case.

Fourth, Respondent's argument fails on the facts as well, because the evidence does not actually show that its past practice was to lay off employees in response to fluctuating work, as Respondent claims. The only evidence Respondent cites in support of its claim is General Counsel's ("GC") Exhibit 14, which is a list of employees produced in response to a subpoena request for "[d]ocuments showing all employees laid off by Respondent from 2013 to 2016, including documents showing the employees' names, dates of hire, dates of layoff, job titles,

rates of pay." (Tr. 96).[3] The document does not contain information showing *why* the listed employees were laid off, however. (*See* GC Ex. 14). The exhibit thus cannot support Respondent's claim that it proves a past practice of laying employees off in response to work fluctuations. Moreover, as explained in counsel for the General Counsel's briefs to the ALJ and Board, the record evidence taken in whole also does not support Respondent's claim.[4]

Finally, had Respondent's argument addressed the ALJ's finding, not been waived, and not failed on both the law and the facts, it would still not demonstrate extraordinary circumstances warranting reconsideration because the ALJ's finding regarding Respondent's daily scheduling practice was not the only basis for his conclusion—affirmed by the Board—that Respondent failed to establish that an economic exigency required immediate layoffs. The ALJ also found, and the Board affirmed, that Respondent's multiple consultations and meetings with an out-of-state consultant demonstrated Respondent had sufficient time to notify and bargain with the Union prior to implementing layoffs. Respondent's argument therefore would not change the conclusion that it failed to prove its defense, and thus does not constitute extraordinary circumstances warranting reconsideration.

E. Respondent's Request for a Review by the Full Board Should be Denied

In addition to requesting reconsideration, Respondent makes the unusual request that the full Board reconsider the decision, claiming such attention is necessary due to "disagreement among the Board members as to the rationale for the outcome." Respondent's Brief at 8. This

---

[3] GC Ex. 14 is also a document Respondent has referred to as "inaccurate" (Respondent's Brief in Support of Exceptions at 2 n.1) and "disputed" (Respondent's Reply in Support of Exceptions at 6 n.4), and to which Respondent has asserted "we cannot, sitting here today, vouch for the reliability of this document." (Tr. 96). It should also be noted that GC Ex. 14 is an exhibit Respondent prepared and produced in response to a subpoena.

[4] *See* CGC's Post-Hearing Brief at 12-24; CGC's Answering Brief at 15-16. Rather than repeat the relevant arguments here, counsel for the General Counsel refers the Board to the arguments already made.

request should be denied because it is not based on Board law and requires an unworkable standard—if disagreement among Board members justified a full panel review, then any decision with a dissent or concurrence would qualify, even a unanimous decision as in this case.

It appears Respondent's true aim in requesting a full Board review is to obtain a second chance to litigate this case in front of new Board members, in the hope they will decide differently. If so, the ruse should be rejected because the Board has been clear that changes in its composition do not constitute grounds for reconsideration. *See Visiting Nurse Health System,* 338 NLRB 1074, 1074 (2003) (calling "changes in the composition of the Board since the issuance of the decision" an "inappropriate ground for reconsideration"); *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1236, 1239 (1954) ("changes in the membership of an agency do not constitute a ground for reopening and reconsidering matters previously adjudicated"). Also, Board members have consistently denied motions for reconsideration despite disagreeing with the merits of the underlying decision. *See, e.g., Roy Spa, LLC*, 19-CA-083329 at 1 fn. 2 (2017) (not reported in in Board volumes) (Chairman Miscimarra denying motion for reconsideration despite adhering to dissent in underlying case because movant failed to demonstrate extraordinary circumstances); *Fresh & Easy Neighborhood Market*, 2014 WL 5286315 at 1 fn.2 (2014) (not reported in in Board volumes) (same for Member Johnson); *Phoenix Coca-Cola Bottling Co.*, 338 NLRB 498 (2002) (Members Bartlett and Cowen denying motion for reconsideration despite disagreeing with underlying case because movant failed to show extraordinary circumstances). Respondent's attempt to get a newly constituted Board to re-decide this case should therefore be rejected.

F. Respondent's Remaining Arguments Are Without Merit

Respondent's remaining arguments raise no new issues and do not demonstrate extraordinary circumstances. Therefore, rather than address them individually and prolong the relitigation of already-considered, already-rejected arguments that fail as a matter of law to constitute extraordinary circumstances, counsel for the General Counsel adopts the arguments made in its briefs to the ALJ and the Board, and reasserts them here to the extent relevant to the Board's consideration.

III. Conclusion

For the reasons discussed above, the Board should deny Respondent's Motion for Reconsideration.

Respectfully submitted,

/s/ Clark Brinker_____
Clark Brinker
Counsel for the General Counsel
National Labor Relations Board, Region 5

Dated this 20th day of December, 2017.

STATEMENT OF SERVICE

I hereby certify that on December 20, 2017, copies of counsel for the General Counsel's Opposition to Respondent's Motion for Reconsideration were served by e-mail on the following parties:

Maurice Baskin, Esquire
Littler Mendelson, P.C.
815 Connecticut Avenue, N.W., Suite 400
Washington, DC 20006
mbaskin@littler.com

Sandro Baiza
The International Union of Painters
and Allied Trades, District Council 51, AFL-CIO
4700 Boston Way
Lanham, MD 20706-4311
sbaiza@verizon.net

/s/ Clark Brinker
Clark C. Brinker
Counsel for the General Counsel
National Labor Relations Board, Region 5