McLaren Macomb *and* Local 40 RN Staff Council, Office and Professional Employees, International Union (OPEIU), AFL–CIO. Case 07–CA–263041

February 21, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX AND PROUTY

On August 31, 2021, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Charging Party filed an answering brief in support of the General Counsel's exceptions and in opposition to the Respondent's exceptions.

The National Labor Relations 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, and conclusions only to the extent consistent with this Decision and Order.[1]

The main issue presented is whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by offering a severance agreement to 11 bargaining unit employees it permanently furloughed. The agreement broadly prohibited them from making statements that could disparage or harm the image of the Respondent and further prohibited them from disclosing the terms of the agreement. Agreements that contain broad proscriptions on employee exercise of Section 7 rights have long been held unlawful because they purport to create an enforceable legal obligation to forfeit those rights. Proffers of such agreements to employee have also been held to be unlawfully coercive. The Board in *Baylor University Medical Center*[2] and *IGT d/b/a International Game Technology*[3] reversed this long-settled precedent and replaced it with a test that fails to recognize that unlawful provisions in a severance agreement proffered to employees have a reasonable tendency to interfere with, restrain, or coerce the exercise of employee rights under Section 7 of the Act. We accordingly overrule *Baylor* and *IGT* and, upon careful analysis of the terms of the nondisparagement and confidentiality provisions at issue here, we find them to be unlawful, and thus find the severance agreement proffered to employees unlawful.

I.

The Respondent operates a hospital in Mt. Clemens, Michigan, where it employs approximately 2300 employees. After an election on August 28, 2019, the Board certified Local 40 RN Staff Council, Office of Professional Employees International Union (OPEIU), AFL–CIO (Union) as the exclusive collective-bargaining representative of a unit of approximately 350 of the Respondent's service employees. Following the onset of the Coronavirus Disease 2019 (Covid-19) pandemic in March 2020,[4] the government issued regulations prohibiting the Respondent from performing elective and outpatient procedures and from allowing nonessential employees to work inside the hospital. The Respondent then terminated its outpatient services, admitted only trauma, emergency, and Covid-19 patients, and temporarily furloughed 11 bargaining unit employees because they were deemed nonessential employees.[5] In June, the Respondent permanently furloughed those 11 employees[6] and contemporaneously presented each of them with a "Severance Agreement, Waiver and Release" that offered to pay differing severance amounts to each furloughed employee if they signed the agreement. All 11 employees signed the agreement. The agreement required the subject employee to release the Respondent from any claims arising out of their employment or termination of employment. The agreement further contained the following provisions broadly prohibiting disparagement of

[1] We shall modify the judge's recommended Order to conform to the violations found, to the Board's standard remedial language, and in accordance with our decisions in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021). In accordance with our decision in *Thryv, Inc*., 372 NLRB No. 22 (2022), we have also amended the make-whole remedy and modified the judge's recommended order to provide that the Respondent shall also compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful furloughs, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall substitute a new notice to conform to the Order as modified.

[2] 369 NLRB No. 43 (2020).

[3] 370 NLRB No. 50 (2020).

[4] All subsequent dates are in 2020.

[5] The 11 employees primarily greeted patients and visitors in the welcome area of the surgery center. The temporary furloughs are not alleged to be unlawful.

[6] The permanently furloughed employees are Roxane Baker, Shanon Chapp, Susan Debruyn, Amy LaFore, Mona Mathews, Brenda Reaves, Patrina Russo, Linda Taylor, Tameshia Smith, Charles Stepnitz, and Mary Valentino. No party disputes that their employment with the Respondent permanently ended in June.

the Respondent and requiring confidentiality about the terms of the agreement:

> 6. **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
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> 7. **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

The agreement provided for substantial monetary and injunctive sanctions against the employee in the event the nondisparagement and confidentiality proscriptions were breached:

> 8. **Injunctive Relief.** In the event that Employee violates the provisions of paragraphs 6 or 7, the Employer is hereby authorized and shall have the right to seek and obtain injunctive relief in any court of competent jurisdiction. If Employee individually or by his/her attorneys or representative(s) shall violate the provisions of paragraph 6 or 7, Employee shall pay Employer actual damages, and any costs and attorney fees that are occasioned by the violation of these paragraphs.

The Respondent neither gave the Union notice that it was permanently furloughing the 11 employees nor an opportunity to bargain regarding that decision and its effects. The Respondent also did not give the Union notice that it presented the severance agreement to the employees, nor did it include the Union in its discussions with the employees regarding their permanent furloughs and the severance agreement. Thus, the Respondent entirely bypassed and excluded the Union from the significant workplace events here: employees' permanent job loss and eligibility for severance benefits.

II.

The judge found, and we agree for the reasons set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by permanently furloughing the 11 employees without first notifying the Union and giving it an opportunity to bargain about the furlough decision and its effects. The judge properly found that the Respondent had not met its burden under *RBE Electronics of S.D., Inc.*[7] of establishing an economic exigency compelling prompt action that excused its failure to satisfy its bargaining obligation.[8] We further agree with the judge's finding, as set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by communicating and directly dealing with the 11 employees to enter into the severance agreement, while entirely bypassing and excluding the Union. However, for the reasons set forth below, we reverse the judge's finding under *Baylor* and *IGT* that the Respondent did not violate Section 8(a)(1) of the Act by proffering the severance agreement to the permanently furloughed employees.

III.

The gravamen of the General Counsel's amended complaint is that the nondisparagement and confidentiality provisions of the severance agreement unlawfully restrain and coerce the furloughed employees in the exer-

[7] 320 NLRB 80, 81 (1995). See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

[8] While we recognize, as did the judge, that the Covid-19 pandemic presented a significant crisis in the health care industry, the Respondent has simply failed to carry its heavy burden under *RBE Electronics*. The Respondent argues that "there can be no genuine dispute" that it was "losing business and suffering a financial decline" during the Covid-19 pandemic. As the judge explained, however, the Respondent failed to adduce even a single balance sheet or financial statement establishing a major economic effect on it from the pandemic. Further, the Respondent's reliance on governmental restrictions on its operations that were imposed in March is insufficient to establish economic exigency. While the Respondent responded to those restrictions by temporarily furloughing the 11 employees in March, it has failed to show that conditions had changed in June in such a manner that required it to immediately permanently furlough them at that time without bargaining with the Union. *Port Printing AD & Specialties*, 351 NLRB 1269 (2007), enfd. 589 F.3d 812 (5th Cir. 2009), relied on by the Respondent, is inapposite. The employer's failure there to bargain over layoffs was excused under the economic exigency exception because of an immediate, mandatory, citywide evacuation order due to an impending hurricane. Such patent evidence of an unexpected shutdown resulting in forced layoffs is lacking here.

Because no party has excepted to the applicability of *RBE Electronics*, and because the Respondent has failed to show economic exigency under *RBE*, we find it unnecessary to pass on whether the economic exigency defense is available to an employer who—as here—was testing the validity of the union certification by refusing generally to recognize and bargain with the union at the time it acted unilaterally. See *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 1 fn. 2 (2017).

cise of their Section 7 rights.[9] Applying *Baylor* and *IGT*, the judge found these provisions to be lawful, and thus concluded that the severance agreement was lawful and that the proffer of the agreement to the furloughed employees was lawful. The General Counsel excepts to the dismissal and argues, among other things, that the Board should overrule *Baylor* and *IGT.* We agree.

Until *Baylor*, when faced with an allegation that a severance agreement violated the Act, Board precedent focused on the language of the severance agreement to determine whether proffering the agreement had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of their Section 7 rights.[10] For example, in *Metro Networks*, the Board specifically analyzed the nonassistance and nondisclosure provisions of the severance agreement at issue and found that "the plain language of the severance agreement would prohibit [employee] Brocklehurst from cooperating with the Board in important aspects of the investigation and litigation of unfair labor practice charges." 336 NLRB at 67. The Board accordingly concluded that the proffer of the severance agreement to Brocklehurst was unlawful. Id., at 65–67. In *Clark Distribution Systems*, the Board likewise carefully scrutinized the language of the confidentiality provision contained in the severance agreement offered to employees. The Board found that the language of the provision prohibited employees from participating in the Board's investigative process, and thus, that the proffer of the severance agreement was unlawful. 336 NLRB at 748–749. More recently, in *Shamrock Foods Co.*, the Board found that a separation agreement proffered to an employee that contained confidentiality and non-disparagement provisions was unlawful. The Board, citing and analyzing the specific language of the provisions, found the agreement unlawful because the provisions "broadly required" the employee to whom it was proffered "to waive certain Sec[tion] 7 rights." Specifically, the separation agreement prevented him from assisting his former co-workers, disclosing information to the Board, and making disparaging remarks which could be detrimental to the employer. 366 NLRB No. 117, slip op. at 3 fn. 12.

In none of these cases was the presence of additional unlawful conduct by the employer necessary to find that the plain language of the agreement violated the Act.[11] Rather, the Board treated the legality of a severance agreement provision as an entirely independent issue. What mattered was whether the agreement, on its face, restricted the exercise of statutory rights.[12]

In *Baylor*, the Board abandoned examination and analysis of the severance agreement at issue. *Baylor* shifted focus instead to the circumstances under which the agreement was presented to employees. The *Baylor* Board held that the Respondent did not violate the Act by the "mere proffer" of a severance agreement that re-

[9] The amended complaint alleges that the two provisions threatened employees with the loss of benefits described in the severance agreement and that the Respondent thereby has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Sec. 7 of the Act in violation of Sec. 8(a)(1) of the Act. We disagree with our colleague's assertion that the General Counsel litigated the case on a "different theory" than whether the proffer of the agreements was, as our colleague phrases it, "merely coercive." In both her post-hearing brief and her brief in support of exceptions, the General Counsel asserted that, "[i]n determining whether an employer has violated the Act through interference, restraint, and coercion under Sec. 8(a)(1), one must apply the Board's well-established objective test, which depends on 'whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act,'" and that "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." (Citations omitted.) Thus, the Respondent has at all times been on notice that the coerciveness of the provisions was under consideration, the parties fully and fairly litigated the issue, and there is no meaningful difference between the complaint allegations and the violations found. See, e.g., *Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1136 fn. 3 (4th Cir. 1982) (rejecting employer's argument of improper variance between allegation that employer unlawfully threatened loss of benefits and finding that employer unlawfully promised benefits where benefits contingent on same employee action and issue fully litigated), cert. denied 460 U.S. 1083 (1983). We agree with the General Counsel that the proffer of the severance agreements unlawfully threatened employees with the loss of the severance benefits by conditioning the receipt of those benefits on acceptance of unlawfully coercive terms.

[10] See, e.g., *Shamrock Foods Co*., 366 NLRB No. 117 (2018), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019); *Clark Distribution Systems*, 336 NLRB 747 (2001); *Metro Networks*, 336 NLRB 63 (2001); *Phillips Pipe Line Co*., 302 NLRB 732 (1991).

[11] In *Shamrock Foods*, the Board found that the employer had unlawfully discharged the employee to whom it offered the unlawful separation agreement, but the maintenance of the agreement was an independent violation of Sec. 8(a)(1), separately found and separately remedied, that was based entirely on the provisions of the agreement that would have required the employee to waive Sec. 7 rights. 366 NLRB No. 117, slip op. at 2–3 & fn. 12. In *Clark Distribution Systems*, the Board's finding that the confidentiality provision in the severance agreement was unlawful on its face was entirely separate from the issue of whether the employees who signed the agreement had been unlawfully terminated. See id. at 749–750 (examining terminations). In *Metro Networks*, severance agreements were found unlawful based on the terms of the agreement, independent of the discharge allegations in the case. 336 NLRB at 66–67. Indeed, the *Metro Networks* Board observed that an employer's restriction on the exercise of a discharged employee's Sec. 7 rights may be found unlawful even where the Board does "not address the question of whether the discharge was unlawful." Id. at 66 (footnote omitted).

[12] Thus, in *Phillips Pipe Line Co.*, the Board examined the facial language of the severance agreement at issue, and found "it clear from the language of the release itself" that it did not unlawfully waive the employees' right of access to the Board. 302 NLRB at 732–733. It was immaterial that the Board dismissed an additional unfair labor practice allegation. Id.

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