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Thryv, Inc. and International Brotherhood of Electrical Workers, Local 1269. Cases 20–CA–250250 and 20–CA–251105

November 10, 2021

NOTICE AND INVITATION TO FILE BRIEFS

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN,
RING, WILCOX, AND PROUTY

In this case, the General Counsel alleges that the Respondent, Thryv, Inc., unlawfully laid off six employees without first bargaining to impasse with the Union, International Brotherhood of Electrical Workers, Local 1269. The Board’s traditional remedy for this alleged violation would require, inter alia, that these employees be reinstated to their previous or substantially equivalent positions and be made whole for their loss of earnings and other benefits they incurred as a result of the unlawful layoff.¹

Although the General Counsel has requested on numerous occasions that the Board award consequential damages, the Board repeatedly has declined to address the merits of these requests. See, e.g., *JBM Janitorial Maintenance, Inc.*, 366 NLRB No. 79, slip op. at 2 fn. 3 (2018); *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 fn. 3 (2018), enfd. 763 Fed.Appx. 5 (2d Cir. 2019); *Laborers’ International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017); *Guy Brewer 43 Inc. d/b/a Checkers*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016) (not reported in Board volumes). In GC Memo 21-06, issued on September 8, 2021, the General Counsel reiterated that Regions should seek compensation for consequential damages as part of the Board’s make-whole remedy. Thus, the issue of whether to award consequential damages will continue to be presented to the Board.

For more than 80 years, the Board has awarded two remedies as part of its make-whole relief that may be characterized as consequential damages, specifically reasonable search-for-work and interim employment expenses. See *Crossett Lumber Co.*, 8 NLRB 440, 497–498 (1938), enfd. 102 F.2d 1003 (8th Cir. 1938). During most of that time, the Board treated those expenses as setoffs from interim earnings, but in *King Soopers, Inc.*, the Board broadened its application of these two remedies by holding that such expenses are to be calculated separately from taxable

net backpay and awarded even where such expenses exceed interim earnings. 364 NLRB 1153, 1160–1161 (2016), enfd. in rel. part 859 F.3d 23 (D.C. Cir. 2017). Further, in the Board’s recent decision in *Voorhees Care & Rehabilitation Center*, two Board Members stated that they would be willing to invite public input in a future appropriate case on the question of whether the Board should award consequential damages to make employees whole for economic losses. 371 NLRB No. 22 (2021). Citing the significant medical costs incurred by employees as a direct result of the respondent’s unlawful mid-term contract modification, Chairman McFerran noted that “this case should prompt the Board to seek public input about whether to add a new, make-whole remedy to those we traditionally order: an award of consequential damages to make employees whole for economic losses (apart from the loss of pay or benefits) suffered as a direct and foreseeable result of an employer’s unfair labor practice.” *Id.*, slip op. at 4 fn. 14. Member Ring noted that “cases like this one, where the employer’s egregious violations so harm employees that they may not be fully remedied by the Board’s traditional make-whole awards, necessitate consideration of consequential damages,” and added that “[h]e would be willing to invite briefing, in a future appropriate case, regarding whether the Board should award consequential damages and under what circumstances.” *Ibid.*

While the General Counsel has not specifically requested a remedy for consequential damages in this case, the Supreme Court has held that the authority vested in the Board to formulate effective remedies under Section 10(c) is a “broad discretionary one.” *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969) (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). Further, “it is well settled that the Board has the authority to consider remedial issues sua sponte.” *J. Picini Flooring*, 356 NLRB 11, 12 fn. 5 (2010).

Accordingly, the parties and interested *amici* are invited to address the following questions:

1. Should the Board modify its traditional make-whole remedy in all pending and future cases to include relief for consequential damages, where these damages are a direct and foreseeable result of a respondent’s unfair labor practice?
2. Alternatively, should the make-whole remedy include relief for consequential damages only upon findings of egregious violations by a respondent?

¹ For the purposes of this notice and invitation to file briefs, we assume, without deciding at this time, that a make-whole remedy is warranted in this case.

3. If consequential damages are to be included in make-whole relief, how should they be proved, and what would be required to demonstrate that they are a direct and foreseeable result of an employer's unfair labor practice?

4. What considerations support making the proposed change to the Board's traditional make-whole remedies?

5. What considerations support retaining the Board's traditional exclusion of consequential damages from its make-whole remedies?

Briefs not exceeding 20 pages in length shall be filed with the Board in Washington, D.C., on or before Monday, December 27, 2021. The parties (but not amici) may file responsive briefs on or before Tuesday, January 11, 2022, which shall not exceed 30 pages in length. No other responsive briefs will be accepted. The parties and *amici* shall file briefs electronically by going to www.nlr.gov and clicking on "E-Filing." Parties and *amici* are reminded to serve all case participants. A list of case participants may be found at <https://www.nlr.gov/case/20-CA-250250> under the heading "Participants." If assistance is needed in E-Filing on the Agency's website, please contact the Office of the Executive Secretary at 202-273-1940

or Executive Secretary Roxanne L. Rothschild at 202-273-2917.

Dated, Washington, D.C. November 10, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

John F. Ring, Member

Gwynne A. Wilcox, Member

David M. Prouty, Member

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