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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

v.

LOS ROBLES REGIONAL MEDICAL
CENTER DBA LOS ROBLES HOSPITAL
AND MEDICAL CENTER; RIVERSIDE
HEALTHCARE SYSTEM, LP DBA
RIVERSIDE COMMUNITY
HOSPITAL; WEST HILLS HOSPITAL
DBA WEST HILLS HOSPITAL &
MEDICAL CENTER,

Respondents.

No. 23-1950

NLRB Nos.

21-CA- 261288,
31-CA-261001,
31-CA-261680,
31-CA- 261874,
31-CA-263992,
31-CA-265832

MEMORANDUM¹

Application for Enforcement of an Order of
the National Labor Relations Board

Argued and Submitted August 23, 2024

Submission Withdrawn August 26, 2024

Resubmitted November 5, 2025

San Francisco, California

Before: BERZON, BRESS, and VANDYKE, Circuit Judges.
Concurrence by Judge VANDYKE.

¹ This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Petitioner the National Labor Relations Board (“NLRB” or “Board”) applies for enforcement of an order issued against Respondents West Hills Hospital & Medical Center, Riverside Community Hospital (“Riverside”), and Los Robles Hospital & Medical Center (“Los Robles”) (collectively “Hospitals”). We grant in part and deny in part the Board’s application for enforcement.

We review the Board’s findings of fact for substantial evidence. *Eichelberger v. N.L.R.B.*, 765 F.2d 851, 853 (9th Cir. 1985). We review the Board’s interpretation of collective bargaining agreements (“CBAs”) *de novo*. *Loc. Joint Exec. Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 1078 (9th Cir. 2008).

1. There was substantial evidence to support the NLRB’s finding that the Hospitals violated Sections 8(a)(1) and (5) of the National Labor Relations Act when they unilaterally implemented the Pandemic Pay Program for all employees represented by Service Employees International Union, Local 121 RN (“the Union”), including those in the Professional and RN Units.

(a) We examine CBAs “‘according to ordinary principles of contract law’ unless federal labor policy dictates otherwise.” *Int’l Longshore and Warehouse Union v. NLRB*, 978 F.3d 625, 640–41 (9th Cir. 2020) (quoting *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015)). The RN Unit’s CBAs include a management-rights clause that generally absolves management of the duty to bargain “over actions of the Hospital . . . which have some effect on bargaining unit

employees,” “except to the extent this Agreement specifically provides otherwise.” Elsewhere, the CBAs state that “[b]efore taking any action” “to increase wage rates, benefits, premiums and differentials, and to pay other extra compensation . . . the Employer shall notify the Union and meet and confer over the proposed changes.”

The Pandemic Pay Program constitutes a “benefit” under the CBAs. Elsewhere, the CBAs use the term “benefit” to refer to monetary payments guaranteed for non-working time, including “PTO, Sick Leave, Tuition Reimbursement, Jury Duty Leave, [and] Bereavement Leave.” The Pandemic Pay Program is comparable to these “benefits,” as it likewise conferred monetary payments related to non-working time. Because the Pandemic Pay Program was a “benefit,” the Hospitals were required to bargain over it before its implementation.

(b) The Board properly held that the COVID-19 pandemic and the resulting threat of a personnel shortage did not constitute an exigency excusing the Hospital’s unilateral imposition of the program. Compelling exigent circumstances may excuse an employer from its obligation to bargain, *RBE Elecs. of S.D., Inc.*, 320 N.L.R.B. 80, 81 (1995), but only if an employer shows the existence of “an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action,” *Hankins Lumber Co.*, 316 N.L.R.B. 837, 838 (1995) (quoting *Angelica Healthcare Servs.*, 284 N.L.R.B. 844, 853 (1987)), or “an

extraordinary and unforeseen imminent threat to human life.” *Metro Man IV, LLC*, 372 N.L.R.B. No. 37, 2022 WL 18232705, at *2 (Dec. 28, 2022).

The Hospitals presented no evidence to indicate that they were on the precipice of a personnel shortage when they implemented the Pandemic Pay Program. In *Metro Man*, in contrast, at the time of a nursing home’s unilateral implementation of a pay increase at the beginning of the COVID-19 pandemic, between 60 and 75% of the staff had stopped reporting to work, those who did report were working 36- to 46-hour shifts, and management was staying at the nursing home around the clock to fill staffing gaps. *Id.* The Board’s finding in this case that there was no imminent need to implement the Pandemic Pay Program without bargaining is supported by substantial evidence.

(c) The Union did not waive its right to bargain over the administration of the Pandemic Pay Program by failing to request bargaining after it was notified that the program had been enacted. “[A] union cannot be found to have waived bargaining when it never had an opportunity to bargain,” such as in instances where a policy is “presented to the union as a *fait accompli*.” *N.L.R.B. v. Merrill & Ring, Inc.*, 731 F.2d 605, 609 (9th Cir. 1984) (quoting *Gulf States Mfg., Inc. v. N.L.R.B.*, 704 F.2d 1390, 1397 (5th Cir. 1983)). Here, the Union received no notice of the Pandemic Pay Program before its implementation and so did not waive its right to bargain.

2. The Board's holding that Los Robles impermissibly rescinded the Pandemic Pay Program for the Professional Unit was supported by substantial evidence. On May 12, 2020, the Hospitals announced in an email to all staff an extension of the Pandemic Pay Program through June 27th; the announcement made no distinction between represented and non-represented employees. Later, the Hospitals contacted the Union's parent organization and sister local seeking concessions in exchange for extending the program for represented employees. Neither the parent organization nor the sister local had authority to bargain on behalf of the Professional Unit, so the notice was ineffective. The Hospitals did not provide an official proposal related to the extension to the Union until May 19th, a week after the extension was announced. The Hospitals then terminated the program for the Professional Unit on June 6th, before the extended end date of June 27th. The Board's finding that Los Robles unilaterally rescinded the Pandemic Pay Program for the Professional Unit after it was extended is thus supported by substantial evidence.

Additionally, even after Los Robles began bargaining on the extension, it terminated the extension before the parties reached an overall impasse. A unilateral change during bargaining cannot be excused absent an overall bargaining impasse. *Bottom Line Enterprise*, 302 N.L.R.B. 373, 374 (1991), *enforced sub nom. Master Window Cleaning, Inc. v. N.L.R.B.*, 15 F.3d 1087 (9th Cir. 1994). Because there was

no overall impasse, Los Robles violated its duty to bargain by unilaterally rescinding the Pandemic Pay Program for the Professional Unit.

3. The Board's conclusion that Riverside was obligated to bargain over its new storage, access, and usage policies for its N95 masks and other personal protective equipment ("PPE") was not supported by substantial evidence. Contrary to the Board's conclusion, the record established that an exigency justified the immediate implementation of a new PPE policy when the COVID-19 crisis began.

Chief Nursing Officer Annette Greenwood testified that the changes regarding the PPE policy were made because Riverside was "receiving information from [its] supply chain that the supply of N95 masks was becoming very difficult to obtain." Moreover, she testified that N95 masks and other supplies were being stolen from Riverside "at a pretty alarming rate." This fear over supply shortages was further informed by the guidance contained in the California Department of Public Health's "COVID-19 Healthcare System Mitigation Playbook." That document warned of global PPE shortages, and instructed hospitals to "[m]itigate scarce resources through . . . rationing supplies like personal protective equipment (PPE) to ensure the most high-risk situations for spread . . . have the proper PPE to protect healthcare workers." Although Riverside did not indicate the exact number of masks or other supplies in its possession when the policy was implemented, the evidence it did proffer sufficiently demonstrates that it faced a likely rapidly approaching PPE

shortage. Accordingly, substantial evidence does not support the Board's rejection of the exigency exception.

However, to the extent that the PPE policy directly affects the job security of bargaining unit members, the Board properly held that Riverside was required to bargain over the *effects* of the PPE policy. "While exigent circumstances may briefly excuse an employer's initial failure to bargain prior to implementing a particular decision, an employer cannot evade bargaining over that decision and its effects . . . on the basis of the exigency once the need for immediate action has passed." *Metro Man*, 2022 WL 18232705, at *4. Once the immediate emergency has passed, "the duty to notify the union and provide an opportunity to bargain over the unilateral change and its effects resumes." *Id.*

The management-rights clause in the CBA does not justify Riverside's failure to bargain over the effects of the PPE policy. That provision requires Riverside to provide notice and an opportunity to bargain over changes that "directly affect the job security of bargaining unit members." Riverside's training module instructing staff on new PPE policy stated that failure to comply with the policy would "subject the offending party to disciplinary action up to and including the termination of employment." Although no employee was disciplined for violating this policy, a policy need not result in actual discipline to directly affect employees' job security. *See El Paso Elec. Co. & Int'l Bhd. of Elec. Workers, Loc. Union 960*, 350 N.L.R.B.

151, 162 n.14, 167 (2007) (concluding that a new cashier shortage and overage policy “presumably provided new grounds for discipline, thus impacting job security,” even though “[a]s of the hearing date, no discipline had been instituted”).

Finally, the Union did not waive its right to bargain about the new PPE policy’s effects relating to bargaining unit member job security. Although the Union did not ask to bargain over Riverside’s earlier PPE policies and trainings, “it is not true that a right once waived under the Act is lost forever.” *N.L.R.B. v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969). Rather, “[e]ach time the bargainable incident occurs—each time new rules are issued—[the] Union has the election of requesting negotiations or not.” *Id.*

4. The Board properly concluded that Los Robles violated the Act by discontinuing its practice of providing a 2% annual wage increase to employees in the Professional Unit. A regular wage increase “constitutes a term or condition of employment when it is an ‘established practice . . . regularly expected by the employees.’” *Gruma Corp.*, 350 N.L.R.B. 336, 337 (2007) (quoting *Daily News of L.A.*, 315 N.L.R.B. 1236, 1236 (1994)). An employer violates the Act by unilaterally discontinuing an established wage increase practice without providing notice and opportunity to bargain. *Omni Hotels Mgmt. Corp. & Unite Here Loc. 1*, 371 N.L.R.B. No. 53, 2022 WL 204141, at *3 (Jan. 20, 2022).

Between at least 2015 and 2019, all employees at Los Robles received a 2% annual wage increase every April. Although Los Robles contends that it evaluated whether to provide a wage each year based on “operational and other circumstances,” there is no evidence in the record to support this assertion. The Board properly concluded that the 2% annual wage increase was a term or condition of employment over which Los Robles was required to bargain.

5. The Board did not abuse its discretion by ordering Los Robles to “[m]ake Professional Unit employees whole for any loss of earnings and other benefits, and *for any other direct or foreseeable pecuniary harms* suffered as a result of rescinding the Pandemic Pay Program and withholding the April 2020 annual cost-of-living increase.” *See Macy’s Inc. v. N.L.R.B.*, ___ F.4th ___, 2025 WL 2963359, at *16 (9th Cir. Oct. 20, 2025); *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 7 (Dec. 13, 2022). *Macy’s* affirmed that *Thryv* remedies are permissible as long as they are “equitable,” encompassing “only the *actual*, and not merely *speculative*, consequences of the unfair labor practices.” *Macy’s*, 2025 WL 2963359, at *11 (citation modified). As in *Macy’s*, “[t]he Board must still establish, in a later [compliance] proceeding, how any make-whole relief it seeks is equitable or ‘sufficiently tailored to the actual, compensable injuries suffered’ by the employees in this case.” *Id.* at *17 (quoting *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 901

(1984)). The need for that later showing does not affect our conclusion that the *Thryv* remedial order currently before us is valid.

The petition is **GRANTED IN PART** and **DENIED IN PART**.²

² The Board's motion for judicial notice of the Hospitals' exceptions brief is denied as unnecessary. *See Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 393 n.7 (9th Cir. 2000).

NLRB v. Los Robles, No. 23-1950
VANDYKE, Circuit Judge, concurring:

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For the reasons articulated in the dissent and the dissent from denial of rehearing en banc in *Macy's Inc. v. NLRB*, I believe that *Thryv* remedies exceed the NLRB's statutory authority and violate the Seventh Amendment jury right. ___ F.4th ___, 2025 WL 2963359, at *18–28, 35–41 (9th Cir. Oct. 20, 2025). But because the majority in *Macy's* blessed *Thryv* remedies and this court—presented with an en banc call—opted not to revisit the decision en banc, I join the majority disposition in full.