UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONSUMERS ENERGY COMPANY.

and **Case 07–CA–329132**

LOCAL 107, UTILITY WORKERS UNION OF AMERICA (UWUA), AFL-CIO

Eric Cockrell **and** ***Patricia Fedewa, Esqs.***, for the General Counsel.
Michelle P. Crockett, Esq. (Miller, Canfield, Paddock and Stone, P.L.C.) for the Respondent.
Jared Kadzban, for the Charging Party

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case arises from a complaint and notice of hearing (the complaint) issued November 4, 2024, which stems from charges that Local 107, Utility Workers Union of America (UWUA) (the Union) filed against Consumers Energy Company (the Company or the Respondent).

Pursuant to notice, I conducted a trial in Grand Rapids, Michigan, on February 19, 2025, during which I afforded the parties a full opportunity to be heard, to call witnesses, and to introduce evidence.[1]

[1] On July 11, 2025, the General Counsel filed a motion to withdraw or amend certain remedial paragraphs of the complaint and strike specified portions of the General Counsel's posttrial brief. Since the General Counsel seeks changes that are favorable to Respondent, I hereby grant the General Counsel's motion and, where appropriate, I have accounted for the modified relief requests in this decision.

ISSUE

Did the Respondent violate Section 8(a)(1) of the Act on May 1, 2023, by including the following language in paragraph 2 of a last chance agreement that settled a grievance filed by Jara Frei (Frei):[2]

> This agreement constitutes a Last Chance Agreement for the grievance [sic] grievant and any and all incidents of misconduct shall be grounds for termination of the grievant and neither the Union nor the grievant shall contest such action in any manner or forum.

FACTS

Frei was the only witness called during the hearing, and she testified credibly. The facts are undisputed. Based on her testimony, documents, stipulations, and the thoughtful briefs that counsel for the General Counsel (the General Counsel) and the Respondent filed, I find the following.

At all material times the Respondent has been a Michigan corporation with a facility in Wyoming, Michigan and has been in the business of providing power generation to residential and commercial customers. The Respondent has admitted Board jurisdiction as alleged in the complaint, and I so find.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

On May 1, 2023, the Respondent, the Utility Workers Union of America, AFL-CIO and its Michigan State Utility Workers Council, and Frei entered into a settlement agreement of Frei's grievance, pursuant to which her March 28, 2023 discharge for serious misconduct was converted to an uncontested long-term disciplinary layoff without backpay. (GC Exh. 2.) In relevant part, the settlement contained the language set out above and stated that the last chance agreement would remain in her personnel file for a period of 3 years.

On October 25, Frei was terminated. Pursuant to the last chance agreement, she was barred from contesting the termination either through the grievance procedure or in any external forum. The merits of her October 25 termination are not before me.

[2] The complaint alleges, and it is admitted, that the Respondent proffered last chance agreements containing the same or similar language to other employees since about that date, but the General Counsel has identified no employees other than Frei. In its July 11, 2025 motion, the General Counsel (among other changes) limited its remedial requests to Frei.

Analysis and Conclusions

A Last Chance Agreement that results in an employees' waiver of rights, both present and in the future, to invoke the Board's processes for alleged unfair labor practices violates Sec. 8(a)(1). In *re McKesson Drug Co.*, 337 NLRB 935, 938 (2002), citing *Retlaw Broadcasting Co.*, 310 NLRB 984 (1993), enfd. 53 F.3d 1002 (9th Cir. 1995); see also *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175 –176 (2001) (a separation agreement forcing an employee to prospectively waive her Sec. 7 rights is overly broad because "[F]uture rights of employees . . . may not be traded away. . .," quoting *Mandel Security Bureau, Inc.*, 202 NLRB 117,119 (1973)), affd. 354 F.3d 534 (6th Cir. 2004). I conclude that the language in paragraph 2 of the last chance agreement is overly broad and unlawful in that it constitutes an employee waiver of the right to contest adverse actions before the National Labor Relations Board or other agencies.

The Board's decision in *Stericycle, Inc.* leads to the same result. Under Stericycle, the Board requires the General Counsel to prove that a challenged rule (here, the provisions of paragraph 2 of the last chance agreement) has a reasonable tendency to chill employees from exercising their Section 7 rights. If the General Counsel carries its burden, the rule is presumptively unlawful but the employer may rebut the presumption by showing that the rule advances a legitimate and substantial business interest that the employer could not advance with a more narrowly tailored rule. 372 NLRB No. 113, slip op. at 2 (2023). For the reasons that I have stated, I find that the General Counsel carried its burden. I also find that the Respondent did not rebut the presumption that the last chance agreement is unlawful, as it did not show that it would not be possible to craft a more narrowly tailored rule that would affirm the validity of the last chance agreement while still permitting the Union and Frei to engage in activities protected by Section 7 of the Act.[3]

The General Counsel further alleges that Frei was terminated on October 25, 2023, as a result of the Respondent's enforcement of the last chance agreement. The Respondent does not dispute that it terminated Frei based on the last chance agreement but alleges that it did so because Frei engaged in additional misconduct. The specific merits of her termination are not before me, and there is no allegation that she was terminated for union or other protected concerted activity. It is noteworthy that the charge included the allegation that her termination violated Section 8(a)(3) and (1) of the Act, but the General Counsel chose not to pursue that allegation,[4] or to allege that Frei was discharged for engaging in other protected concerted activity. Furthermore, there is no evidence that she was terminated due to anything contained in

[3] In its posttrial brief, the Respondent cited to the Board's decision in *Coca-Cola Bottling Company of Los Angeles* as an example of a case where the Board found that a grievance settlement lawfully included a provision that (in the Respondent's view) is similar to the one at issue in this case. 243 NLRB 501, 502 (1979). I disagree. The Board in *Coca-Cola Bottling* predicated its decision on its finding that that grievance settlement language was sufficiently clear in that it only precluded the employee from taking further action to contest the suspension that was at issue, and did not preclude action based on future matters. Id. The language at issue in the last chance agreement in this case lacks that level of clarity regarding whether future actions on other matters are permitted.

[4] No partial dismissal letter was issued, but either the Charging Party did not pursue the 8(a)(3) allegation during the investigation, or the Region found it to be without merit.

the last chance agreement or that her signing the agreement in fact prejudiced Frei's ability to file a charge over her termination with the NLRB and have it investigated; she, in fact, timely filed one.

The General Counsel is essentially asking me to find that the termination triggered Board remedies, including reinstatement and backpay, despite no evidence that Frei's termination was unlawful or that the other aspects of the last chance agreement (apart from the disputed language quoted above) were problematic.

This is not a situation where Frei was terminated for refusing to sign the unlawful last chance agreement or terminated as a result of its enforcement, and the cases that I cited above do not support the General Counsel's position. In *McKesson Drug Co.*, an employee was discharged when he refused to sign an unlawful agreement that conditioned his reinstatement on his withdrawing his pending unfair labor practice charge and agreed to not file future charges. In those circumstances, the Board concluded that he was entitled to reinstatement and backpay. In *Ishikawa*, although the Board found that conditioning an employee's receipt of separation payments on her refraining from protected activities for a 1-year period violated Sec. 8(a)(1), it ordered no remedies for her.

Therefore, I will not order those reinstatement and backpay remedies. Those would be appropriate only if it was determined that Frei's termination was solely based on the unlawful provision of the last chance agreement.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 107, Utility Workers Union of America (UWUA) is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act: requiring Frei to sign a last chance agreement with an unlawful provision as a condition of settling grievances.

Remedy

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel seeks the following remedies:

(a) Rescind the unlawful last chance agreement that was promulgated to, executed by and enforced against Jara B. Frei, and notify her, in writing, that the agreement has been rescinded and that she is released from the obligations contained therein.

(b) Physically post, and electronically distribute, including by e-mail, any text-based mobile messaging platform, social medial website, internal app, and any other means by which Respondent communicates with its employees a copy of the signed the Notice to Employees at Respondent's facilities a copy of the Notice to Employees at Respondent's Wyoming, Michigan facility regarding the unfair labor practices alleged in paragraph 7.

I agree that rescission or modification is appropriate, but only as to the unlawful language in the last chance agreement. Accordingly, I shall require Respondent to rescind or modify the following language in paragraph 2 of the last chance agreement that it issued to Frei: "and neither the Union nor the grievant shall contest such action in any manner or forum." I shall also require the Respondent to notify Frei in writing that this has been done and that the unlawful language of the last chance agreement will not be used against her in any way. If Respondent chooses to modify the unlawful language, the modified language shall make it clear that Frei retains her rights to engage in activities protected by Section 7 of the Act. Cf. *Battle's Transportation, Inc.*, 362 NLRB 125, 127 (2015) (directing the employer rescind an unlawful work rule or revise the rule to remove any language that prohibits or would reasonably be read to prohibit conduct protected by Section 7 of the Act).

Since I have concluded that reinstatement and backpay remedies are not appropriate, I will not address the General Counsel's requests for them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Consumers Energy Company, Wyoming, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring employees to sign last chance agreements that include unlawful language as a condition of settling grievances.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after the Board order, rescind or modify the following language from the last chance agreement that it executed with Jara Frei as described in the remedy section of this decision: "and neither the Union nor the grievant shall contest such action in any manner or forum."

(b) Once the rescission or modification is complete, notify Frei, in writing within 3 days, that this has been done and that the unlawful language in the last chance agreement will not be used against Frei in any way. The Respondent shall also remove from its files any references to the unlawful language in Frei's last chance agreement.

(c) Within 14 days after service by the Region, post at its facility in Wyoming, Michigan, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If during the pendency of these proceedings, the Respondent has gone out of business or closed its facilities in Wyoming, Michigan, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2023.

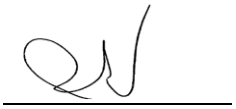
[6] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If one (or more) of the facilities is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]."

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C., July 16, 2025.



Ira Sandron
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT require employees to sign last chance agreements that include unlawful language as a condition of settling grievances.

WE WILL, within 14 days of the Board's order, rescind or modify the following language in last chance agreements that we executed with Jara Frei: "and neither the Union nor the grievant shall contest such action in any manner or forum."

WE WILL, once the rescission or modification of the unlawful language in the last chance agreement is complete, notify Frei, in writing within 3 days, that this has been done and that the unlawful language in the last chance agreement will not be used against her in any way. In addition, WE WILL remove from our files any references to the unlawful language in Frei's last chance agreement.

CONSUMERS ENERGY COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether

employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-329132 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (616) 930-9165