

Ninth Circuit Buys a Circuit Split on Available Remedies Under the NLRA

Labor Relations Update on January 30, 2025

On January 21, 2025, the U.S. Court of Appeals for the Ninth Circuit enforced a National Labor Relations Board (“NLRB” or the “Board”) order requiring Macy’s to provide workers with heightened remedies in response to an unfair labor practice (“ULP”) charge. As reported [here](#), the Court’s ruling creates a split with the Third Circuit on available remedies under the National Labor Relations Act (“NLRA” or the “Act”).

Background and *Thryv* Decision

In September 2020, the Union went on strike after rejecting the Final Offer provided by Macy’s on a successor collective bargaining agreement. Three (3) months later, the Union made an unconditional offer to return to work. Macy’s asked for additional time to evaluate this “unexpected offer,” but the Union refused, and the employees reported to work. Macy’s then locked out the Union employees in support of its bargaining position. In response to that action, the Union filed a ULP charge claiming that Macy’s violated Sections 8(a)(1) and 8(a)(3) of the NLRA by locking out the Union employees.

The Administrative Law Judge (“ALJ”) agreed with the Union, holding that the lockout violated the NLRA because Macy’s failed to provide employees “with a timely, clear, or complete offer, which sets forth the conditions necessary to avoid the lockout.”

Concerning remedies, the ALJ recommended reinstatement and make-whole remedies for “any losses of pay and benefits that they may have suffered by reason of the lockout,” including “search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings.”

The Board affirmed the ALJ's ruling and adopted the ALJ's recommended order. However, the Board amended the "make-whole remedy" to provide that Macy's also be required to "compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful lockout..." As reported [here](#), that language follows the Board's decision in *Thryv., Inc.*, 372 NLRB No. 22 (2022), which held that, in cases involving remedies of make-whole relief, the respondent must compensate affected employees for "all direct or foreseeable pecuniary harms" resulting from the ULP.

Macy's petitioned for review of the Board's Decision and Order in the Fifth Circuit, while the Union filed its petition for review in the Ninth Circuit. Pursuant to 28 U.S.C. § 2112, the Ninth Circuit was selected to hear the case. The NLRB also filed an application for Enforcement of its Order.

Ninth Circuit Ruling

Merits of the Underlying ULP Charge

The Ninth Circuit initially held that substantial evidence supported the Board's holding that the lockout was unlawful. It found similarly to the Board that Macy's "did not inform the Union of its demands or conditions" ahead of the lockout, as is required under Board law. This prevented the Union "from having a fair opportunity to evaluate any bargaining proposals for either lockout or reinstatement purposes."

Expanded Remedies Under *Thryv*

The Ninth Circuit also upheld the remedies issued by the Board.

The Court first noted that, given the Board's "primary responsibility and broad discretion to devise remedies," it would not disturb the Board's Order on remedies unless it attempted to "achieve ends other than those which can fairly be said to effectuate the policies of the Act." In declining to disturb the Order, the Court reasoned that the *Thryv* remedies "further the policy of the NLRA" because they are "directly targeted" at unlawful conduct and "aimed at restoring the economic strength that is necessary to ensure a return to the status quo ante."

The Court further addressed the position of Macy's that *Thryv* remedies constitute "full compensatory damages," resembling the "adjudication of private rights," which is outside the administrative purview of the NLRB. In response to this argument, the Court concluded that "the Board's invocation of *Thryv*'s make-whole relief here vindicates a public right." Any resemblance to compensation for private injury was viewed by the Court to be "merely incidental to 'the effectuation of the policies of the Act'" because the remedy was "designed to aid in achieving the elimination of industrial conflict," thus vindicating public rather than private rights.

The Court likewise addressed the issue of the expanded remedies potentially being outside the purview of the NLRA, which does not permit an award of pecuniary damages.

Macy's relied in part on *United States v. Burke*, 504 U.S. 229 (1992)—a U.S. Supreme Court case involving backpay under Title VII of the Civil Rights Act of 1964—to assert that the *Thryv* remedies were prohibited consequential damages. While not binding, the *Burke* decision concerned Title VII, which has a similar remedial scheme to the NLRA.

Both Macy's and the Partial Dissent referenced *Burke* for the proposition that the NLRA, similar to Title VII, "does not allow awards for compensatory or punitive damages." Instead, both statutes "limit[] available remedies to backpay, injunctions, and other equitable relief," which restore individuals "to the wage and employment positions they would have occupied" absent the unlawful conduct.

However, the Ninth Circuit reconciled *Burke* with its decision by citing to Title VII opinions holding that the statute was "directed...to the consequences of employment practices" with an aim of making individuals whole, "in a pecuniary fashion." The Court analogized these cases to NLRA decisions holding that the Board's authority over remedies was aimed at "removing or avoiding the consequences of violation[s]" of the Act. According to the Ninth Circuit, the NLRB's *Thryv* remedies fit within this remedial power, by restoring "the situation, as nearly as possible, to that which would have occurred but for the violation."

Takeaways

The Ninth Circuit's decision sets up a split with the Third Circuit on the issue of available remedies under the NLRA. In its analysis of the issue, the Third Circuit held that the Board's remedial authority does not extend to the imposition of consequential damages orders, like the ones issued in *Thryv* as well as the instant Ninth Circuit decision. As a result, Board decisions that order compensation for direct or foreseeable pecuniary harms will be conclusively enforceable in Alaska, Arizona, California, Guam, and Hawaii, and enforceable (for now) in all states and territories *outside of* Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands.

It remains to be seen whether the U.S. Supreme Court will take on a Board case addressing this issue. However, with President Trump's recent inauguration, and the significant shakeup we have seen at the NLRB (including the expected firing of NLRB General Counsel Jennifer Abruzzo and the less expected dismissal of NLRB Member Wilcox) (discussed [here](#)), it is unclear whether the Acting General Counsel (and subsequent General Counsel) will continue to seek the expansive remedies under *Thryv*. Moreover, when the NLRB achieves a quorum in the future, the *Thryv* decision seems ripe to be overturned.

We will continue to monitor the status of available remedies under the NLRA and the impact of the recent changes to the NLRB under the new administration.

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