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Divided Ninth Circuit Panel Upholds NLRB's Enhanced Remedial Powers



In *IUOE, Local 39 v. National Labor Relations Board*, No. 23-124, No. 23-150, 23-188, a U.S. Court of Appeals for the Ninth Circuit panel issued a 2-1 ruling on January 21, 2025, enforcing a National Labor Relations Board (NLRB or Board) order requiring Macy's to pay heightened remedies to workers it did not reinstate following a 2020 strike.

The opinion held that the Board did not exceed its authority by ordering so-called “*Thryv* remedies” made pursuant to the Board’s 2022 decision in *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 1 (Dec. 13, 2022) (clarifying that “make-whole relief” includes compensation “for all direct or foreseeable pecuniary harms” to affected employees), *order vacated in part on other grounds*, 102 F.4th 727 (5th Cir. 2024). *Thryv* established a practice of ordering employers to cover certain nonwage losses caused by labor violations. In relying on *Thryv* for the principle that back wages are appropriate remedies in this context, the Ninth Circuit split from a U.S. Court of Appeals for the Third Circuit ruling in December 2024 that found the Board lacked authority to issue *Thryv* remedies.

Background

After months of negotiations between the International Union of Operating Engineers Local 39 (Union) and Macy's, in September 2020, the Union rejected Macy's' last, best, and final offer and began a three-month strike. On December 4, 2020, the Union workers offered to return to work unconditionally. In response, Macy's asked for time to respond to the Union's “unexpected offer.” Despite Macy's' request, Union members reported to work three days later on December 7, 2020. Macy's turned them away.

The Union filed an unfair labor practice charge against Macy's on December 9, 2020, alleging Macy's' refusal to reinstate the workers was an unfair labor practice under the National Labor Relations Act (NLRA). On April 6, 2022, after a six-day hearing, an administrative law judge (ALJ) issued a decision in the Union's favor, having

concluded that Macy’s violated Section 8(a)(1) and (3) of the NLRA “[b]y locking out its employees on December 7, 2020, without providing them with a timely, clear, or complete offer, which sets forth the conditions necessary to avoid the lockout[.]” The ALJ recommended that Macy’s “offer reinstatement to all employees who were unlawfully locked out and make them whole 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.” At the time of the ALJ’s ruling, Macy’s and the Union still had not reached an agreement, so the employees remained out of work.

On January 17, 2023, the Board adopted the conclusion of the ALJ that Macy’s violated Section 8(a)(1) and (3) of the NLRA but amended the ALJ’s recommended order with respect to the appropriate scope of remedies. Specifically, the Board modified the ALJ’s “make-whole” remedy to include direct or foreseeable pecuniary harms incurred due to the lockout pursuant to *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 1 (Dec. 13, 2022) (clarifying that “make-whole relief” includes compensation “for all direct or foreseeable pecuniary harms” to affected employees), *order vacated in part on other grounds*, 102 F.4th 727 (5th Cir. 2024). Macy’s petitioned for review in the U.S. Court of Appeals for the Fifth Circuit; the Union filed its petition in the Ninth Circuit. Pursuant to 28 U.S.C. § 2112, the U.S. Judicial Panel on Multidistrict Litigation randomly selected the Ninth Circuit to handle the case and the petitions were consolidated.

The Ninth Circuit Decision

The main takeaway from this decision is the panel’s holding that the Board did not err in awarding *Thryv* remedies. In *Thryv*, the Board “standardiz[ed] [its] make-whole relief to expressly include the direct or foreseeable pecuniary harms suffered by affected employees.” Direct harms are those in which an employee’s “loss was the direct result of the employer’s illegal conduct,” whereas foreseeable harms are “those which the [employer] knew or should have known would be likely to result from its violation of the Act, regardless of its intentions.”

Relying on the Supreme Court of the United States’ decision in *United States v. Burke*, 504 U.S. 229 (1992), Macy’s argued that the Board’s decision in *Thryv* improperly authorized the Board to award full compensatory or consequential damages. In *Burke*, the Supreme Court prohibited consequential damages under Title VII of the Civil Rights Act, which contains similar remedial language to the NLRA. However, citing *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 543 (1943), the Ninth Circuit majority held that the Board’s invocation of *Thryv*’s “make-whole” relief served to vindicate a public right and thus the Board acted within its authority. In the majority opinion, Judge Evan Wallach, an appointee to the U.S. Court of Appeals for the Federal Circuit sitting on the Ninth Circuit by designation, wrote that “[t]he *Thryv* remedies are therefore like a backpay order, serving to effectuate the policies of the Act by eliminating industrial conflict and giving something akin to restitution.” (Notably, the Ninth Circuit also rejected Macy’s’ argument that it was entitled to a jury trial on the *Thryv* remedies, and held that the Seventh Amendment has no application to *Thryv* remedies because the money damages are “incident to equitable relief” where “[t]he Board seeks enforcement as a public agent” vindicating a public right.)

The opinion greatly expands the scope of available remedies under the NLRA and represents a split from the Third Circuit’s decision last month in *NLRB v. Starbucks Corp.*, — F.4th —, No. 23-1953, 2024 WL 5231549 (3d Cir. Dec. 27, 2024). In *Starbucks*, the Third Circuit enforced the Board’s petition to enforce its order but vacated expansive *Thryv* remedies for exceeding the Board’s authority under the NLRA. The Third Circuit reasoned that compensatory relief cannot exceed what the employer unlawfully withheld and *Thryv* remedies would do so.

Although this decision represents a victory for the NLRB it is possible that President Donald Trump’s appointees to the NLRB will overturn a series of Biden-era decisions that favor unions and workers, including *Thryv*.

Employers should stay tuned to the Board's actions under the new administration and seek experienced labor counsel to navigate labor-related issues.

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