

Ninth Circuit Diverges from Third Circuit on Scope of National Labor Relations Board's Remedial Power, Ripening Issue for Supreme Court Review

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As previously reported, the Third Circuit Court of Appeals handed Starbucks a victory in *NLRB v. Starbucks Corp.* by vacating part of an order issued by the National Labor Relations Board (“Board” or “NLRB”) requiring Starbucks to compensate two terminated baristas for all “direct and foreseeable pecuniary harms incurred as a result of the unlawful adverse action against them, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceeded interim earnings.” The Third Circuit reasoned the Board’s decision in *Thryv*, which held that the Board may order employers to compensate affected employees for all direct and foreseeable pecuniary harms suffered as a result of the employer’s unfair labor practices, was contrary to the legislative scheme of the National Labor Relations Act (the “Act”), which does not authorize the Board to award full compensatory damages for injuries caused by wrongful conduct.

The Ninth Circuit Court of Appeals disagreed with the Third Circuit in *International Union of Operating Engineers Local 39 v. NLRB*. In *International Union of Operating Engineers Local 39*, the Ninth Circuit reasoned that *Thryv* remedies are “like a backpay order, serving to effectuate the policies of the Act by eliminating industrial conflict and giving something akin to restitution.” The dispute in *International Union of Operating Engineers Local 39* arose after Macy’s locked out union-represented workers after they offered to return to work from a three-month strike amid contract negotiations. As a result, the Union filed unfair labor practice charges against Macy’s, alleging that the company violated section 8(a)(1) and (3) of the Act by unlawfully locking out workers after they offered to return without presenting a timely, clear, and complete offer that set forth conditions necessary to avoid a lockout. The Board adopted the ALJ’s finding that Macy’s violated the Act but amended the remedial provision of the order to include all direct and foreseeable pecuniary harms incurred during the lockout.

In addressing the *Thryv* remedies, the Ninth Circuit reasoned that its decision to uphold the order is not wholly in conflict with the Third Circuit’s decision in *Starbucks*, as the Court did not read *Starbucks* as invalidating any form of monetary relief because it resembles an order to pay damages. Rather, the Ninth Circuit reasoned that an order “resembling” damages, standing alone, cannot be dispositive where Congress has expressly granted the Board broad authority to fashion appropriate remedies whose nature and purpose is to provide make-whole relief.

The apparent conflict between the Ninth Circuit’s decision in *International Union of Operating Engineers Local 39* and the Third Circuit’s decision in *Starbucks Corp.*

provides the Supreme Court of the United States with an avenue to squarely address and define the limits of the Board's remedial powers. Past legislative attempts to expand the Board's power to respond to unfair labor practices and discourage violations of the NLRA, like the 2021 PRO Act, have floundered in the Senate, and it is unlikely that doing so will be a top legislative priority under the Trump Administration.

While the Board is likely reinvigorated by the court's holding that consequential damage orders are enforceable in the Ninth Circuit, which includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, for how long the Board will continue issuing such orders remains to be seen. It is only a matter of time before President Trump appoints a new Board general counsel and nominates two new Board members, ushering in a new era at the NLRB.

For more information, contact an attorney in Benesch's [Labor & Employment Practice Group](#).

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