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NLRB Expands Make-Whole Remedy

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For years, many have criticized the relief available under the National Labor Relations Act (NLRA) and have been looking to Congress to expand the statute's remedies. In December, the National Labor Relations Board ("Board" or NLRB) took matters into its own hands.

In *Thryv, Inc.*,[1] the Board decided to modify the standard make-whole remedy available under the NLRA to compensate employees for all "direct or foreseeable pecuniary harm" suffered as a result of unfair labor practices (ULPs). According to the decision, such a remedy should not only cover lost benefits and earnings, but also financial costs employees may incur, such as credit card debt, out-of-pocket medical expenses, and other direct or foreseeable costs. The decision opens the door to the categories of relief available in compliance proceedings that follow ULP findings and applies retroactively to all currently pending cases as well as future cases.

Facts

The employer in *Thryv* operated a marketing agency that sells the well-known Yellow Pages advertising as well as an application for small businesses called "Thryv."[2] A labor union represents some of the employer's workforce, including outside salespeople.[3] The outside sales force solicits sales for large and medium-sized as well as new accounts.[4] The employer's inside sales force, which is not represented by the union, solicits sales for small accounts.[5]

At issue in the case was the employer's decision to lay off the sales force in northern California responsible for new accounts. The Board highlighted a few facts surrounding the layoff, including the following:

- There were internal employer communications around mid-July 2019 about the layoff. In an email, the employer discussed first moving the "good" employees that would otherwise be impacted by the layoff to the sales force responsible for soliciting medium-sized accounts. The employer then moved two employees accordingly.[6]
- About a month later, on Aug. 21, the employer notified the union that it would be laying off the sales force in northern California responsible for new accounts in 30 days. The employer invited the union to "to exercise its right to meet and discuss" the layoff. The parties agreed to meet on Sept. 11 and 12.[7]
- About a week prior to the first scheduled meeting, the employer informed the union on Sept. 5 that it was notifying the affected employees about the layoff the next day. The employer did just that on Sept. 6.[8]
- During the first meeting on Sept. 11, the union asked the employer if it had a proposal regarding the layoff. The employer told the union that language in the last, best, and final offer (LBFO) under which the parties were operating, which said that the employer would provide 30 days' notice of a layoff, was its offer.[9] The union asked the employer about other jobs into which the employees slated for layoff could transition, information about the accounts those employees had been handling, and those employees' market locations. The union further proposed that the employer suspend the layoff until the parties could more thoroughly discuss the situation. The employer told the union that there was insufficient revenue to transition the employees and it would not rescind the layoff. Later that day, the union sent an email asserting that the parties had an obligation to discuss transitioning the employees to the sales force that solicits medium-sized accounts, pointing to language in the LBFO that contemplates a discussion about so transitioning employees every six months.[10]
- During the meeting the next day, Sept. 12, the union again mentioned that the employer should transition the employees slated for layoff into other positions. The union further mentioned that it did not have information it needed to discuss transitioning the employees who would be laid off to the sales force that solicits medium-sized accounts.[11]
- A few days later, on Sept. 16, the union sent an email reiterating its position and request for information.[12]
- On Sept. 20, the employer laid off the employees, consistent with what it previously communicated

to the affected employees and union.[13] The parties were in the process of negotiating a new collective-bargaining agreement at the time.[14]

- About two weeks later, on Oct. 3, the parties met again. During the meeting, the union said that it still was waiting for the information it requested.[15]
- A couple of weeks after the Oct. 3 meeting, on Oct. 17, the union sent an email asking for account information for the northern California and Nevada markets during the prior 12 months, including accounts that were reassigned or moved out of the market.[16]
- About two weeks after that, on Oct. 31, the parties held their last meeting about the layoff. The union said that it had a number of outstanding information requests. It specifically mentioned that it was awaiting information about the two employees responsible for new accounts in northern California that the employer moved to the sales force responsible for soliciting medium-sized accounts. The union further contended that members of the sales force had left the employer and the employer could hire at least some of the laid off employees to perform that work.[17]

Procedural History

The union filed unfair labor practice charges against the employer, challenging the employer's refusal to provide the union with information it requested in connection with the layoff and the layoff decision.[18]

After a hearing, an administrative law judge (ALJ) found that the employer committed a ULP by failing to provide the union with the information it requested on Sept. 11, Sept. 16, Oct. 3, Oct. 17, and Oct. 31, but that the employer did not commit a ULP by laying off the employees.[19] With regard to the layoff, the ALJ concluded that the parties reached an impasse during their discussions prior to the layoff.[20] The ALJ further opined that, to the extent the layoff was a fait accompli, the employer cured any potential ULP by bargaining with the union prior to laying off the employees.[21]

Before issuing its decision, the Board invited interested parties to file briefs in the case to address whether the NLRB should modify its make-whole remedy.[22] Although the invitation focused on "consequential damages"[23] and the Board acknowledged in *Thryv* that "'consequential damages' is a term of art used to refer to a specific type of legal damages awarded in other areas of the law and fails to accurately describe the make-whole remedial policy we espouse here,"[24] the NLRB nonetheless forged ahead in deciding the case, including modifying its make-whole remedy.

Decision

The Board agreed with the ALJ that the employer committed a ULP by failing to provide the union with the information it requested, but disagreed with the ALJ's conclusion that the layoff did not constitute a ULP.[25] The NLRB opined that the employer's decision to layoff the employees was an accomplished fact prior to the employer meeting with the union and added that the employer's failure to provide the union with the information it requested prevented an impasse.[26] The Board further found that the employer committed a ULP by unilaterally laying off the employees as the parties were in collective bargaining negotiations for a successor collective-bargaining agreement.[27]

In addressing the make-whole remedy standard, the NLRB stated:

> We find...that it is necessary for the Board to revisit and clarify our existing practice of ordering relief that ensures affected employees are made whole for the consequences of a respondent's unlawful conduct. We conclude that in all cases in which our standard remedy would include an order for make-whole relief, the Board will expressly order that the respondent compensate affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent's unfair labor practice.... [A]ny relief must be specifically calculated and requires the General Counsel to present evidence in compliance demonstrating the amount of pecuniary harm, the direct or foreseeable nature of that harm, and why that harm is due to the respondent's unfair labor practice. The respondent, in turn, will have the opportunity to present evidence challenging the amount of money claimed, argue that the harm was not direct or foreseeable, or that it would have occurred regardless of the unfair labor practice.[28]

Later in its decision, the Board cited to an NLRB trial manual to add "'[u]ncertainties or ambiguities in the evidence' may be 'resolved against the respondent whose unlawful actions created the dispute.'"[29]

The Board did "not attempt…to enumerate all pecu-

niary harms that may be considered direct or foreseeable,"[30] but did say that laid off employees like those at issue in the case immediately before it "may be forced to incur significant financial costs, such as out-of-pocket medical expenses, credit card debt, or other costs[.]"[31]

Dissent

The dissent highlighted a few of the problems with the NLRB's decision, focusing on the "foreseeable pecuniary harms" language in the newly announced standard. The dissenting members explained that the standard opens the door to damages indirectly caused by a ULP without establishing the appropriate causal nexus, referencing a law school favorite, *Palsgraf v. Long Island R.R.*[32] The dissent further mentioned that the standard offered by the Board presents both constitutional and statutory problems because it subjects respondents to liabilities sounding in tort law in the absence of the right to a jury trial and presents due process concerns as respondents could be inhibited in their abilities to effectively litigate whether they should be liable for allegedly foreseeable harms sought by the Board's general counsel during compliance hearings.[33]

Motion for Reconsideration

The employer in *Thryv* filed a motion for reconsideration of the NLRB's decision.[34] In its motion, the employer argued that the Board's decision ignored the "undisputed fact" that the parties were at an "overall impasse."[35] The employer asked the NLRB to reconsider its decision in light of this oversight, including "the Board's decision breaking new ground on remedies."[36]

The NLRB denied the employer's motion.[37] It stated that the employer was not at an impasse at the time the employer implemented its layoff decision because the parties were in negotiations for a successor collective-bargaining agreement.[38] The Board recognized that a regional director previously dismissed a ULP charge challenging whether the employer lawfully implemented the aforementioned LFBO, but said the dismissal of the charge did not establish that the employer did, in fact, lawfully implement the LFBO, and further asserted that an employer "cannot rely upon even a lawfully implemented LBFO to arrogate to itself the privilege to unilaterally lay off employees without bargaining, and during contract negotiations, without bargaining to an overall impasse."[39]

Conclusion

The NLRB's decision in *Thryv* is a significant Board development. After the NLRB finds a ULP has been committed, there is a compliance hearing to assess remedies absent a resolution. For example, if an individual's employment termination is a ULP, the amount of back pay owed to them would be addressed during a compliance hearing. Pursuant to *Thryv*, these hearings now will address not only direct harms of ULPs, but also any foreseeable pecuniary harms advanced by the NLRB's general counsel. Litigants before the Board best be prepared.

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Endnotes

1. 372 NLRB No. 22 (2022).
2. *Id.* at slip op. *1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at slip op. *1-2.
7. *Id.* at slip op. *2.
8. *Id.*
9. A party makes a LBFO during collective bargaining negotiations to indicate that it has no further room for negotiations. An employer may unilaterally implement its LBFO if the parties are at an impasse in their collective bargaining negotiations. About a year before the September 11, 2019 meeting, the employer declared impasse and implemented its LFBO. *See id.* at slip op. *2 n.5.

10. *Id.* at slip op. *2.
11. *Id.*
12. *Id.* at slip op. *2-3.
13. *Id.* at slip op. *3.
14. *Id.* at slip op. *5.
15. *Id.* at slip op. *3.
16. *Id.*
17. *Id.*
18. *See* NLRB Case Nos. 20-CA-249882, -250250, and -251105, *available at* nlrb.gov.
19. *Thryv*, *supra* n.1, at slip op. *3.
20. *Id.*
21. *Id.*
22. *Thryv, Inc.*, 371 NLRB No. 37 (2021).
23. *Id.*
24. *Thyrv*, *supra* n.1, at slip op. *8.
25. *Id.* at slip op. *3-4.
26. *Id.* at slip op. *4-5.
27. *Id.* at slip op. *5-6.
28. *Id.* at slip op. *6 (italics in original).
29. *Id.* at slip op. *12.
30. *Id.*
31. *Id.* at slip op. *9.
32. *Id.* at slip op. *16, 18 (citing *Palsgraf*, 248 N.Y. 339 (1928)).
33. *Id.* at slip op. *16, 18-19.
34. *See* NLRB Case Nos. 20-CA-250250 and -251105, *available at* nlrb.gov.
35. *Id.* (motion for reconsideration filed Dec. 22, 2022).
36. *Id.* (motion for reconsideration).
37. *Id.* (order denying motion filed Mar. 8, 2023).
38. *Id.* (order denying motion).
39. *Id* (order denying motion).