

Jury Trials, Back Pay, and Labor Law: How the Supreme Court Could Deal Yet Another Blow to the NLRB

by Alex MacDonald

It has been a bad run for the National Labor Relations Board. For most of 2025, the Board was basically inoperative after the president [fired](#) one of its members. At the same time, it lost [ten percent](#) of its personnel, hollowing out its institutional expertise. It also accumulated a huge backlog of cases—more than 500 sitting at the Board itself and more than [7,000](#) in the regional offices. And to top it all off, in May, a district court in Texas declared the whole agency [unconstitutional](#).

Yet things may be about to get worse. Last month, the U.S. Supreme Court took up [Sun Valley Orchards v. U.S. Department of Labor](#), a case about the H-2A visa program. On its face, the case has little to do with the Board. The central question is whether the Department of Labor can collect monetary remedies through its in-house administrative processes. But one of the remedies at issue is back pay, which is also one of the most important remedies used by the Board. And if the Supreme Court rules that back pay can't be collected through administrative procedures, the Board could lose one of its most important enforcement tools. Its situation would go from bad to even worse.

Judges, Juries, and the Constitution

The Board's problem comes from the overlap between two parts of the Constitution: the [Seventh Amendment](#) and [Article III](#). The Seventh Amendment ensures a jury trial for any "suit at common law." A common-law suit is basically a case that could have been tried by a common-law court in 1791, when the Amendment was adopted. Because many modern cases involve claims that didn't exist back then, courts now must discern whether a case is roughly parallel to an old common-law suit.

The remedy is central to that analysis. Common-law suits were defined in part by their remedies, which usually involved someone paying money to someone else. So if a modern claim involves a money payment, like damages, courts are more likely to hold that it [triggers](#) the Seventh Amendment.

A similar analysis plays out under Article III. Article III gives all "judicial power" to federal judges, which means only judges can decide cases that belong in court. However, it's not always clear which cases those are. Typically, they are cases involving "[core private rights](#)"—disputes about life, liberty, and property—but not those involving "public rights"—disputes between a private person and the public.

The public/private rights distinction is difficult to apply precisely. Courts have struggled to come up with a crisp test. Some examples, however, are clear. Public-rights cases involve topics like immigration, taxes, licensing, and public benefits. Private-rights cases, on the other hand, center around contract disputes and tort claims. And it's clear that if a case involves private rights, it belongs in court

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and cannot be tried in an administrative tribunal.

The Back-Pay Bombshell

Sun Valley technically addressed only the Article III issue. The case arose from the Department of Labor's enforcement scheme for H-2A visas, which grant temporary entry to foreign agricultural workers. To hire such a worker, an employer has to jump through several administrative hoops, including paying the worker everything the employer listed in its job advertisements. The Department accused *Sun Valley* of violating those conditions that and fined it for noncompliance—all through its in-house administrative enforcement system. In response, the company sued the agency in court, **arguing** that the fines were invalid because they had been imposed without the supervision of a “real federal judge.”

The Third Circuit **agreed**. It held that the Department couldn't collect money from *Sun Valley* through a purely administrative process. The Department's claims were essentially contractual: the agency had accused the company of failing to meet its promises to workers. The agency also sought to recover money: civil fines and back wages. Those remedies, the court said, were “common law” remedies. And because they were common-law remedies, they should have been imposed only by an Article III court.

That conclusion was an administrative law **bombshell**. Historically, courts have treated back pay as an “equitable” remedy. That means it hasn't triggered the Seventh Amendment, and agencies have been able to collect it using in-house administrative proceedings. But if back pay is in fact a legal remedy, as the Third Circuit found, agencies can't do that. Instead, to get the money, they must go to court.

Another Blow for the Board

That would be a big problem for the Board. By **statute**, the Board can remedy labor-law violations by ordering “affirmative action, including reinstatement with or without back pay.” For years, the Board has interpreted that language to allow it to collect not only back pay, but also out-of-pocket costs like medical bills and travel expenses. But more recently, in a case called *Thryv*, it has taken the language even further. The Board now says that it can award all “direct or foreseeable pecuniary harms.” That means it can order a violator to pay for all kinds of financial knock-on effects, ranging from late charges on a credit card to early-withdrawal penalties on a 401(k).

The *Thryv* standard has stirred controversy. Companies have argued in **lawsuits** across the country that *Thryv* is inconsistent with the Seventh Amendment. They contend that even if back pay is equitable (and authorized by the statute), these new remedies are not. *Thryv* remedies are basically common-law damages. And common-law damages can't be imposed through an administrative process: they can be collected only if the defendant has access to a jury.

Though the Supreme Court recently **declined** to take up a *Thryv* case directly, *Sun Valley* could supercharge that argument. The Third Circuit's holding establishes that back pay is a common-law remedy. If the Supreme Court agrees, the result could carry over into the Board's Seventh Amendment litigation. The Board would not only be blocked from collecting *Thryv* damages, but also nearly any monetary remedies.

That would be especially hard for the Board to manage. Unlike some agencies, the Board lacks the authority to sue violators in court. It can enforce the law only through its in-house administrative process. And if it can't use that process to collect back pay, it can't collect back pay at all, and its remedial powers will wither to the vanishing point.

The Board has taken a lot of hits in recent years. At some point, you'd expect its luck to turn. But if *Sun Valley* goes the way it seems to be going, its bad run is far from over. The coming year could be just as rough as the last.