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You'll Say Nothing and Like It - The Ninth Circuit Ignores the Supreme Court and a Sister Court of Appeals to Find That an Airline's First Amendment Rights Are Not Violated by the National Mediation Board's Order for a New Unionization Election: *Horizon Air Industries, Inc. v. National Mediation Board*

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"YOU'LL SAY NOTHING AND LIKE IT"—THE NINTH CIRCUIT IGNORES THE SUPREME COURT AND A SISTER COURT OF APPEALS TO FIND THAT AN AIRLINE'S FIRST AMENDMENT RIGHTS ARE NOT VIOLATED BY THE NATIONAL MEDIATION BOARD'S ORDER FOR A NEW UNIONIZATION ELECTION: *HORIZON AIR INDUSTRIES, INC. v. NATIONAL MEDIATION BOARD*

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IN THE 2000 case of *Horizon Air Industries, Inc. v. National Mediation Board*,[1] the Ninth Circuit upheld a National Mediation Board (NMB)[2] order for a second unionization vote by Horizon Airline pilots, after a first vote failed to certify a union.[3] In its decision, the Ninth Circuit ruled (1) the NMB did not violate Horizon Airline's First Amendment free speech rights[4] when the NMB found the airline tainted a union election by urging airline employees not to certify the union, and (2) the ruling did not operate as a prior restraint on the airline in the time before the second unionization vote.[5] The Ninth Circuit explicitly re-

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[1] Horizon Air Indus., Inc. v. Nat'l Mediation Bd., 232 F.3d 1126 (9th Cir. 2000).

[2] The National Mediation Board is the venue for disputes arising under the Railway Labor Act, 45 U.S.C. §§ 151-188 (2001). The NMB's function is analogous to the National Labor Relations Board (NLRB), but as the *Horizon* court explains, "Unlike the NLRB which has broad adjudicatory and remedial powers, the NMB was set up to help the parties reach quick resolution themselves." 232 F.3d at 1131. Nonetheless, one need only look to the case at hand, where the NMB ordered Horizon to hold a second election, to note the power afforded the NMB under the Railway Labor Act.

[3] *See* Horizon Airlines, 24 N.M.B. 458 (1997).

[4] *See* U.S. CONST. AMEND I.

[5] *Horizon*, 232 F.3d at 1138.

fused to apply *National Labor Relations Board v. Gissel*,[6] the 1969 Supreme Court case that set the parameters for management free speech in the context of a union election under the National Labor Relations Act (NLRA).[7] The D.C. Circuit had reached a conclusion directly contrary to *Horizon Airlines* in *U.S. Airways v. National Mediation Board*,[8] a 1999 case with strikingly similar facts to *Horizon Airlines*. The Ninth Circuit ruling erred in its failure to apply *Gissel* to *Horizon Airlines* because the court improperly balanced First Amendment rights against the Congressional intent of expediency in the RLA.

In 1988, Horizon Airlines established a management/employee liaison program called the "Pilot Representative Program" (PIREPS).[9] Under the program, Horizon pilots elected representatives to PIREPS.[10] The pilot representatives would then meet with management representatives to negotiate binding agreements between pilots and the airline. PIREPS resulted in several agreements negotiated between pilot and management representatives.[11] These agreements became binding when later ratified by the pilots. One such PIREPS agreement involved a compensation and benefits package that expired in 1996.[12]

In 1993, the International Brotherhood of Teamsters (IBT) approached Horizon pilots about formal unionization. In March 1995, the pilot representatives to PIREPS resigned en masse to protest what some pilot representatives characterized as "frustration with the Horizon management" over the airline's perceived failure to adequately deal with labor issues resulting from a pilot shortage.[13] New PIREPS pilot representatives were subsequently elected. The IBT unionization campaign picked up steam. The Airline reacted to the campaign by portraying

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[6] NLRB v. Gissel, 395 U.S. 575 (1969).

[7] *Id.* at 618; *see also* National Labor Relations Act, 29 U.S.C. § 151 (2001).

[8] U.S. Airways v. Nat'l Mediation Bd., 177 F.3d 985 (D.C. Cir. 1999). For a full discussion of *U.S. Airways*, see also ROBERT A. SIEGEL, AM. LAW INST., FIRST AMENDMENT RIGHTS AND THE RIGHT OF SELF-ORGANIZATION UNDER THE RLA (2000), available on Westlaw at SF15 ALI-ABA 369.

[9] *Horizon*, 232 F.3d at 1128. For a discussion of the facts of the case, see also DANIEL M. KATZ, AM. LAW INST., RECENT DEVELOPMENTS IN NMB ELECTION INTERFERENCE CASES AND EMPLOYEE COMMITTEES (1999), available on Westlaw at SD50 ALI-ABA 109, 122.

[10] *Horizon*, 232 F.3d at 1128.

[11] *Id.*

[12] *Id.*

[13] *Id.*

PIREPS as an "in house" union, and the agreements reached in PIREPS negotiations as "exactly the same [as] provisions found in union contracts."[14]

In September 1995, the IBT applied to the NMB for recognition that a "representation dispute" existed between the airline and its pilots.[15] After its own investigation, the NMB ordered an election.[16] In the months prior to the election, Airline management touted the effectiveness of PIREPS, and questioned the wisdom of IBT representation for the airline's pilots. Additionally, the Airline argued that changes in personnel and policies relating to PIREPS made the program more responsive to pilot concerns. In a January 1996, the IBT failed in an initial vote for union certification.[17] After a second investigation, the NMB ruled that, "[b]ased on the totality of the circumstances," Horizon had interfered with the election when it, among other things, "communicated to pilots that the PIREPS program was a substitute for a collective bargaining agreement [and when it] represented that PIREPS had undergone significant changes that responded to pilot concerns and permitted more impact from the pilots."[18] The NMB ordered a second election, which the IBT won.[19]

After the second election, Horizon filed suit in the Western District of Washington. The airline claimed the NMB had exceeded its authority under the RLA, and that the NMB had in-

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[14] *Id.* at 1130.

[15] *Id.*; *see also* 45 U.S.C. § 152, subd. 9 (2001) ("If any dispute shall arise among a carrier's employees as to who are the representatives of such employees. . .the National Mediation Board shall be authorized to take a secret ballot of the employees.").

[16] *Horizon*, 232 F.3d at 1131.

[17] *Id.*

[18] *Id.* (quoting *Horizon Airlines*, 24 N.M.B. 458, 508-09 (1997)). The NMB requires a "laboratory conditions" standard in elections where "under the totality of the circumstances, sterile conditions, without contamination by carrier coercion, be maintained from the time the carrier becomes aware of the union's organizing drive until the ballots have been counted." KATZ, *supra* note 9, at 109 (quoting *Continental Airlines*, 21 N.M.B. 229 (1994)). The NMB evaluates through five factors: "(1) The establishment of a committee. . .after the carrier becomes aware of. . .organizing efforts, (2) A material change. . .during the critical period in. . .the activities of a pre-existing committee, (3) The use of . . .a committee to expand employee benefits during the critical period, (4) Carrier campaigns which indicate a pre-existing committee is, or should be, a substitute for a collective bargaining representative, and (5) Carrier campaigns which indicate that the certification of a labor organization will lead to the termination of a pre-existing committee." *Horizon*, 232 F.3d at 1135.

[19] *Horizon*, 232 F.3d at 1131.

fringed the airline's Fifth[20] and First Amendment Constitutional rights.[21] Judge Zilly granted summary judgment in favor of the NMB and dismissed the case.[22]

Horizon appealed to the Ninth Circuit Court of Appeals. Writing for the Ninth Circuit, Judge Fletcher denied the appeal. She noted that federal courts are allowed to review NMB actions in only two contexts: (1) to consider whether the NMB acted outside its legislative mandate, and (2) to consider whether the NMB has exceeded Constitutional scope in the course of its investigation.[23] Judge Fletcher applied a so-called "peek-at-the-merits" approach to examine whether the NMB exceeded its authority under the RLA.[24] The court found that the NMB had not directly deviated from its investigatory role under the RLA "statutory language."[25] But Judge Fletcher also held that Horizon's allegations of NMB Constitutional violations should be evaluated using the same "peek-at-the-merits" approach.[26] The court explained "this approach is best suited to fulfill Congres-

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[20] Horizon argued its Fifth Amendment right against self-incrimination was violated when the NMB mailed a notice to Horizon pilots saying that the NMB found employer interference during the election process, and citing the provisions of the RLA which make such interference unlawful. *Horizon*, 232 F.3d at 1131; *see also* 45 U.S.C. § 152, subd. 9. The court found no Fifth Amendment violation because the notice (1) did not present the NMB's findings as an adjudication, and (2) when considered objectively, did not appear to be generated by Horizon. *Horizon*, 232 F.3d at 1135.

[21] Horizon claimed in oral argument that its First Amendment rights were violated in two ways. First, the NMB's ruling on the Airline's communications prior to the first election punished protected speech. Second, that this punishment constituted a prior restraint on the airline's speech in the second election. *Horizon*, 232 F.3d at 1135.

[22] *Id.* at 1127.

[23] NMB decisions regarding investigation methods, balloting procedures, the results of those investigations are largely unreviewable as a result of *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943). The Supreme Court held that Congress intended to give the NMB broad power to resolve representation disputes under the RLA. "There was to be no dragging out of the controversy into other tribunals of law." *Id.* at 305.

[24] This approach is judicial shorthand for the Supreme Court's limiting instructions in *Brotherhood of Railway & S.S. Clerks v. National Mediation Bd.*, 380 U.S. 650 (1965). The court limited judicial inquiry into NMB actions under the RLA to "specific statutory language, without extension to arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide." *Id.* at 671. But notably important to the case at hand, *Railway & S.S. Clerks* included no Constitutional challenge to the NMB, merely question on the merits of an NMB ruling. *Id.*

[25] *Horizon*, 232 F.3d at 1134.

[26] *Id.* at 1133; *see also* Bhd. of Maint. of Way Employees v. Grand Trunk R. Co., 961 F.2d 1245, 1249 (6th Cir. 1992) (stating in dicta that a "peek-at-the-merits"

sional intent, since it allows courts to check improper NMB actions without causing undue delay in the determination of valid labor representation."[27] Applying this peek approach, the court rejected Horizon's First Amendment claim. Essentially, the court balanced fundamental Constitutional Rights against a stated Congressional intent of expediency. Expediency ruled the day.

The Ninth Circuit expressly rejected the analysis offered by the D.C. Circuit in a very similar case decided in the course of the Horizon case.[28] The D.C. Circuit struck down an NMB-ordered second unionization election on First Amendment grounds in *U.S. Airways v. National Mediation Board.*[29] U.S. Airways had also organized an employee-management liaison organization, and gave the organization power to negotiate binding contracts.[30] Furthermore, U.S. Airways counseled its employees that the employee-management organization served a similar function to a union, that the organization would be dissolved if the union was approved, and that the union would be an overall bad idea. The Communications Workers of America (CWA) asked the NMB to step in after the union failed to win enough votes from flight attendants for certification purposes. After looking into the claim, the NMB found that U.S. Airways had interfered with employees' free choice, and ordered a new election.[31] U.S. Airways requested a temporary restraining order, claiming the NMB violated the airline's First Amendment rights. The district court denied the TRO, the election was held, and the flight attendants voted to certify the CWA.[32] U.S. Airways filed suit, claiming the NMB's ruling subsequent to the first election functioned as a prior restraint on the airline. The district court rejected the airline's argument and

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approach should be used in Constitutional cases under the RLA in the Sixth Circuit).

[27] *Id.*; *see also* 45 U.S.C. § 151a (2001) ("The purposes of the chapter are. . .(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions. . .").

[28] *U.S. Airways* was decided between the close of briefing and before oral argument in the *Horizon* case. *Horizon*, 232 F.3d at 1135.

[29] U.S. Airways v. Nat'l Mediation Bd., 177 F.3d 985 (D.C. Cir. 1999).

[30] *Id.* at 987.

[31] *Id.* at 988. The NMB applied the same five-factor test in *U.S. Airways* as in *Horizon*. *See* FN 18, *supra*. U.S. Airways understood factors 4 and 5 to bar it from advocating its employee committee as an alternative to union representation, and further to bar the airline from predicting that election of the union would result in the disbanding of the committee. *U.S. Airways*, 177 F.3d at 988.

[32] *Id.*

granted summary judgment for the NMB.[33] U.S. Airways appealed to the D.C. Circuit Court of Appeals.

The D.C. Circuit overturned the district court ruling. Judge Silberman ruled the so-called "peek-at-the-merits" approach "simply not suitable to the evaluation of Constitutional claims."[34] Since the court was able to look beyond the "plain language" of the RLA, the court applied *NLRB v. Gissell*.[35] The Supreme Court noted the proper balancing test for employer speech in a labor context is against the employees' right to associate freely, not against general legislative intent.[36] The D.C. Circuit noted "the First Amendment does not ebb and flow with the legislative will."[37] As a result, Judge Silberman ruled U.S. Airways First Amendment rights were unconstitutionally restrained by the NMB in the period between the first and second elections.[38]

Judge Fletcher sought to distinguish Horizon from U.S. Airways in two ways. First, she said the D.C. Circuit mistakenly read the NMB's five-factor test disjunctively, rather than conjunctively.[39] Second, she ruled Horizon could not press its claim of prior restraint because of Congressional intent.[40] The Ninth Circuit ruled the NMB's policy of considering the "totality of circumstances" supports the idea that the five factors must be taken together, rather than independently dispositive.[41] Therefore, the court reasoned, Horizon was not unconstitutionally punished for speech alone in the order for a second election. Applying this analysis, an airline can then only be punished under the NMB's five-factor test if the airline *both* violates factors

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[33] *Id.* at 989.

[34] *Id.* at 990 ("[C]onstitutional arguments cannot sensibly be restricted to the plain text of the clause at issue, which is what the 'peek' framework would require").

[35] NLRB v. Gissell, 395 U.S. 575 (1969).

[36] *Id.* at 617 ("An employer's rights cannot outweigh the equal rights of the employees to associate freely."). The Supreme Court allows an employer to communicate his opinion on unions in the form of a "reasonable prediction based on available facts," but not "a threat of retaliation based on misrepresentation and coercion." *Id.* at 618.

[37] *U.S. Airways*, 177 F.3d at 991.

[38] *Id.* at 992. While U.S. Airways brought no claim regarding the NMB's order for a second election, the D.C. Circuit made it clear that the court would have found a First Amendment violation on that issue as well. *Id.* at n.5.

[39] *Horizon*, 232 F.3d at 1137.

[40] *Id.* at 1138.

[41] "[The NMB's] order articulated a set of factors that could be used in considering whether an employer interfered, under the totality of the circumstances, with their employees' choice of a representative." *Id.*

that implicate speech (such as factors four and five), *and* violates NMB factors that implicate action. But notably, speech alone could not be enough to find a violation, according to the court.[42] One must then ask: Does that not make the fourth and fifth factors in fact unconstitutional on their face? The court says "a reasonable carrier" would not reach such a chilling conclusion.[43]

Judge Fletcher believed that Horizon felt no such chill after the first election because—unlike U.S. Airways—Horizon sought no TRO.[44] The court notes that only after the second election turned out against the airline did Horizon file suit. Judge Fletcher says the delay worked against Congressional intent for "speedy resolution" of RLA cases, and, as such, consideration of the prior restraint issue was barred by a "peek-at-the-merits" consideration under the Act.[45] Once again, the court balanced the First Amendment against expediency. And once again the court determined expediency must prevail. In general, Congress explicitly allows courts to take notice on appeal if "substantial rights" are affected.[46] But to consider whether rights as substantial as Free Speech would be implicated a court would be forced to "peek" beyond the text of the RLA and consider the actual merits of the First Amendment implications of the NMB's five factors, either on their face, or as applied.

In conclusion, the Ninth Circuit erred in Horizon by (1) applying a "peek-at-the-merits" approach to the Constitutional claims, (2) failing to properly apply the Gissell standard to the NMB's five-factors, and (3) dismissing the prior restraint claim on the basis of Congressional intent. This results in a clear split in policy and in rule among the circuits. A carrier subject to the RLA in the Ninth Circuit should know that the NMB's five-factor test will be taken as a whole, and that a claim for a Constitutional violation is probably without hope. But carriers in the Ninth Circuit who wish to pursue such a claim have two options. First, a carrier should seek a TRO after the NMB invalidates an

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[42] This is why the court says *Gissell* could not apply to the case. *Horizon*, 232 F.3d at 1138, n. 7 ("Because we do not treat the factors disjunctively, we need not comment on, or apply, the *Gissell* standard. . .")

[43] *Id.*

[44] *Id.* at 1138.

[45] "Allowing a carrier to wait to press its claim until after it has lost the second election would be contrary to Congressional intent in establishing the RLA." *Id.* at 1138.

[46] *See, e.g.*, FED. R. EVID. 103(D) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights. . .").

initial unionization vote. The court did not make it clear exactly how it would have dealt with Horizon's prior restraint claim had the airline in essence preserved its objection. But, given that the court will undoubtedly only "peek-at-the-merits" of such a claim, the second option is probably the better course of action: file the initial claim against the NMB in the D.C. Circuit, where the NMB can always be sued.[47]

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[47] Furthermore, a challenge in the D.C. Circuit could give ammunition to carriers seeking to battle the NMB on other Constitutional grounds. *See* SIEGEL, *supra* note 8, at 374.