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WAR AND (LABOR) PEACE: HOW THE NINTH CIRCUIT CHANGED THE RULES OF ENGAGEMENT FOR SERVICE PROVIDERS AND ORGANIZED LABOR

KLAYTON SWEITZER HILAND*

I. SERVICE PROVIDERS MUST NOW BRING KNIVES TO A GUNFIGHT

IN *AIRLINE SERVICE PROVIDERS ASSOCIATION V. LOS ANGELES WORLD AIRPORTS*, the Ninth Circuit held that the City of Los Angeles, operator of the fourth largest airport in the world,¹ may require airline service providers to enter into Labor Peace Agreements with organized labor representatives.² Although the court correctly ruled that the trade association plaintiffs had standing and that the plaintiffs should have the opportunity to amend their complaint, the court erred in affirming the district court's decision to dismiss the complaint.³ Specifically, the Ninth Circuit erred in holding that the city was acting as a market participant, rather than a regulator, when imposing contract conditions on the service providers.⁴ The proximate holding that the National Labor Relations Act (NLRA) does not preempt the city's action was premised on an error.⁵

The City of Los Angeles operates Los Angeles International Airport (LAX) through its agency, Los Angeles World Airports (LAWA).⁶ Airlines operating out of LAX hire other businesses to

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¹ *Airline Serv. Providers Ass'n v. L.A. World Airports*, 873 F.3d 1074, 1093 (9th Cir. 2017).

² *Id.* at 1077.

³ *See id.*

⁴ *Id.* at 1079.

⁵ *Id.* at 1079–80.

⁶ *About LAWA*, CITY OF LOS ANGELES, http://www.lawa.org/welcome_lawa.aspx?id=326 [https://perma.cc/5QJM-FWMC] (last visited Jan. 30, 2018).

provide services such as baggage handling, who then must obtain a license from LAWA.⁷ LAWA imposes conditions for those licenses, including Section 25, which prompted this case.⁸ Section 25 requires that all licensed service providers enter into a Labor Peace Agreement (LPA) with any union that requests one and that the LPA prohibit work disruptions.⁹ If the parties cannot agree, Section 25 requires mediation and binding arbitration after sixty days.¹⁰ The Airline Service Providers Association and the Airline Transport Association of the Americas sued to challenge Section 25 as a regulation preempted by federal laws,¹¹ including the NLRA.¹² The district court dismissed for lack of standing and failure to state a claim; plaintiffs appealed both issues.¹³

II. LEGAL FRAMEWORK: WHY SERVICE PROVIDERS CAN ONLY BRING KNIVES

The Supreme Court ruled that NLRA preemption applies to state and local regulations; entities acting for their proprietary interest in the market are presumed not to be preempted.¹⁴ The Ninth Circuit applied the two-pronged test in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford* to determine whether LAWA acted as a market participant rather than a regulator when imposing Section 25.¹⁵ The first prong asks, “Does the challenged action . . . reflect the entity’s own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances?”¹⁶ The second prong questions whether the action’s scope is narrow enough to “defeat an inference that its primary

⁷ *Airline*, 873 F.3d at 1077.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See generally National Labor Relations Act, 29 U.S.C. §§ 151–69 (2012).

¹³ *Airline*, 873 F.3d at 1077–78.

¹⁴ *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 227 (1993) [hereinafter *Boston Harbor*].

¹⁵ *Airline*, 873 F.3d at 1080; see *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999); see also *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1023 (9th Cir. 2010).

¹⁶ *Cardinal Towing*, 180 F.3d at 693.

goal was to encourage a general policy rather than address a specific proprietary problem.”¹⁷

To answer these questions, the court relied on a variety of precedential, yet distinguishable, cases. First, the court applied *Johnson v. Rancho Santiago Community College District*, which held that a community college district could impose LPA requirements on construction contractors because of a proprietary interest in procuring labor without disruption.¹⁸ The court contrasted *Johnson* with *Golden State Transit Corp. v. City of Los Angeles*, where the Supreme Court held that the city could not condition a taxi company’s license on a strike ending because the city had no proprietary interest in the operations of a private taxi company and did not contract for their services.¹⁹ Here, the Ninth Circuit found that Section 25’s application was more akin to the LPA in *Johnson* because the city operated the airport, competed in the transportation market, and had a proprietary interest in preventing strikes.²⁰

Addressing the second prong, the court rejected the plaintiff’s argument that three cases showed Section 25’s scope to be too broad to avoid regulation status.²¹ The court declined to apply *Wisconsin Department of Industry, Labor, & Human Relations v. Gould Inc.* because Section 25 purported to cover only the airport’s contractual relationships rather than all state procurement transactions.²² Next, the court distinguished Section 25 from an overturned California law preventing state contractors from using state funds to either support or oppose employee union organization.²³ That law was not “specifically tailored to one particular job,”²⁴ whereas Section 25 was “limited to addressing the needs of LAX.”²⁵ Finally, the court held that Sec-

¹⁷ *Id.*

¹⁸ *Johnson*, 623 F.3d at 1028. The court also found a sufficiently narrow scope; it applied only to a specific project, funded by a specific bond initiative, and for a specific time period. *Id.* at 1024–29.

¹⁹ *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 617–18 (1986).

²⁰ *Airline*, 873 F.3d at 1080–82.

²¹ *Id.* at 1082–84.

²² *Id.* at 1082–83; see *Wisconsin Dep’t of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 291 (1986).

²³ *Airline*, 873 F.3d at 1083; see *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008).

²⁴ *Brown*, 554 U.S. at 70 (quoting *Gould*, 475 U.S. at 291). The overturned California law’s preamble also declared a regulatory intention and included additional record keeping and fund segregation requirements. *Id.* at 71.

²⁵ *Airline*, 873 F.3d at 1083.

tion 25 was distinguishable from similar ordinances that, though intended to achieve similar LPA results, might have “spillover effects on the service providers’ operations” and encourage unionization.²⁶ The Ninth Circuit held that imposing Section 25 was narrow enough to defeat an inference of regulatory action and applied the market participant exception.²⁷

Judge Tallman, in dissent, argued that Section 25’s impact was the exact result that Congress intended to preempt through the NLRA by creating a uniform regulatory scheme surrounding labor policy.²⁸ The dissent cited two preemption doctrines.²⁹ First, local governments may not “regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.”³⁰ Second, preemption applies to areas “left ‘to be controlled by the free play of economic forces.’”³¹ Because Section 25 mandates that LPAs result from negotiations and artificially limits bargaining strategies, it is preempted by the NLRA.³² Next, the dissent argued that the market participant exception is based on the “actual content of [the] policy and its real effect on federal rights”³³ instead of its supposed purpose.³⁴ After applying this analysis to Section 25³⁵ and comparing its effects to those of the laws addressed in the majority’s cited cases,³⁶ the dissent found

²⁶ *Id.*; see *Metro. Milwaukee Ass’n of Commerce v. Milwaukee County*, 431 F.3d 277, 282 (7th Cir. 2005).

²⁷ *Airline*, 873 F.3d at 1084.

²⁸ *Id.* at 1086–87; see *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 242–43 (1959) (the NLRA is “a complex and inter-related federal scheme of law, remedy, and administration.”).

²⁹ *Airline*, 873 F.3d at 1087 (Tallman, J., dissenting).

³⁰ *Id.* (quoting *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 65 (2008)).

³¹ *Id.* (quoting *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618 (1986)).

³² *Id.* at 1088.

³³ *Livadas v. Bradshaw*, 512 U.S. 107, 119 (1994).

³⁴ *Airline*, 873 F.3d at 1089 (Tallman, J., dissenting). The dissent focused on the *Brown* Court’s decision to overlook proprietary interests and rule based on the law’s market effects. *Id.*; see *Brown*, 554 U.S. at 70–73.

³⁵ *Airline*, 873 F.3d at 1090–94 (Tallman, J., dissenting).

³⁶ See *Brown*, 554 U.S. at 70–73; *Boston Harbor*, 507 U.S. 218, 232 (1993); *Wisconsin Dep’t. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 291 (1986); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1024–29 (9th Cir. 2010); *Metro. Milwaukee Ass’n of Commerce v. Milwaukee County*, 431 F.3d 277, 282 (7th Cir. 2005).

that Section 25 failed to meet both prongs of the *Cardinal Towing*³⁷ test.

III. ANALYSIS: WHY CONGRESS WANTED BOTH SIDES TO HAVE GUNS

A. THE MAJORITY ERRED IN APPLYING THE FIRST *CARDINAL TOWING* PRONG

The majority failed to address the core issue of *Cardinal Towing*'s first prong: whether “the challenged governmental *action* [is] undertaken in pursuit of the ‘efficient procurement of needed goods and services,’ as one might expect of a private business in the same situation.”³⁸ The key question is not whether they operate in a market, but rather whether an action has the “manifest purpose and inevitable effect” of conflicting with the “complex and interrelated federal scheme of law, remedy, and administration.”³⁹ The NLRA “treats state action differently from private action . . . because they . . . take different forms, [and] also because . . . States simply are different from private parties and have a different role.”⁴⁰ The market participant exception only allows government to avoid preemption when acting as a private business would.⁴¹ Section 25 failed the first prong because its purpose and effect altered the regulatory scheme imposed by the NLRA beyond the capabilities of an actual private entity.

The majority failed to accurately address both the purpose and effect of Section 25. Section 25 purports to address business disruptions⁴² but has an attenuated relationship with that purpose and appears regulatory. LAWA has an interest in running a competitive airport, but it is the airline that contracts with the service providers.⁴³ The conditions imposed on service providers in exchange for licenses to operate at LAX are not bargained for by the service providers in their contract with the airline; they are mandates imposed by the airport. LAWA is only procuring services from the airlines, not the service providers employed by them. Section 25 imposes a hiring policy on the

³⁷ See *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999).

³⁸ *Airline*, 873 F.3d at 1080 (emphasis added) (internal quotations omitted).

³⁹ See *Gould*, 475 U.S. at 286, 291.

⁴⁰ *Id.* at 290.

⁴¹ See *id.*

⁴² See *Airline*, 873 F.3d at 1077.

⁴³ *Id.*

airlines, without allowing the airlines and service providers to negotiate as expected in a free market. LAWA is exercising the power of law to take actions unavailable to private enterprises; otherwise, the licensing terms would be negotiated between LAWA and the airline, the service providers, or both. Thus, LAWA's ability to impose licensing conditions separates Section 25's purpose and effect from those expected of private enterprises.⁴⁴

Section 25 is designed to be ineffective in preventing work disruption but very effective in altering bargaining positions; this infers regulatory intent. Alternatives like incentives, bonuses, liquidated damages, and refusal to renew contracts have been cited as the usual way to address labor issues for private employers.⁴⁵ "Employers know better how to keep their workers from striking than purchasers of the employers' services."⁴⁶ The court record contained no evidence that private businesses had ever attempted to mandate LPAs in licensing service providers.⁴⁷ Free bargaining would likely preclude private businesses from similar solutions. Section 25 is particularly ineffective because its conditions only impact service providers using unionized labor asking for LPAs; other employees may still strike.⁴⁸ Also, Section 25 only penalizes service providers for LPA violations while providing no more incentive for unions to avoid disruptions than a standard employment contract.⁴⁹ Because Section 25's design is ineffective in its alleged purpose, the court should have inferred an alternative—and preempted—purpose.

Contrarily, Section 25 is effective, to the point of being preempted, in altering the balance of power between service providers and unions in collective bargaining. Economic disruption is perhaps a union's strongest negotiation tool; unions will not relinquish this weapon easily.⁵⁰ Mandating negotiation outcomes shows Section 25's true purpose and effect in two ways.

First, it inherently alters the negotiation structure. Mandatory no-strike clauses are a significant departure from the "free play

⁴⁴ See generally National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

⁴⁵ *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277, 280 (7th Cir. 2005).

⁴⁶ *Id.*

⁴⁷ *Airline*, 873 F.3d at 1090 (Tallman, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1091.

⁵⁰ *Id.* at 1091–92.

of economic forces” prescribed in *Boston Harbor*.⁵¹ The NLRA requires good faith but “does not compel either party to agree to a proposal or require the making of a concession.”⁵² Section 25, however, does obligate an outcome and coerces service providers to make concessions until an LPA is signed.⁵³ The NLRA created the scheme for labor regulation, and Section 25 alters it; the effect is inherently regulatory. Second, by mandating both mediation and binding arbitration after sixty days, Section 25 provides unions with bargaining power beyond that prescribed in the NLRA.⁵⁴ Unions can hold out longer because the process guarantees binding arbitration likely resulting in significant concessions.⁵⁵ The service providers, however, have lost the ability to wait out the union. Section 25 does not allow economic forces and negotiation strategies to work freely. The effect and purpose of Section 25 is to tip the negotiations toward unions. Section 25 fails the first *Cardinal Towing* prong and is preempted.

B. THE MAJORITY ERRED IN APPLYING THE SECOND CARDINAL TOWING PRONG

The majority found that Section 25 is distinguished from other precedent⁵⁶ and is narrow under the second *Cardinal Towing* prong. Section 25, the majority claims, is distinguished from other preempted laws because it does not apply to all of the city’s contracts, declare a regulatory purpose, impose additional burdens related to record keeping or enforcement, or impose conditions favorable to union organizing.⁵⁷ The majority drastically underestimated Section 25’s reach within the operations of LAX and the overall marketplace.

⁵¹ See *Boston Harbor*, 507 U.S. 218, 225 (1993) (quoting *Lodge 76, Int’l Ass’n of Machinists and Aerospace Workers v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132, 140 (1976)).

⁵² 29 U.S.C. § 158(d) (2012).

⁵³ See *Airline*, 873 F.3d at 1090 (Tallman, J., dissenting); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 616 (1986).

⁵⁴ See 29 U.S.C. § 158(d).

⁵⁵ Mediation garnered pay increases of 6% despite a 3.2% guideline and 4.5% settlement. *Today in Labor History: Airline Workers Strike in 1966*, PEOPLE’S WORLD (July 8, 2015, 11:28 AM), <http://www.peoplesworld.org/article/today-in-labor-history-airline-workers-strike-in-1966/> [<https://perma.cc/W4AH-D2QR>].

⁵⁶ *Airline*, 873 F.3d at 1082–83.

⁵⁷ *Id.*; see *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008); *Wisconsin Dep’t of Indus., Labor & Human Relations v. Gould*, 475 U.S. 282, 291 (1986); *Metro. Milwaukee Ass’n of Commerce v. Milwaukee County*, 431 F.3d 277, 280–82 (7th Cir. 2005).

On its face, Section 25 is broad enough to infer it is a regulatory action. It does not declare its regulatory intention,⁵⁸ but a missing preamble does not comfort those enduring the effects of a broad labor policy. Although it is not a city-wide licensing policy,⁵⁹ it impacts a significant share of the local and global transportation markets. Section 25 does not address individual disruptions or timely performance of specific services.⁶⁰ Rather, it is an ongoing policy that applies to all service providers.⁶¹ On its face, Section 25 is insufficiently narrow.

The majority also failed to account for Section 25's impact on national and international labor and transportation markets. Section 25 contains no internal or external controls to limit its jurisdictional scope or possible LPA provisions.⁶² Service providers may be coerced to sign an LPA covering labor outside of LAX. Also, LPAs tend to promote labor organization.⁶³ Thus, Section 25 is designed to do more than prevent service disruptions; it encourages and facilitates unionization, thereby increasing labor's propensity to utilize its economic disruption arsenal.⁶⁴

Therefore, Section 25 is broad on its face and general in its effects so as to defeat any inference that it was tailored to address a proprietary problem. It could easily impact markets outside of LAWA's jurisdiction. The court should have concluded that Section 25 failed the *Cardinal Towing* test and was subject to NLRA preemption.

IV. WHAT HAPPENS WHEN SERVICE PROVIDERS ARE OUTGUNNED?

The ramifications of the Ninth Circuit's error may be catastrophic. As unions gain bargaining power, the industry can expect to see increased concessions by service providers to garner the required LPAs.⁶⁵ This is particularly worrisome given labor costs'⁶⁶ impact on growth and consistency.⁶⁷ The industry has a

⁵⁸ See *Airline*, 873 F.3d at 1083; *Brown*, 554 U.S. at 70.

⁵⁹ See *Gould*, 475 U.S. at 291.

⁶⁰ See *Airline*, 873 F.3d at 1092 (Tallman, J., dissenting).

⁶¹ *Id.* at 1093.

⁶² See *id.*

⁶³ *Id.* at 1092.

⁶⁴ See *id.*

⁶⁵ See *id.* at 1093.

⁶⁶ Labor costs accounted for 25% of all airline expenses in 2006. Barry Hirsch, *Unions and Wages in the US Airline Industry*, INT'L AIR TRANSP. ASS'N 1 (July 2007),

history of labor-related⁶⁸ insolvency,⁶⁹ and multiple bailouts were conditioned on labor cost reductions to mitigate solvency risks.⁷⁰ Increasing labor's collective bargaining power in LAX will cause continued financial struggle.

V. CONCLUSION

The Ninth Circuit's failure to protect the NLRA's regulatory scheme will inherently alter the power relationship between service providers and labor interests operating LAX. The majority has delivered to labor organizations powerful bargaining weapons. History indicates that this new power will cause financial instability throughout the market.

http://www.iata.org/publications/economic-briefings/Hirsch_Unions_Wages.pdf [<https://perma.cc/CV7C-RTHW>].

⁶⁷ Renegotiated labor contracts have hurt airlines and offset gains from lower fuel costs. ZACKS EQUITY RESEARCH, *High Fuel Costs Likely to Hurt Airlines Q3 Earnings Picture*, YAHOO FIN. (Sept. 26, 2017), <https://finance.yahoo.com/news/high-fuel-costs-likely-hurt-191707822.html> [<https://perma.cc/3G3J-LQZZ>].

⁶⁸ “[T]he airline was in the midst of battle with its labor unions over wage reductions when it entered bankruptcy protection.” Barbara Kiviat, *Continental Airlines*, TIME (Apr. 2, 2009), http://content.time.com/time/specials/packages/article/0,28804,1888946_1888944_1888942,00.html.

⁶⁹ The airline industry has seen 189 bankruptcies since 1990. *American Joins Long List of Airline Bankruptcies*, BOSTON.COM (Nov. 29, 2011), http://archive.boston.com/business/articles/2011/11/29/american_joins_long_list_of_airline_bankruptcies/.

⁷⁰ “America West was handed a \$379.6 million loan-guarantee package. In return, the government demanded severe limits on labor costs. . . .” Sally B. Donnelly, *Air Support*, TIME (Nov. 24, 2003), <http://content.time.com/time/magazine/article/0,9171,1006304,00.html>.