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# Legal Research Digest 31

## PREEMPTION OF WORKER-RETENTION AND LABOR-PEACE AGREEMENTS AT AIRPORTS

This digest was prepared under ACRP Project 11-01, "Legal Aspects of Airport Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. Under Topic 07-02, this digest was prepared by Eric T. Smith, Kaplan Kirsch & Rockwell, LLP, Washington, DC.

### Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International–North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Research reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

### Foreword

Airports are centers of economic activity and places where a great number of jobs exist. Viewed as engines of economic development, airports often become the focus of groups seeking to have an impact on the local economy and the persons who work at the airport. These groups include elected officials, the media, social activists, and labor unions. Airports are increasingly being asked, for a variety of reasons, to become involved in matters that historically were reserved for private employers to address with their own employees. Among the matters airports are becoming involved in are, potentially, setting minimum wage rates, establishing safety/training baselines, and requiring "labor-harmony" or "labor-peace" agreements at the subject airports.

These agreements generally require that, as a condition of operating on-airport property, an organization must become signatory to some form of an agreement with a labor organization. These matters are usually injected into the conduct of on-airport business by the sponsor, including certain contractual language in the agreements between the sponsor and the business. The implications of involving the airport in such matters may be dramatic, far-reaching, and fraught with legal entanglements. This is especially true with respect to labor-harmony or labor-peace agreements.

This digest is intended to serve as an overview of issues related to labor-harmony or labor-peace agreements for airport management personnel and other interested personnel, including airport authority board members or elected officials.

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# PREEMPTION OF WORKER-RETENTION AND LABOR-PEACE AGREEMENTS AT AIRPORTS

By Eric T. Smith, Kaplan Kirsch & Rockwell, LLP

## I. INTRODUCTION AND OVERVIEW

### A. Introduction to Topic

A growing trend in the United States is that airport sponsors are imposing—or considering imposing on parties with whom they contract—provisions that are generally referred to as "labor-harmony" or "labor-peace" requirements. In a similar manner, airport sponsors are also increasingly imposing—or considering imposing—"worker-retention" provisions in contracts that involve concessions programs.

The reasons for these trends are multifold, but they are all based on labor-union–related matters. The legality of imposing such contractual requirements on airport businesses is complex, and the airport sponsor faces the risk of being sued by both airport-based employees and on-airport businesses. Airport concessionaires, airlines, and the major airline trade organization in the United States, Airlines for America (A4A), have already filed suits that involve these types of provisions.

Although the facts and causes of action vary from situation to situation, the core assertions remain the same: The airport sponsor has allegedly overstepped the limitations placed on it under federal law or, in other words, the sponsor-initiated rules, regulations, or requirements are preempted by federal law.

Several federal labor laws, including the National Labor Relations Act (NLRA) and Railway Labor Act (RLA), are the subject of these arguments. Other federal statutes that are related to airline operations, such as the Airline Deregulation Act (ADA), are also the subject of the preemption arguments made in these cases.

An understanding of the legal limits of locally based labor initiatives, the "standard" model for union organizing, and how labor-harmony requirements may modify those standard protocols is essential for airport management personnel, as well as for governing personnel (such as board members or elected officials) who may be asked to initiate a labor-harmony requirement at a given airport.[1]

[1] Readers should note that the scope of this digest's subject matter is limited to issues involving labor-harmony agreements and worker-retention programs. Accordingly, while there are a number of other labor-related issues that can and do come up in the context of airports, such as living wage measures, part-time off, and scheduling, these are beyond the scope of this digest.

### B. Structure of Analysis—A Brief Synopsis

This digest begins in Section Two with an overview of the basic foundational legal principles that underpin labor-harmony agreements and worker-retention programs, including federal labor protection laws, preemption, and the proprietary rights exception. Section Two includes discussion of the primary federal laws governing labor–management relationships in the airport context, the RLA and NLRA. It provides an outline of the particular parameters set out by these laws. Next, it discusses the concept of federal preemption and the preemptory effect of congressional action in the field of labor relations. Finally, it ends with a discussion of the development of an exception to preemption, known as the *proprietary rights exception* or *market-participant doctrine*.

Section Three defines and describes the characteristics of labor-harmony agreements and worker-retention programs and explains their development under—and relationship to—federal labor law. This section covers particular mechanisms used by unions to their advantage in unionizing airport workers.

Section Four more expressly connects the background discussions in the previous sections to unionization efforts at airports. This section includes specific data on unionization at airports, previous approaches used by airport employers and unions, and the implications and impacts that labor harmony has on airport operations.

Section Five specifically identifies sources of legal risk to airports that arise from the development and implementation of labor-harmony agreements.

Section Six concludes the digest. In addition, several appendices provide ready reference points for airports that are dealing with labor-harmony and worker-retention issues.

## II. FEDERAL LABOR PROTECTION LAWS, PREEMPTION, AND THE PROPRIETARY RIGHTS EXCEPTION

When implemented in a typical fashion (as discussed in the following Section III), labor-harmony agreements alter the baseline protocols, procedures, and rights granted to employers and employees under the applicable federal labor laws. It is this

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alteration of statutorily granted rights that forms the basis for claims of preemption.

In order to fully comprehend those arguments, it is necessary to first understand the foundation on which those arguments are constructed. The following is a brief outline of the legal and practical reference points utilized in those claims.

## A. The NLRA and RLA—A Brief Summary and Introduction

Two federal laws, the RLA and NLRA, control labor relations in most domestic industries, including those that involve airports and their employees, contractors, and entities with whom they contract.

In 1926, Congress enacted the RLA to reduce the threat of work stoppages and other costly effects of labor–management disputes within the railway industry.[2] At the time, railroads constituted the most important domestic transportation mode and were a significant driver of economic activity nationally.[3] The RLA, as amended, establishes limits on railroad laborers' and carriers' use of self-help measures, such as strikes and worker lockouts, in disputes over labor issues. The RLA helps minimize labor disruption through regulation of the labor–management relationship between workers and railroad and airline carriers by establishing standardized procedures for selecting union representation, setting ground rules for interactions between carriers and labor, and structuring negotiations between the parties.[4] In 1936, Congress extended most of the RLA's provisions to commercial airline carriers operating in interstate or foreign commerce.[5]

In 1935, in the midst of the Great Depression, Congress enacted the NLRA, which guarantees most private-sector workers' rights to organize and collectively bargain over wages, hours, and other working conditions.[6] Like the RLA, the NLRA seeks to regulate and lessen the impact of labor–management disputes.[7] The NLRA dictates a process for workers to seek union representation, proscribes the issues that can be the subject of bargaining, and regulates how the parties can interact with each other and with workers during union selection and the collective bargaining process.[8] The NLRA applies to private-sector employees other than railroad and airline carrier workers, as well as agricultural laborers, family domestic workers, supervisors, and independent contractors.[9]

Airports have a mix of workers: employees of airlines, employees of the companies that provide direct support to the airlines, and a large group of employees that more generally support airport operations, such as concession workers, cleaners, maintenance workers, and the like. Together, the RLA and the NLRA provide the legal background for labor issues at airports.

Determining which statutory structure is applicable to a given group of employees is an essential initial analysis point. As previously indicated, the RLA controls labor issues that involve airline carriers and their employees, as well as potentially subcontracted, underwing services and providers such as baggage handlers, aircraft fuelers, and aircraft cleaning personnel. The NLRA is potentially implicated in practically all other labor dispute contexts that involve private employers at airports, including those that involve concessions operations.

In the case of an airport sponsor who directly employs affected personnel, an entirely different set of factors come into play. In that case, due to the public nature of the employer, it is likely that neither the RLA nor the NLRA applies. A different case still may be presented in which the sponsor *directly* contracts with the affected entity. The analysis for determining which statute applies is fact-specific and must be done on a case-by-case basis, and thus is beyond the scope of this digest.[10]

[2] Act of May 20, 1926, ch. 247, 44 Stat. 577 (codified as amended at ch. 8, tit. 45 of the United States Code).

[3] *See* Alexandra Hegji, Congressional Research Service, Federal Labor Relations Statutes—An Overview 1 (2012).

[4] *See id.* at 3–4.

[5] Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189 (codified at 45 U.S.C. § 181 et seq.); Hegji, *supra* note 3, at 3.

[6] Act of July 6, 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at ch. 7, tit. 29 of the United States Code).

[7] Hegji, *supra* note 3, at 16.

[8] 29 U.S.C. § 151; Hegji, *supra* note 3, at 15–16.

[9] 29 U.S.C. § 152(3).

[10] *See, e.g., Aeroground, Inc.,* 28 NMB 510 (2001) (NMB describing, in finding airline subcontractor to be subject to the RLA, its two-part test:

> (1) First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers—the "function" test. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with a carrier or carriers—the "control" test. Both parts of the test must be satisfied for the NMB to assert jurisdiction).

United Parcel Service, Inc. v. Nat'l Labor Relations Bd., 92 F.3d 1221, 1227 (D.C. Cir. 1996) (D.C. Circuit describing, in affirming NLRB's decision that United Parcel Service (UPS) was subject to the NLRA rather than the RLA, the standard for trucking services subject to the RLA: "(1) the trucker must perform services principally for an RLA carrier with which it is affiliated; (2) the trucker must be an integral part of that affiliate; and (3) the trucker must provide services 'essential to the [RLA] carrier's operations.'" The decision distinguished UPS from a rival, Federal Express, which is subject to the RLA.). *See also* 45 U.S.C. § 151, which defines "carrier" for purposes of the RLA. This digest only provides an introduction to the analysis involved in application of the RLA and NLRA.

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Although both the RLA and NLRA contain numerous provisions relevant to the airport context, the focus for the purposes of this digest will be on the process for—and restrictions on—establishing union representation *prior* to collective bargaining, as these have been the most relevant to labor-harmony and worker-retention issues at airports.

### *1. Representation Elections*

To understand the significance of alternative means for a union to become an authorized bargaining agent for a given set of airport-based employees, which is the pivotal issue in the labor-harmony and worker-retention context, one must understand the "standard" procedure for unionization under both the RLA and NLRA.

Both the RLA and NLRA provide for employee unionization by secret-ballot election. Differences in coverage, methodology, and impact on the employer's nonairport work sites exist, however. The basics are covered in the following sections.

*a. An Overview of the Process.—*

1. RLA.—Elections under the RLA generally proceed along the following timeline: Either due to employee-generated requests or a union-centered initiative, a union sets out to assess whether a given group of employees can be organized at a particular company. The putative union seeks to garner support among the company's employees by a variety of means, ranging from holding one-on-one meetings to handing out informational materials.

As discussed briefly in the previous section, the RLA was designed to deal with the threat of *nationwide* disruptions to interstate commerce. For that reason, the scope of a putative bargaining union is much wider than under the NLRA (which, as discussed in the following section, is usually focused on a single location). The bargaining unit is defined based on a particular "craft" or "class" whose constituents are established prior to voting. The National Mediation Board (NMB), the primary federal entity in charge of administrating and enforcing the RLA, has interpreted the scope of a bargaining unit to include all employees of a particular "class" or "craft" within the entire company, including all offices and work locations.[11] Thus, there is a national consequence to a union drive in an RLA-covered company.[12]

If early assessments by the union indicate that there is sufficient level of interest to invest time, energy, and money into the organizational efforts, then the union will seek to obtain signed authorization cards from bargaining unit employees.

The reason for the union to obtain the authorization cards is twofold. First, if the union has signed cards from a sufficient number of employees, then it may petition NMB to hold an election. Second, the union may attempt to use the signed cards to have the employer voluntarily recognize the union without an election.

With respect to the election procedure, NMB usually requires that a union seeking to gain recognition as the bargaining representative submit an application to investigate a dispute (Form NMB-3), accompanied by authorization cards signed by more than 50 percent of the craft or class of employees.[13]

The appointed mediator determines whether there is a sufficient showing of interest to hold an election and assesses the validity of the cards submitted. If the mediator concludes that there are an insufficient number of eligible cards, then the case is dismissed. If a sufficient number of cards has been filed to warrant an election, however, then an election date is scheduled. Noteworthy is the fact that under the RLA, another union may petition to put itself on the ballot by filing cards from more than 50 percent of employees.[14]

The election is operated under NMB direction and conducted via a secret ballot.[15] NMB requires preelection campaigning by the parties to be conducted within certain bounds. These will be discussed in Sections II.A.1.c and II.A.3 and 4. Generally speaking, however, the secret ballot must be implemented "without interference, influence, or coercion exercised by the carrier."[16] Historically, elections take around 40 days from the time a petition is filed,[17] but campaigning on the part of the union often begins in secret months before the filing.[18]

[11] *See* 45 U.S.C. § 151, Fifth ("The term 'employee' as used herein includes every person in the services of a carrier…."); 45 U.S.C. § 152, Fourth ("The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class"); National Mediation Board, Frequently Asked Questions, http://www.nmb.gov/services/representation/frequently-asked-questions-representation/ (Revised Mar. 2013) [hereinafter NMB FAQ], Question 14.

[12] This fact may have a significant impact upon the dynamics involved in how a company views airport- or municipality-based initiatives that could result in unionization of the company's employees.

[13] 45 U.S.C. § 152, Twelfth; *see also* HEGJI, *supra* note 3, at 7.

[14] 29 C.F.R. § 1206.2(a).

[15] 45 U.S.C. § 152, Ninth.

[16] *Id.*

[17] *See* Lafe E. Solomon, Acting General Counsel, *Summary of Operations (Fiscal Year 2010)*, Memorandum GC 11-03 (Jan. 10, 2011) at 5 (median time between filing of petition and election was 38 days in 2010).

[18] Marshall J. Coleman, *The Manager's Practical Guide to Union Organizing* (Dec. 2003), at 5 (discussing unionization in the context of electrical workers).

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If more than 50 percent of the number of employees who voted choose a particular union, NMB will certify that union as the workers' representative.[19] If there are multiple unions seeking to represent the class or workers and no selection wins a majority, NMB may conduct a runoff election between the two choices that receive the most votes (including, if applicable, the choice of not unionizing).[20] Once a union is selected, collective bargaining can commence.

As mentioned previously, an alternative path to this result is for the union to request that the company voluntarily recognize the union as the authorized bargaining representative, usually upon the union presenting a sufficient number of signed cards to the employer. This "card-check" procedure is discussed in Section III.A.2.b.

2. NLRA.—The process for determining whether a given union may be certified as the authorized bargaining representative of a given group of employees under the NLRA is similar, but not identical, to the process under the RLA. As with the RLA, the NLRA provides procedures for employees to unionize through secret-ballot election.[21] A union, worker, or employer may petition the National Labor Relations Board (NLRB) to determine if a union should be recognized and certified as the representative of a particular bargaining unit.[22]

NLRB serves a purpose similar to NMB: administering and enforcing the NLRA by conducting investigations and adjudicating representation disputes, complaints of unfair labor practices, and contract disputes.[23] At least 30 percent of employees in a particular previously established bargaining unit must sign a petition or authorization cards for NLRB to order an election.[24] Despite this relatively low threshold, unions do not usually petition for an election unless they have well over 50 percent of the employees' signed cards.

Unlike under the RLA, NLRB has determined that under the NLRA, a bargaining unit is generally determined on a location-by-location basis, rather than on a company-wide basis.[25] Bargaining units are determined by a process that precedes the election process. In general, after submission of the petition or authorization cards, the employer and the union may enter into a consent election agreement, under which the employer and union agree to the procedures for the election.[26]

If an agreement is not reached, NLRB will hold a hearing and, if it determines it to be appropriate, will establish the parameters for a secret-ballot election to determine unionization.[27] Thereafter, if a majority of workers who are members of the appropriate bargaining unit vote in favor of unionization, NRLB can certify the union as the workers' representatives.[28]

In December 2014, NLRB made significant revisions to the procedural rules that govern representation hearings and elections.[29] The rules have been the subject of much debate, including in the courtroom and in Congress.[30] The details of the new rules are beyond the scope of this digest. It is important to note, however, that one of the main components of the new rules is aimed at streamlining and reducing what NLRB calls "unnecessary delays" in the election process.[31] These changes have had the effect of reducing the time between the petition and an election to 24 days, as compared with the prior median time of 38 days, with even shorter time periods possible.[32]

Although proponents for the new rules argue that the rules will address delays in election voting, critics argue that the rules result in employees being less informed on the merits of unionization and employers being less prepared to respond to a vote.[33] Despite opposition to the new rules from the business community, the U.S. District Court for the District of Columbia recently rejected arguments that opposed

[19] 29 C.F.R. § 1202.4. Before 2012, the regulations provided that a union needed a majority of *all* workers eligible to vote, rather than voting workers, to vote in its favor in order to win the election. *See* Hegji, *supra* note 3, at 8.

[20] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95.

[21] 29 U.S.C. § 159(e).

[22] 29 U.S.C. § 159(c)(1). Establishment of a particular bargaining unit is a separate analysis that precedes determination of representation and is typically done on a site-by-site basis.

[23] Hegji, *supra* note 3, at 17.

[24] 29 U.S.C. § 159(e)(1); Hegji, *supra* note 3, at 21.

[25] NRLB, Basic Guide to the National Labor Relations Act (1997) ("NLRB Guide"); Hegji, *supra* note 3, at 20.

[26] Hegji, *supra* note 3, at 21.

[27] 29 C.F.R. § 102.66-102.67; Hegji, *supra* note 3, at 21.

[28] 29 U.S.C. § 159; Hegji, *supra* note 3, at 21.

[29] *Representation—Case Procedures*, 79 Fed. Reg. 74308 (Dec. 15, 2014).

[30] U.S. Chamber of Commerce v. NLRB, Civ. Action No. 15-0009 (ABJ) (D. D.C. July 29, 2015); Tim Devaney, *House Votes to Scrap Union Election Rule, Defying Veto Threat*, The Hill, http://thehill.com/regulation/labor/236290-congress-votes-to-roll-back-ambush-election-rule (Mar. 19, 2015). Detractors have dubbed this rule the "ambush rule."

[31] 79 Fed. Reg. at 74308; NLRB Representation Case-Procedures Fact Sheet, https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-representation-case-procedures-fact-sheet (visited Jan. 14, 2015).

[32] Robert Combs, *Analysis of NLRB Elections Shows Quicker Elections, More Union Wins*, Bloomberg BNA (Jan. 4, 2016), http://www.bna.com/analysis-nlrb-elections-b57982065730/; Dan DiMaggio, *New Rule Speeds Unionization Votes, Say Organizers*, Labor Notes, http://labornotes.org/2015/06/new-rule-speeds-unionization-votes-say-organizers (Jun. 19, 2015).

[33] 79 Fed. Reg. at 74318-23.

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the rules, and the Obama administration has likewise opposed congressional measures to undo them.[34]

As a result of the rule changes, employers can likely expect less time to prepare for unionization elections or conduct an opposition campaign. Airport owners should be aware of this new limitation for airport-based businesses that desire to keep their operations union-free.

*b. Union-Organizing Activity: The Norm.*—Within the previously cited time and legal framework, a labor union that seeks to represent a set of employees will work toward (1) obtaining enough authorization cards to justify petitioning for an election and (2) winning the election when it is held. Although the specifics vary among particular situations, some generally applicable events appear in most union-organizing campaigns.

Once a union becomes involved in organizing a group of employees, it will seek means to establish and broaden its support base within the identified company. Most often, a single or a small group of employees will act as the core around which this support base will be built. The union will deploy personnel to meet with the core rank-and-file employees to learn more about the workplace issues at play. The union personnel will then equip these employees with information and train them in how to approach other employees to gauge interest in joining a union.[35]

The union personnel initially act as "coaches" for the employees, but will take a more active role in recruitment via one-on-one meetings with other employees. A series of off-site meetings will be scheduled. Locations for these meetings vary from ad hoc discussions in parking lots to more formalized meetings at off-site locations such as restaurants, bars, or even at the local union's offices.[36] The union will also often prepare and distribute written materials in the form of handouts, emails, or a Web site that are intended to convey the union's arguments for unionization.[37]

If an election is scheduled, the union personnel and their employee agents are deeply involved in continuing to convey the union's message and respond to employer-generated communication initiatives that may oppose unionization. Often there is extensive back-and-forth (a sort of "tit for tat") between those in favor and those opposed to unionization. All of this requires an all-encompassing level of attention by the union and a substantial expenditure of resources in terms of time, personnel, and monetary outlays.[38] Sources have calculated the average cost of union organizing (i.e., from the beginning to commencement of initial contract negotiations) to be between $1,000 and $3,500 per worker.[39]

*c. Employer Activity.*—Employers opposed to unionization engage in their own campaigns to counter organizing drives. The timing of employer campaigns depends on when the employer learns about the union's efforts; from an employer standpoint, the earlier the better. If an employer is surprised by the filing of a petition seeking an election, it will have very little time to present its viewpoints, especially given the new rules on election scheduling previously detailed in this digest. If it begins such communication initiatives before authorization cards are signed, however, it will have a greater chance to present its arguments against unionization to its employees.

Whatever the timing, employers often vigorously oppose organizing efforts. Employers will use various means and methods to get their messages out. An entire industry exists that provides services to employers to aid them in these efforts, ranging from collecting and providing information about particular unions to supplying advisors who actively engage employees and present communications from the employer perspective.

To say that these efforts are often time-intensive and expensive would be an understatement. One reported campaign at a nursing facility cost the employer in excess of $100,000.[40] Figure 1 on Page 8 is a typical "preelection calendar" that shows the high level of organization and intensity involved in some preelection campaigns.[41]

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[34] *See supra*, note 30.

[35] *See Organizing the Unorganized!*, 57th Convention of the Amalgamated Transit Union, San Diego, Cal. (Aug. 26–30, 2013), at 3–5.

[36] *See* Larry W. Bridgesmith, Six Steps to Staying Union-Free 2–3 (2007); *Organizing the Unorganized!*, 57th Convention of the Amalgamated Transit Union, San Diego, Cal. (Aug. 26–30, 2013), at 3–5.

[37] *See, e.g.*, Unite Here! Airport Group Web site, *available at* https://web.archive.org/web/20120126005223/http://www.airportgroup.info/ (archived Jan. 26, 2012) (last visited Jan. 14, 2016).

[38] This is especially true when legal issues exist with respect to the conduct of the election campaign. Legal fees related to challenges and responses to challenges (by both parties) can be significant.

[39] Richard B. Freeman & Joel Rogers, What Workers Want 189–90 (2006).

[40] Elliot Grossman, *Anti-Union Drive at Cederbrook Cost $115,000*, The Morning Call (Mar. 23, 1994), http://articles.mcall.com/1994-03-23/news/2957183_1_union-vote-union-campaign-union-drive.

[41] Winning NLRB Elections. Avoiding Unionization Through Preventative Employee Relations Programs 167 (Jackson Lewis/CCH, 4th ed. 1995). Reproduced subject to fair use. *See* 17 U.S.C. § 107.

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| Week | Monday | Tuesday | Wednesday | Thursday | Friday |
|---|---|---|---|---|---|
| 1 | *Day 1*<br>*Receive* NLRB Decision<br>*Meet* with supervisors<br>*Post* election arrangements | *Day 2*<br>*Presentation:* All employees, large group<br>*Handout* by supervisors | *Day 3*<br>*Mail* letter to homes | *Day 4*<br>*Handout* by supervisors | *Day 5*<br>*Submit:* Voter eligibility list to NLRB |
| 2 | *Day 6*<br>*Meet* with supervisors<br>*Poster* | *Day 7*<br>*Handout* by supervisors<br>*Mail* letter to homes | *Day 8*<br>*Presentation:* All employees, small groups | *Day 9*<br>*Handout* by supervisors | *Day 10*<br>*(Payday)*<br>*Paycheck Stuffer* |
| 3 | *Day 11*<br>*Meet* with supervisors<br>*Handout* by supervisors: Contest | *Day 12*<br>*Poster*<br>*Mail* letter to homes | *Day 13*<br>*Presentation:* All employees, small groups<br>*Handout* by supervisors | *Day 14*<br>*Poster* | *Day 15*<br>*Handout* by supervisors |
| 4 | *Day 16*<br>*Post:* Official Notice of Election<br>*Meet* with supervisors | *Day 17*<br>*Mail* letter to homes<br>*Handout* by supervisors | *Day 18*<br>*Meet* with supervisors<br>*Announce:* Contest winner on bulletin board | *Day 19*<br>*Presentation:* All employees, large group<br>*Handout* by supervisors | *Day 20*<br>*(Payday)*<br>ELECTION DAY |

From *Winning NLRB Elections, 4th Edition*

Figure 1. Preelection calendar.

The allowable scope, content, means, and methods that may be utilized by employers in conducting this campaign are outlined in Section II.A.3.

### *2. The Authorization Card*

In addition to certification by secret-ballot election, unions may also be recognized through other means under both the RLA and NLRA. Authorization cards, which are used to support petitions for elections, may also be used by unions to negotiate with employers for voluntary recognition of the union's role as the workers' representative. As discussed in Section III.A.2, the potential use of authorization cards is a key element in the labor-harmony equation.

Authorization cards are physical cards that an employee uses to signify in writing to an employer the employee's application for membership to a union or authorization for the union to represent him or her as an authorized bargaining representative.[42] Cards that only contain language asking for an election have also been held by NLRB to be valid under the NLRA.[43] In contrast, under the RLA, NMB will not accept authorization cards that merely request an election as an indication of intent that the worker desires to unionize.[44]

The RLA provides that NMB can either conduct elections or use "any [other] appropriate method" to determine union representation.[45] If a majority of employees sign authorization cards, then the RLA allows NMB to certify a union based on a carrier's voluntary recognition that the union is the representative of its workers.[46]

In a similar manner, the NLRA provides that an employer may voluntarily recognize a union when presented with authorization cards signed by a majority of employees in a bargaining unit.[47] The union and employer may also enter into a card-check agreement, discussed later in this section, under which an employer agrees it will recognize a union if the union obtains a certain number of authorization cards before the union officially begins to collect cards. Agreements may also require the union to collect a "supermajority" of cards under such an agreement.[48] In addition, NLRB may require an employer to recognize a union if a majority of employees sign authorization cards and the employer is found to have engaged in unfair labor practices that make a fair election unlikely.[49]

An example of an authorization card is reproduced in Figure 2.

**CWA REPRESENTATION AUTHORIZATION CARD**

**Yes**, you can count on me to vote "YES" when we have our representation election for customer service employees at American Airlines. I know the only way to protect and improve what we have is to negotiate a legally-binding contract.

I authorize the Communications Workers of America (CWA) to represent me for collective bargaining purposes by filling out and signing this card.
**Please print.**

Name: _____

Date: _____ Employee # _____

Address: _____

City: _____ State: _____

Zip Code: _____

Cell Phone: _____

Home Phone: _____

Email: _____

Job Title: _____ Location: _____

Signature: _____
*(required)*

**Yes**, I understand that it takes all of us to build a strong union. By checking this box, I want you to use my name as a public supporter in American Airline agents' campaign materials.

Figure 2. Example of a union authorization card.

[42] National Labor Relations Board, Office of the General Counsel, *An Outline of Law and Procedure in Representation Cases* 5–200 (Aug. 2012) ("NLRB Outline").

[43] *Potomac Electric Co.*, 111 NLRB 553, 554–55 (1955); NLRB Outline, 5–200.

[44] NMB FAQ, *supra* note 11, Question 5.

[45] 45 U.S.C. § 152, Ninth.

[46] NMB FAQ, Question 19; HEGJI, *supra* note 3, at 8.

[47] GERALD MAYER, CONG. RESEARCH SERV., RL 32930, LABOR UNION RECOGNITION PROCEDURES: USE OF SECRET BALLOTS AND CARD CHECKS (2007).

[48] *Id.* at 11.

[49] *Id.* at 8; Nat'l Labor Relations Bd. v. Gissel Packing Co., 395 U.S. 575, 614–15 (1969).

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### *3. Employer Rights to Engage Its Employees in Discussions About Unions*

Employers have a substantial number of rights with respect to efforts to inform employees about their viewpoints on potential unionization of their workforce. The surrender of these rights is used as a factual basis for asserting that labor-harmony requirements violate federal labor law (see Section V).

The RLA states that a carrier shall not "interfere… influence or coerce" its employees in the choice of representative.[50] The Supreme Court has held, however, that this provision of the RLA does not take away a carrier's free speech rights. In interpreting this section of the RLA, the Supreme Court recognizes that influence does not mean simple expression of views, that the statute does not repeal the First Amendment, and that employer free speech is allowed.[51] Therefore, the carrier is free to express its views, as long as there is no threat of retribution for supporting a union and no promise of benefits for not supporting a union.[52]

The RLA prohibits carriers from interfering with employees' rights to organize and select a union representative.[53] Carriers cannot deny or question employees' rights to unionize or require prospective employees to sign an agreement to join or not join a union.[54] The carrier may not engage in surveillance, polling, or interrogation and may not discharge, transfer, or withhold benefits from an employee for his or her participation in union or organizing activities.[55]

Carriers also cannot unilaterally change pay rates, rules, and working conditions during the unionization process and within 30 days after NMB issues a decision.[56] Although the RLA does not specifically list what constitutes unfair labor practices, it does provide that NMB will look to general considerations of fair dealing, including the responsibility to bargain in good faith and refrain from interfering with the other party's rights.[57]

In a similar manner, the NLRA cannot take away an employer's rights under the First Amendment.[58] Therefore, unless the employer activity constitutes an unfair labor act, it is permissible speech.[59] In fact, Congress added Section 8(c) to the NLRA, which affirmed the right of employers to engage in free speech during election campaigns:

> (c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Again, it is the modification or elimination of these federal rights that forms the challenge to many labor-harmony requirements (see Section V).

With regard to that which is not allowed, the NLRA expressly prohibits employers from engaging in unfair labor practices, which it defines to include coercion of employees, interference with the formation or administration of unions, or discrimination regarding employment in order to encourage or

[50] 45 U.S.C. § 152.

[51] Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 568 (1930) stating that

> "Interference" with freedom of action and "coercion" refer to well-understood concepts of the law. … The use of the word ["influence"] is not to be taken as interdicting the normal relations and innocent communications which are part of all friendly intercourse, albeit between employer and employee. "Influence" in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization." The phrase covers the abuse of relation or opportunity so as to corrupt or override the will….

[52] US Airways v. NMB, 177 F.3d 985 (D.C. Cir. 1999); Teamsters v. Braniff, 70 L.R.R.M. (BNA) 3333 D.D.C. (1969). *But see, In US Air, Inc.*, 17 N.M.B. 377 (1990), where NMB disapproved of routinely used campaign strategies found acceptable under the NLRA, such as a poster criticizing past experiences of other groups of employees with the Teamsters. NMB also found US Airway's speech to be coercive when the carrier predicted that the likelihood of strikes would increase and that the employees would have to pay union dues if the union was certified as the authorized bargaining representative. *See also In US Airways*, 24 N.M.B. 354 (1997), rev'd, 177 F.3d 985 (D.C. Cir. 1999), where NMB found "interference" when the carrier stated that employee committees were an alternative to having a union and that the committees would be disbanded if a union was elected.

[53] 45 U.S.C. § 152, Third.

[54] 45 U.S.C. § 152, Fourth, Fifth; Hegji, *supra* note 3, at 9.

[55] 45 U.S.C. § 152, Fourth, Fifth; Hegji, *supra* note 3, at 9.

[56] 45 U.S.C. § 156; Hegji, *supra* note 3, at 2, 9.

[57] Hegji, *supra* note 3, at 9.

[58] 49 U.S.C. § 158(c).

[59] *Id.* Note that an examination of the legislative history to 8(c) reflects that the purpose of this provision was to protect employers' right of free speech by prohibiting the Board's previous practice of using employers' speeches and publications concerning labor organizations or collective bargaining as evidence that a subsequent employer act was undertaken with illegal motive. *See* H.R. Conf. Rep. No. 80-510, at 45 (1947). Numerous examples of legislative history confirm and indicate that the provision was meant to allow employers to be heard, at their discretion, without being penalized; there is no evidence that Congress contemplated an audience's right to receive information. *See, e.g.*, 93 Cong. Rec. 3953 (1947) (remarks of Sen. Taft); *id.* at 4261, 4266 (1947) (remarks of Sen. Ellender); *id.* at A3233 (1947) (remarks of Sen. Ball); H.R. Rep. No. 80-245, at 33 (1947); S. Rep. No. 80-105, at 23–24 (1947); 93 Cong. Rec. 7487 (1947) (veto message of President Truman).

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discourage union membership.[60] Under the NLRA, employers may campaign on company property and may require employees to attend so-called "captive audience" meetings at which the employer's representatives can assert the employer's position; however, audience meetings cannot be held within 24 hours before an election.[61] Employers can also give employees written information and hold individual meetings with employees, absent an agreement with the union stating otherwise.[62]

Under the NLRA, however, it is considered an unfair labor practice for an employer to restrain or coerce employees with regard to union activities.[63] An employer cannot threaten to close operations or discriminate against an employee because of his or her union activities.[64] An employer also cannot raise wages to discourage workers from joining or forming a union.[65]

Distilling all of the above, employers are prohibited from:

1. *Threatening employees* in any way (adverse job actions such as lowering pay, terminating employment, closing the site, reducing staffing, etc.).
2. *Promising employees anything* (e.g., "if you don't support the union, we will give you a raise").
3. *Interrogating employees* (asking them any questions about whether they support the union, what the issues are within the workplace, what it would take to make employees happy, etc.).
4. *Spying on employees* (e.g., conducting surveillance of meetings with the union personnel).[66]

Although at first glance this appears to substantially limit the ability of an employer to discuss anything union-related with the employees, in practice, it leaves significant room for open communications. The law does not prevent employers from informing their employees of the reasons why a union is not necessary. As highlighted in Table 1, employers or their representatives may actively campaign against the union organization by providing factual statements or opinions to employees, as well as by providing actual examples of matters with which there may be a discussion.

[60] 29 U.S.C. §§ 158(a), 160(c).

[61] *Peerless Plywood Co.*, 107 NLRB 427 (1953).

[62] Mayer, *supra* note 47, at 5.

[63] 29 U.S.C. § 158(a)(1); Mayer, *supra* note 47, at 5.

[64] Mayer, *supra* note 47, at 5.

[65] *Id.*

[66] Coleman, *supra* note 18, at 16–17 (discussing "TIPS").

**Table 1. Permissable Employer Statements to Employees Under NLRA**

| Means/ Method | Examples |
|---|---|
| Facts | Joining a union means you would have to pay dues. |
| | The only meaningful tool a union has at the negotiating table is to threaten or engage in a strike. |
| Opinions | I don't believe that it is in your best interest to join a union. |
| | I think that it would harm the work environment here if a union was placed between our employees and us. |
| Examples | It took over 2 years for that other company to get a contract, and they only got 2 percent raises. |
| | Unions can't prevent an employer from cutting staff; just look at what happened to the airlines after 9/11. |

Thus, as long as the employer conforms to the above-described parameters, it is within its First Amendment rights.

### *4. Employee and Union Rights and Limitations*

As with carriers, under the RLA unions are prohibited from interfering with employees' process of selecting (or not selecting) union representation.[67] In a similar manner, unions are required to deal fairly with employers in organizing employees.[68] Other than the general prohibition against coercion or threats,[69] however, and some limited restrictions on campaigning on company property,[70] union organizers are generally not restricted from other campaigning approaches.[71]

With respect to employee rights, the NLRA provides substantial rights and protections. Employees have the right to be unionized and to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[72]

Perhaps most important for purposes of the instant analysis, *Section 7 of the NLRA specifically states that employees also have the right not to unionize or engage in union or organizing activities.*[73]

[67] 45 U.S.C. § 152, Third; Hegji, *supra* note 3, at 6.

[68] Hegji, *supra* note 3, at 9.

[69] 29 U.S.C. 158(b)(1)(A), (2); Mayer, *supra* note 47, at 5.

[70] Mayer, *supra* note 47, at 5.

[71] *Id.* (discussing unions' rights to engage employees in public areas and contact employees at their homes or by personal phone number or email address).

[72] 29 U.S.C. § 157.

[73] 29 U.S.C. § 158(b).

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## B. The General Rule—Labor Relations Matters Are Preempted By Federal Statutes, Rules, and Regulations

The ground rules established by the RLA and NLRA have profound implications on state and local governments' ability to regulate or otherwise alter labor relations due to the doctrine of federal preemption. The Supremacy Clause of Article VI of the U.S. Constitution grants Congress the power to preempt state or local law.[74] Under the doctrine of preemption, a federal law displaces state law if that state law is found to be in conflict with the text or scope of the federal law.[75]

There are three kinds of preemption: (1) express preemption, (2) "actual conflict" preemption, and (3) "field preemption."[76] Express preemption exists when Congress enacts an explicit statutory demand that state law be displaced.[77] Conflict preemption is found "where compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[78] Field preemption exists "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation."[79]

Courts have held that both the RLA and NLRA preempt the areas of state law regarding labor relations in certain circumstances.[80] Preemption under the RLA exists when (1) a state seeks to prohibit collective bargaining altogether by railway and airline employees, (2) a state law cause of action depends on the interpretation of a collective bargaining agreement, and (3) a state law will frustrate the purpose of the RLA.[81] Courts have held that many labor-related state and local regulations are generally preempted by the NLRA, either through conflict or field preemption.[82] The Supreme Court has in particular outlined two types of implied preemption applicable to NLRA cases: *Garmon* preemption and *Machinist* preemption.[83] Under *Garmon* preemption, courts prohibit regulation of "activit[ies] that the NLRA protects, prohibits, or arguably protects or prohibits."[84] Under *Machinist* preemption, courts will prohibit "state and municipal regulation concerning those aspects of labor–management relations that Congress intended 'to be controlled by the free play of economic forces.'"[85] According to this doctrine, states may not impose additional restrictions on economic approaches such as strikes or lockouts, unless such restrictions were presumably contemplated by Congress.[86]

## C. Proprietary Rights Exception

Although the case law makes clear that state and local governments generally cannot interfere with the laws and policies of the RLA and NLRA, there is an exception when a government entity is acting in a proprietary capacity rather than a regulatory capacity with respect to the challenged action.[87] This is often referred to as the "market-participant doctrine" or "proprietary rights exception."

### *1. Genesis of the Proprietary Rights Exception*

The Supreme Court first acknowledged the market-participant doctrine in discussing the constitutionality of state action under the Commerce Clause in *Hughes v. Alexandria Scrap Corporation*.[88]

[74] U.S. Const. art. VI, § 2.

[75] Olympic Pipe Line Co. v. City of Seattle, 437 F.3d 872, 877 (9th Cir. 2006) (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299–300 (1988); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280–81 (1987)).

[76] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000). Courts and observers sometimes combine the latter two types of preemption into a single category, implied preemption. *See* English v. General Elec. Co., 496 U.S. 72, 79 n.5 (1990).

[77] *Olympic Pipe Line*, 437 F.3d at 877 n.13 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992)).

[78] *Id.* (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[79] *Olympic Pipe Line*, 437 F.3d at 877 n.13 (citing Moldo v. Matsco, Inc. (In re Cybernetic Servs., Inc.), 252 F.3d 1039, 1045–46 (9th Cir. 2001) (internal quotation marks omitted)).

[80] Air Transport Ass'n v. City and Cty. of San Francisco, 266 F.3d 1064, 1076 (9th Cir. 2001); Fitz-Gerald v. Sky-West Airlines, Inc., 65 Cal. Rptr 3d 913, 919 (Cal. App. Ct. 2007) (citing Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994)) (RLA preempts state law causes of action that depend upon interpretation of a collective bargaining agreement); Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 149–51 (1976) (NLRA preempts state law).

[81] Air Transport Ass'n v. City and Cty. of San Francisco, 266 F.3d 1064, 1076 (9th Cir. 2001).

[82] Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, 216 (3d Cir. 2004); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247–48 (1959); Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 149–51 (1976); Wis. Dep't. of Industry v. Gould, Inc., 475 U.S. 282, 286 (1986); Hegji, *supra* note 3, at 19. One particular provision in the NLRA, 29 U.S.C. § 164(b), provides that states may enact "right to work" laws, which are laws that require union membership as a condition of employment.

[83] *Sage*, 390 F.3d at 216.

[84] *Sage* at 212 (quoting Wis. Dep't of Industry v. Gould, Inc., 475 U.S. 282, 286 (1986)).

[85] *Id.* (quoting *Machinists*, 427 U.S. at 140).

[86] *Id.*

[87] *See* Air Transport Ass'n v. City and County of San Francisco, 266 F.3d 1064, 1076 n.4 (9th Cir. 2001).

[88] 426 U.S. 794 (1976). *See* White v. Mass. Council of Construction Employers, Inc., 460 U.S. 204, 206 (1983).

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In *Hughes*, the Court upheld a Maryland statute that had the effect of providing special state-funded incentives to in-state automobile scrappers to encourage the recycling of abandoned automobiles. In upholding the constitutionality of the statute, the Court stated that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[89] Because Maryland was participating in the market rather than regulating the market, the Court concluded that no constitutional violation existed.[90] In several subsequent decisions, the Court considered additional types of state and local economic actions under the market-participant doctrine.[91]

In *Wisconsin Department of Industry v. Gould Inc.*—the first Supreme Court case that squarely addressed the market-participant doctrine in the context of the NLRA—the Court invalidated a Wisconsin law that prohibited state procurement agents from purchasing any product sold or manufactured by a firm that had violated the NLRA in three separate cases within any 5-year period.[92] The Court stated that

> [b]ecause Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the Board's comprehensive regulation of industrial relations in precisely the same way as would a state statute preventing repeat labor law violators from doing any business with private parties within the State.[93]

The Court rejected Wisconsin's argument that it was exercising its proprietary rights because "it simply is not functioning as a private purchaser of services."[94]

In 1993, the Court took the market-participant doctrine a step further by applying it to state control over contracts that affect unionization rights under the NLRA.[95] In *Boston Harbor*, the Court ruled that a state water resources authority could require private companies bidding on Boston Harbor environmental cleanup work to adhere to a union-supported project labor agreement negotiated to avoid labor-related disruptions.[96] Noting that private-sector companies were free to enter into such agreements with unions, the Court stated that "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a pre-hire agreement, a public entity *as purchaser* would be permitted to do the same."[97] Because the state water resources authority sought to complete the cleanup "as quickly and effectively as possible at the lowest cost," the Court found that "[t]here is therefore no basis on which to distinguish the incentives at work here from those that operate elsewhere in the construction industry, incentives that this Court has recognized as legitimate."[98] Accordingly, the Court held that the bid specification was not a government regulation and thus not subject to preemption under the NLRA.[99] The Court distinguished the case from the regulation in *Gould*, which it described as "a state agency's attempt to compel conformity with the NLRA."[100] As stated by the Court, the conduct in *Gould* "was a state agency's attempt to compel conformity with the NLRA."[101] As a consequence, *Gould* "left open the question whether a State may act without offending the pre-emption principles of the NLRA when it acts as a proprietor and its acts therefore are not 'tantamount to regulation' or policymaking."[102]

### *2. Development of the Exception and Identification of Limits*

Since *Boston Harbor*, a number of state and local governments have sought to mandate private-sector relationships with unions under the market-participant doctrine and, as a result, courts from around the country have occasionally considered application of the doctrine in a range of contexts. As articulated in *Boston Harbor*, state action falls within the market-participant exception to preemption when the state (or local) public entity directly participates in the market by purchasing goods or services.[103] Although in theory the distinction between government regulation and participation in the

[89] *Id.* at 810.

[90] *Id*. at 809.

[91] *See* Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (South Dakota policy of restricting sale of state-produced cement to state residents held constitutional); White v. Mass. Council of Construction Employers, Inc., 460 U.S. 429 (1983) (mayor's executive order requiring, among other things, at least half of all workers hired under city-funded construction projects be bona fide city residents was constitutional).

[92] 475 U.S. 282 (1986).

[93] *Id.* at 288.

[94] *Id.*

[95] Building Trades Council v. Associated Builders and Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993) ("*Boston Harbor*").

[96] *Id.* at 221–22.

[97] *Id*. at 231 (emphasis in original).

[98] *Id.* at 232 (citing Woelke & Romero Framing Co. v. NLRB, 456 U.S. 645, 662 and n.14 (1982)).

[99] *Id.* at 233.

[100] *Id.* at 229.

[101] *Id*. at 228.

[102] *Id.* at 229.

[103] *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1040 (9th Cir. 2007) (describing the "single inquiry" in market-participant cases as "whether the challenged program constituted direct state participation in the market").

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market might be easy enough to state, in practice, however, distinguishing between the two can become difficult.[104] For instance, as indicated in *Gould*, if a state's direct participation in the market is "tantamount to regulation," the market-participant doctrine will not exempt the state's action from preemption.[105]

The particular test used to determine whether the market-participant doctrine applies differs slightly between jurisdictions, although the general effect appears to be largely the same. The Fifth, Second, and Ninth Circuits have adopted a test known as the *Cardinal Towing* test. The *Cardinal Towing* test asks:

> First, does the challenged action essentially 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? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?[106]

Applying the *Cardinal Towing* test, the Ninth Circuit has explained that "[t]hese questions 'seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.'"[107]

The Third Circuit has identified a similar test, which asks whether (1) the challenged regulation serves to advance or preserve the state's proprietary interest in a project or transaction as an investor, owner, or financier, and (2) the scope of the regulation is specifically tailored to the proprietary interest.[108] A leading Third Circuit case, *Hotel Employees and Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*. provides an example of the application of this test. In *Sage,* a hotel developer appealed a district court decision that required arbitration of a dispute with the union representing the developer's employees.[109] The developer argued that the NLRA preempted a municipal resolution requiring the developer to enter into labor agreements that include binding arbitration provisions as a condition to accepting tax-increment financing.[110] Applying its preemption doctrine test, the Third Circuit held that the resolution was not preempted because the municipality, in passing the resolution, was acting as a market participant.[111] First, the court noted that unlike other forms of government taxation, the revenues from the tax-increment financing provided to the developer were allocated specifically to benefit the tax-increment district, either for debt service or for other development activities.[112] Second, the resolution was specifically tailored to protect the municipality's proprietary interest, applying only to hotels and hospitality projects receiving tax-increment financing.[113] The resolution did not require participating contractors to sign labor agreements extending to other projects outside of the tax-increment projects.[114] As a result, because the municipality was acting as a reasonable private investor, federal preemption did not apply.

More recent cases have provided additional judicial gloss to the application of the market-participant doctrine. For instance, in *Johnson*, the Ninth Circuit addressed NLRA preemption of a project labor agreement between a district and trade council that required contractors on many district construction projects to use union hiring halls and also required workers to become union members within 7 days of their employment.[115] The court held that the agreement constituted market participation not subject to preemption by the NLRA, reasoning that under the first question in the *Cardinal Towing* test, the agreement was for the purpose of efficiently procuring services for district construction projects and, under the second question in the test, the agreement addressed construction projects that were paid for with specific allocated funds within a 3-year period of time.[116]

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[104] *See Sage,* 390 F.3d at 214 ("[T]he line between state regulation that is subject to preemption and market participation that escapes preemption must be drawn more finely than by simply distinguishing between regulation through mandatory laws and regulation achieved through the spending or procurement power."); see Associated Builders & Contrs., Inc. v. City of Jersey City, 2:14-cv-05445-SDW-SCM (D. N.J. Aug. 3, 2015) (dismissing challenge to an ordinance requiring Project Labor Agreements under *Sage* because the City was acting in its proprietary interest as a financier of a tax-abated project); George v. Richter, No. 11 Civ. 8648 (S.D.N.Y. Apr. 25, 2014) (dismissing child caregivers union's preemption challenge to City's interference with collective bargaining agreement negotiations because the City's efforts at cost savings were part of a larger effort to restructure public health insurance payments).

[105] Wis. Dep't of Indus., Labor & Human Relations v. Gould, 475 U.S. 282, 289 (1986).

[106] Cardinal Towing and Auto Repair v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999).

[107] Johnson v. Rancho Santiago Cmty. College Dist., 623 F.3d 1011, 1022–1023 (9th Cir. Cal. 2010) (quoting *Cardinal Towing*).

[108] *Sage,* 390 F.3d at 216.

[109] *Id.* at 208.

[110] *Id.*

[111] *Id.* at 218.

[112] *Id.* at 216–17.

[113] *Id*. at 217–18.

[114] *Id.* at 218.

[115] *Johnson,* 623 F.3d at 1016.

[116] *Id*. at 1025–28.

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## III. LABOR-HARMONY AGREEMENTS AND WORKER-RETENTION PROGRAMS

The previous sections describe the rules of the game when it comes to labor relations under the RLA and NLRA. The rules of the game can change, however, and the vehicles for doing so are local government-mandated agreements between employers and unions to set their own rules. Although local government authority over labor relations is generally preempted by federal labor laws, namely the RLA and NLRA, the mechanism for bypassing preemption is the proprietary-interest doctrine, as previously discussed.

### A. Definition of "Labor Peace" or "Labor Harmony"

Labor-harmony agreements, also known as *labor-peace agreements*, are agreements that local governments require private employers to enter into with unions to bid on public contracts or subcontracts.[117] Thus, they are usually prerequisites to the private employer doing business with the municipality or on municipal property.

The ostensible purpose of such agreements is to provide local governments as proprietors with assurance that there will be no labor disputes that disrupt the public goods or services provided through the private employer, although more often than not, there are more complicated political factors at play. As discussed in the following section, although local governments cannot mandate any specific terms to be included in the agreements between the private employers and the unions, the fact that an agreement must be negotiated in the first place provides unions with significant leverage in seeking concessions from employers.

#### *1. "Book" Definition and Example*

Valid local ordinances that require labor-harmony agreements are uniformly open-ended and generally straightforward. The primary elements are: (1) a proprietary basis for mandating labor-harmony agreements between private employers and unions, (2) the requirement to enter into a labor-harmony agreement with a union that seeks to organize the employer's employees, and (3) the requirement that the terms of the labor-harmony agreement prevent strikes, work stoppages, and other disruptions.

For example, the City of Philadelphia has enacted the following ordinance that covers ground handling services at the Philadelphia International Airport:

> (8) All lease and use agreements the City enters into with any air carrier operating at Philadelphia International Airport, including any amendments, extensions or renewals thereof, shall contain provisions which provide the following commitments to ensure uninterrupted services:
>
> (a) The air carrier shall require that any service contractor it retains to provide Ground Handling Services…at Philadelphia International Airport shall secure a Labor Peace Agreement with any labor organization representing, or seeking to represent, the employees of such contractor which shall be in effect on or before the effective date of the air carrier's service agreements for such Ground Handling Services….[118]

Under Philadelphia's labor-peace provision for ground handling services, a labor-peace agreement is defined as:

> [A] collective bargaining agreement, or other written agreement as defined under 29 U.S.C. § 185, between Ground Handling Services contractor and a labor organization which represents or is seeking to represent for purposes of collective bargaining the employees of such Ground Handling Services contractor. The Labor Peace Agreement shall contain terms prohibiting the labor organization and its members, and in the case of a collective bargaining agreement, the employees covered by the agreement, from engaging in picketing, strikes, work stoppages, boycotts or any other forms of interference with, or disruptions to, Ground Handling Services during the duration of the air carrier's service agreement with such Ground Handling Services contractor….[119]

Philadelphia's proprietary interest in avoiding strikes, reflected in the law's reference to "ensure uninterrupted service," is more expressly stated in the bill accompanying the law. The preamble to the bill states in part:

> The City of Philadelphia has a strong proprietary interest in protecting the substantial revenues it receives from the efficient operations of air carrier transportation at the Philadelphia International Airport ("the Airport") and the volume of passenger enplanements at the Airport….
>
> A requirement that air carriers who lease Airport terminal space from the City retain only those Ground Handling Service contractors who have a proper Labor Peace Agreement in effect to ensure the continuity of such service at the Airport effectively protects the City against any loss of volume-based revenues the City receives from Airport operations by preventing labor disputes among these employees….[120]

Likewise, some local governments have also required nonaeronautical concessionaires at airports

[117] Labor-harmony agreements resemble "project labor agreements," which are specifically referenced in the NLRA. The difference between the two is that of process; labor-harmony agreements involve state and local governments invoking their proprietary interest in order to require private employers working on publicly funded projects to agree to agreements resembling project-labor agreements. *See* U.S. Chamber of Commerce, Labor Peace Agreements—Government as Union Advocate 3 (2013); *infra*, § III.A.2.

[118] Phila. Code § 18-201(8).

[119] Phila. Code § 18-201(8)(c).

[120] Phila. Bill No. 140829, Preamble (Jan. 15, 2015).

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to abide by labor-harmony agreements, although the specific terms of the agreements to be entered into are not provided. For instance, a Miami-Dade County resolution provides:

> WHEREAS, Miami-Dade County has a financial and proprietary interest in the success of the concessionaires doing business at Miami International Airport…
>
> NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that all Requests for Proposals, Requests for Qualifications and bids for food/beverage, retail/news/gifts and hotel services at Miami International Airport ("MIA") shall require the proposer to sign a labor peace agreement with the labor organization(s) that seeks to represent the proposer's employees and submit such agreement as part of its proposal to assure that no labor dispute or unrest will disrupt their operations at MIA; and further requiring that all contracts for such concessions at MIA shall include a provision giving the County the right, in the event of a labor disruption, to suspend the County's obligations under the contract while the labor disruption is ongoing and to use alternative means to provide the service that is affected by the labor disruption.[121]

An airport's proprietary interest in avoiding strikes is generally stronger when its contractual relationship with potentially unionizable employees is more direct. For instance, the airport's proprietary interest may be stronger when it is contracting directly with an employer of unionizable employees, rather than with an employer who contracts with a separate employer that has unionizable employees.

### *2. The Practical Definition—A Short Discussion*

While the terms of labor-harmony requirements imposed on private employers are open-ended and facially neutral with respect to unions' and employers' interests, the practical effect of such laws is to provide unions with significant negotiating leverage over employers who oppose unionization. In practice, unions can use this leverage to establish an environment in which they are more likely to succeed in unionizing private employees. How, or to what extent, a public entity becomes involved in the implementation of a labor-harmony requirement can trigger preemption concerns. In the context of a public entity directly contracting or subcontracting, such terms may also implicate preemption issues.

With a labor-harmony law that requires an agreement with the union in exchange for the union's forbearance from labor disruptions, what remains to be negotiated between the employer and the union is the concessions that the employer will grant to the union for this forbearance of union rights. Thus, although the applicable labor-harmony ordinance does not explicitly *require* a private employer to forego its rights under federal labor laws—which the employer could argue would be preempted—when implemented in the real world, such ordinances do, in practice, usually result in employers forfeiting some of their federal rights and thus triggering preemption issues.

This "reading between the lines" is often a source of confusion between elected officials and airport management personnel. The fact that in most, if not all, cases where labor-harmony agreements are implemented, several common items are included in the final agreements between the private employers and the unions demonstrates how the requirements work and, ultimately, come under fire from both employers and employees.

Two of the most important terms that unions seek in order to establish conditions advantageous to unionization are known as "neutrality" and "card-check" provisions.

*a. Introduction of Concept of "Neutrality."*—"Neutrality" in the context of unionization is the concept that the employer not take any position that supports or opposes efforts to unionize its employees.[122] In the airport context, it essentially means that the employer will not take any action to oppose the union's efforts to obtain signed authorization cards. An employer's concession to remain "neutral" with regard to unionization is extremely helpful for a union, as it allows the union to present its own uncontested, unopposed arguments in favor of unionization to the employees.

As discussed previously in the digest, employer speech is protected under both the NLRA and the First Amendment. Under Section 8(c) of the NLRA, any views, arguments, or opinions may be expressed by an employer so long as they contain "no threat of reprisal or force or promise of benefit."[123] Thus, under the NLRA, employers are free to provide facts, examples, and opinions to their employees on their premises and on company time. The Supreme Court has previously stated that this statutory provision "merely implements the First Amendment" protection of free speech.[124]

An employer may also waive its constitutional right to free speech if it does so "voluntarily, intelligently, and knowingly" in advance "with full awareness of the legal consequences."[125] This "freedom" to waive free speech rights is the basis for the enforceability of neutrality agreements between employer and union.

[121] Miami-Dade Cty. Res. No. R-148-07 (Feb. 6, 2007).

[122] *See* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 Ind. L. J. 1589, 1590 (2008).

[123] 29 U.S.C. § 158(c).

[124] NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1970).

[125] Int'l Union, United Auto. v. Dana Corp., 679 F.2d 634, 645 (6th Cir. 1982) (citing D.H. Overmyer v. Frick Co., 405 U.S. 174 (1972)).

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In the context of a labor-harmony agreement, the public entity merely requires the parties to agree to a labor-harmony agreement without imposing any specific terms, such as neutrality (the proverbial "agreement to agree"). The inclusion of such provisions in the agreement between the on-airport business and the union appears voluntary in nature. In reality, however, because the company seeking to do business at an airport must have an agreement with a union as a prerequisite to performing work at the airport, the union has significant—and at times, arguably, overwhelming—bargaining power.

Some have asserted that the union has what amounts to a veto power over the question as to whether the company can do business at the airport. Thus, employers argue that they have no choice in agreeing to whatever is proposed by a union if they desire to continue conducting business with the public entity. Unions would argue that this situation may be viewed merely as the cost of doing business with the public entity and/or at an airport. Regardless, it is these questions surrounding the lack of choice and union bargaining power that give rise to preemption issues—in this case, the forfeiture of the employer's free speech rights.

*b. Introduction to Concept of Card Check.*—Card-check certification is a method for an employer to recognize a union as the authorized bargaining representative without conducting an election. A card check involves the union obtaining "authorization cards" from employees and then submitting them to the employer, which in turn examines them to see if more than 50 percent of its employees are reflected in the signed cards. Under a card-check agreement between employer and union, the employer agrees ahead of time to voluntarily recognize and bargain with the union if the union obtains authorization cards from a majority of its employees.[126] Card-check provisions allow a union to forego the substantial effort, time, and expense necessary to petition for and then engage in an active campaign seeking to be certified as the bargaining representative to the subject group of employees.

As with neutrality provisions, a card-check agreement requires the employer to forego rights it otherwise would have under federal law.[127] In the case of a card-check provision, the employer foregoes its rights under the RLA or NLRA to have an election to determine whether its employees unionize.

Although voluntary card-check certification has long been a mechanism available to recognize unions, employers and their advocates argue that being required to forego elections, a well-established default mechanism for unionization, violates the fundamental tenants of federal labor law.[128] In this respect, they cite federal court and NLRB cases supporting the primacy of elections.[129] For their part, unions respond that the substantial cost and time required to undergo an election process—which may be prolonged by resistant employers—create an undue burden on unionization, and therefore, shorter, alternative means to recognition are justified.

As previously discussed with respect to neutrality, the voluntary nature of a business agreeing to a card-check procedure gives rise to preemption issues—in this case, the forfeiture of the right to have an election via a secret-ballot procedure. With respect to card check, it can be argued that both the employer and employees are involuntarily surrendering federally guaranteed rights, and thus, both groups may bring actions against the public entity.

### B. Other Employee-Centered "Benefits" that May Be Topics of Negotiation

Other topics invariably become the subject of bargaining between an on-airport employer and a putative union. One such topic that may be the subject of union–airport negotiations is so-called "worker retention" programs.

Worker-retention programs are programs designed to facilitate the retention of employees during a transition from one private contractor to another. Under a worker-retention program, an incoming contractor must consider hiring employees from the outgoing contractor. As with labor-harmony agreements, worker-retention programs may vary in process and substance. Some programs may require only voluntary measures, such as job fairs, while others may include mandatory contractual requirements.

For example, worker-retention programs for commercial airport concessionaires commonly require successor concessionaire employers to offer employment to qualified persons previously employed with the predecessor concessionaire employer; these programs also prohibit successor concessionaire employers from firing retained employees without

[126] *Cooper*, 83 IND. L. J. at 1591.

[127] Since the late 2000s, there have been congressional efforts to amend the NLRA to provide card check as an alternative to elections. *See, e.g.*, Employee Free Choice Act, H.R. 800, 110th Cong. (2007). None of these bills, however, has passed both houses of Congress.

[128] *See* Jonathan Kane & Christopher P. Zubowicz, *Consequence of the Employee Free Choice Act: What's Left of Section 7?*, American Bar Association 2007 Annual Labor and Employment Law Conference, http://apps.americanbar.org/labor/annualconference/2007/materials/data/papers/v2/070.pdf (discussing card-check certification in the context of the proposed Employee Free Choice Act).

[129] *Id.* at 2–3 (citing Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 310 (1974); Dana Corp. and Metaldyne Corp., 351 NLRB No. 28 (2007)).

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cause within 90 days of the transition.[130] Worker-retention programs can be established on their own or may be established as part of or alongside labor-harmony agreement requirements.

The stated purpose of worker-retention programs is to (1) attempt to lessen the impact on employees of an airport-based business after its closure and (2) assist incoming employers in obtaining employees who have already proved that they can pass the security checks required to obtain clearance into sterile areas. Worker-retention provisions could arguably benefit unions as well, assuming that a previously unionized workforce might desire to unionize again under a new employer.

Other employee-centered terms may be a topic of negotiation, either between the on-airport employer and a union or between a union and the airport. One topic that appears to come up often is access to the airport. This topic specifically covers union access to workplaces that are otherwise prohibited. Additional topics are those centered on union access to employers' employee contact information and arbitration provisions.[131]

The impact and importance of these types of matters, both individually and collectively, cannot be understated. Access to the workplace in the airport setting, especially with respect to concessions operations, may be critical for making and continuing contact with putative union members. Concession operations often operate in the sterile areas of an airport (i.e., those areas beyond the security checkpoints) and thus present an obstacle to union organizers. Unions are increasingly including provisions in labor-harmony agreements that provide for employer-assisted access to union organizers. This often takes the form of an agreement that an employer will provide escorted access to the sterile areas.

Employers may find this term problematic because such activities may be perceived as tenant-sanctioned solicitation on airport premises.[132] In some instances, the union may approach the airport directly and request that it consider certain access arrangements. For many reasons that are not covered herein, both of these scenarios present many issues for the airport owner/operator. Most of these airport owner issues could require the airport to reject such access proposals to avoid security or litigation by third parties against the airport.

Along the same lines, to aid union access to putative members, unions often request lists of employees, along with home addresses, email addresses, and telephone numbers, prior to petitioning for an election and before the union is certified as the authorized bargaining representative. Such requests are usually made to the on-airport businesses, but they could also be made to the airport. Regardless of to whom the request is made, airport owners and businesses may express concerns with regard to employee rights to privacy and the potential liability that may attach to releasing such private information.

Finally, another example of an employee-centered benefit that has recently been the subject of negotiated agreements between employers and unions is the application of local "living wage" ordinances. With respect to airports, significant airport-centered pushes by unions for legislatively mandated increases in on-airport wages have taken place in many cities.[133]

With respect to the on-airport businesses, it appears that in some cases unions have advocated for organized workers to be exempt from living wage laws (more accurately, that employees covered by collective bargaining agreements need not be paid the minimum wage otherwise required under the law). It is possible that in the process of negotiating a labor-harmony agreement, this fact may come into play and could act as an incentive for the employer to assent to union demands.[134]

For example, the City of Philadelphia's living wage ordinance provides that compliance with its requirements "may be waived by a bona fide collective bargaining agreement."[135] As a result, unions seeking

[130] *See, e.g.*, San Jose Mun. Code 25.11.711.700–.740; SeaTac Municipal Code 7.45.060 (upheld in Filo Foods, LLC v. City of SeaTac, Case No. 89723-9 (Wash. 2015)).

[131] *See, e.g.*, Los Angeles Department of Airports Construction Project Labor Agreement, Art. IV (Nov. 19, 1999) (providing union access to premises).

[132] If the agreement to provide for tenant-escorted access to sterile areas occurred *after* a union was certified as the authorized bargaining representative of the tenant's employees, then a strong case may be made for the union personnel having a business purpose to visit the tenant. When the agreement addresses precertification activities (essentially a union soliciting employees for support), the case is not so clear.

[133] Broward County, Florida, in October 2015, after an extended effort by SEIU, enacted an ordinance requiring the payment of certain minimum wages for workers at Ft. Lauderdale International Airport. Similar initiatives are occurring across the United States, including efforts focused on New York and Washington, D.C., area airports. *See* Luz Lazo, *Airport Workers Plan Disruptions in Nine U.S. Cities on MLK Day*, WASH. POST (Jan. 15, 2016), https://www.washingtonpost.com/news/dr-gridlock/wp/2016/01/15/airport-workers-plan-disruptions-in-nine-us-cities-on-mlk-day/.

[134] Peter Jamison, David Zahniser & Emily Alpert Reyes, *L.A. Labor Leaders Seek Minimum Wage Exemption for Firms with Union Workers*, L.A. TIMES (May 27, 2015), http://www.latimes.com/local/lanow/la-me-ln-los-angeles-minimum-wage-unions-20150526-story.html. For commentary on unions' use of living wage laws, see Maxford Nelson, *"Living Wage" Laws Are Union Lifesaver*, WALL STREET JOURNAL (Oct. 3, 2014).

[135] PHILA. CODE § 17-1304(10).

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recognition by Philadelphia government subcontractors can offer exemption from Philadelphia's living wage law, thereby reducing the employer's costs, in return for recognition. This example demonstrates how rights and benefits outside the NLRA and RLA may become intertwined with union recognition negotiations.

These and other rights may provide additional bargaining tools between the employer and union, although in general they are not as central as the issues of neutrality and card check. These topics are accordingly not the focus of this digest and are only briefly addressed.

## IV. APPLICABILITY TO AIRPORTS

### A. Relevance of Labor Laws and Preemption in the Airport Context—A Survey of Matters that Impact Airports, Challenges to Organizing Airport-Based Employees, and Related Political and Practical Factors

Depending on the size of a particular airport, hundreds—or sometimes thousands—of persons work on airport property. A large portion of these persons do not work for the airlines (which are typically already unionized) or the airport itself, but rather are employed by companies that contract with the airport or the airlines to provide certain services. Especially at larger airports, a substantial number of employees work for concessions businesses and for companies with whom airlines contract to service their aircraft.

Unions' major source of income is the dues paid by members. For decades, unions have been facing declining membership and, therefore, declining income. Specific data on declining union membership is discussed in the next subsection. Unions have increased efforts to obtain new private-sector members, and concessions and aircraft service workers represent a tremendous area for recruiting new members. As discussed in the following section, however, unions face many challenges to obtaining new members, and these hurdles are even more substantial at airports. These challenges are at the root of the reasons why unions are increasingly looking to nontraditional organizing techniques, such as use of labor-harmony agreements, to obtain new members.

#### *1. General Statistics on Union Organizing*

*a. Unionization Statistics.*—It is well documented that union membership has been sliding for decades. The number of unionized workers, both in absolute numbers and as a proportion of the overall workforce, has been declining for many years.[136] Since 1983, the overall union membership has decreased from approximately 20 percent of the working population to just over 11 percent in 2014.[137] Although unions have been better able to maintain unionization in the public sector, resulting in proportionally higher unionization rates there, the private-sector unionization rate has fallen to less than half of what it was 25 years ago and now stands around 6.5 percent.[138]

According to research literature, since the 1990s the "vast majority" of new union members in the private sector have unionized outside of NLRB's election procedures.[139] Union elections were three times more common in 2000 than they were in 2012, and the number of new workers organized has dropped from 100,000 to 40,000 during the same time.[140]

Even though fewer private sector workers become union members through the election process, unions' success rates in elections have improved, indicating that unions have become more strategic in utilizing the election process.[141] In 2015 the unionization success rate was 66 percent, compared to 50 percent in 1997.[142]

Although unions may be more selective in utilizing the formal election process, and more successful in the elections they participate in, they still face an overall dwindling number of unionized members. The statistics are also consistent with the assertion that unions are less willing to risk their limited resources to engage in the formal election process and instead seek recognition through alternative means.

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[136] Henry S. Farber, *Union Organizing Decisions in a Deteriorating Environment: The Composition of Representation Elections and the Decline in Turnout*, Princeton University Industrial Relations Section, Working Paper No. 577, at 1, http://arks/Princeton.edu/ark:/88435/dsp-01mg74qm23v (Nov. 4, 2013).

[137] Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members–2015, USDL-16-0158 (Jan. 28, 2016) [hereinafter BLS 2015], at 1.

[138] BLS 2015, at 1 (private-sector rate for 2015 was 6.7 percent); Barry T. Hirsch & David A. Macpherson, Union Membership and Coverage Database from the Current Population Survey, at www.trinity.edu/bhirsch/unionstats (Jan. 5, 2009).

[139] Dorian T. Warren, *Union Organizing in National Labor Relations Board Elections*, Roosevelt Institute (Oct. 7, 2015), at 1.

[140] Warren at 2–3.

[141] *Id. See also* NLRB, Election Reports FY 2011–FY 2015 (available at https://www.nlrb.gov/reports-guidance/reports/election-reports) and Bureau of Labor Statistics, Employee Union Representation Elections, 1997–2009, http://www.bls.gov.opub/ted/2010/ted_20100709.htm (July 9, 2010) [hereinafter BLS 1997–2009] (showing success rates increasing while elections decreasing).

[142] NLRB, FY 2015 NLRB Elections–Summary (available at https://www.nlrb.gov/reports-guidance/reports/election-reports/election-reports-fy-2015); BLS 1997–2009.

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*b. Costs to Union to Organize a Work Unit.*—Organizing workers is both a costly and uncertain process.[143] The costs to a union in organizing a unit can include monitoring and responding to management activity, engaging with employees, and campaigning to collect signatures.[144] As discussed in Section II.A.1.a, "campaigning" before petitioning for an election and then between the petition and the election is a long and involved process that includes numerous persons on the ground, as well as a litany of supporting personnel such as counsel and research staff.

There are few formally researched estimates of unions' organizing costs. One commonly cited paper estimated the cost per each new member to be just over $3,000 (adjusted for inflation to 2015 dollars).[145] Although this estimate reflects analysis of organizing data that is now decades old, it provides at least a baseline for the mercurial costs associated with unionizing.[146] The literature has also noted that the costs required to maintain or increase union numbers likely far exceed the amount unions spend on organizing.[147] Because the costs of organization are based on federal labor rules, i.e., the election process, unions have directed considerable effort and resources to reforming the labor organization process.[148]

Considering the overall success rate for unions is still only around 66 percent, substantial risk exists for unions investing such sums.[149]

### 2. Practical Airport-Centered Realities for Unions

Compounding the general challenges for unions, from a practical standpoint there are numerous specific or unique obstacles that present themselves to unions that are attempting to organize employees at airports, including the characteristics of the workforce and the workplace. These make it particularly difficult to organize employees and show why unions are increasingly looking for alternatives to traditional organizing.

*a. The Relevance of the Security Identification Display Area (SIDA) and Related Security Concerns.*—Security at airports presents a unique challenge to unions that are attempting to conduct organizing activities within SIDAs in airports. Federal and local security requirements request that all employees and visitors be screened and display badges within certain areas of the airport; this potentially prevents unions from campaigning or conducting other union activities in employer areas that might be accessible outside SIDAs.

The practical impact of this is an almost insurmountable barrier to having a nonemployee come near the workplace to actively engage employees about the potential for being represented by a union. Further, most airports forbid use of SIDA credentials to gain access to secured areas when not on company time. This similarly constructs a barrier to having employees serve as agents for the union to actively engage other workers when they are not working.

In addition, most airports have security requirements that prohibit any activity that may adversely impact passenger movement through the terminal. This further hinders most attempts to engage in large-scale informational activities.

*b. Nature of Potential Units at Airports.*—The characteristics of employee units at airports also present a particular problem for unions trying to organize on-airport private employees. These characteristics include:

1. Size.—Airport employee units are relatively small, resulting in fewer employees unionized as a result of each campaign. For example, under the "developer" and "fee manager" concession models, the concessions programs are made up of many independently operated entities who may only employ 20 employees each. In light of the costs of organizing employees, the potential return on investment may be small.

2. Cost and Work-Rule Sensitivity.—In general, doing business on an airport presents some added financial challenges. Costs to start the business are often high, and businesses face considerable uncertainty. Large-scale disruptions in passenger throughput (such as the Severe Acute Respiratory Syndrome (SARS) epidemic or the terrorist attacks of September 11, 2001) can decimate a business in a short period of time. Major changes can occur even without such far-reaching events. Airlines may

[143] Emin Dinlersoz, Jeremy Greenwood & Henry R. Hyatt, *Who Do Unions Target? Unionization Over the Life-Cycle of U.S. Businesses*, IZA Discussion Papers, no. 8416, hdl.handle.net/10419/102342 (2014).

[144] *Id.* at 9 n.13.

[145] Henry S. Farber & Bruce Western, *Accounting for Decline of Unions in the Private Sector*, 1973–1998, Journal of Labor Research, vol. XXII, no. 3, at 479 (Summer 2001) (citing Paula Voos, *Trends in Union Organizing Expenditures*, 1953–1977, Industrial and Labor Relations Review, 38(1): 52–63 (1984) (adjusting Voos's numbers to 1998 dollars)).

[146] Emin Dinlersoz, Jeremy Greenwood & Henry R. Hyatt, *Who Do Unions Target? Unionization Over the Life-Cycle of U.S. Businesses*, IZA Discussion Papers, no. 8416, hdl.handle.net/10419/102342 (2014), at 12 n.16 (Noting that Voos's estimates on "real organizing expenditures per organizable worker remained relatively constant over the years she studied.").

[147] Farber & Western, *supra* note 145, at 479–80 (estimating that based on 1998 figures for amounts unions spent on organizing, unions would have to increase expenditures 500 percent to maintain steady union numbers.).

[148] Farber & Western, *supra* note 145, at 479.

[149] *See supra* note 142 (Bureau of Labor Statistics and NLRB data).

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drastically reduce service or even pull out of a market altogether—events that will have a major impact on a business's cash flow. Further, staffing challenges are present with on-airport businesses. The times that the businesses may have to remain open are often a challenge, especially when schedules are required to be adjusted based on air traffic and air service. This makes the prospect of unionizing certain on-airport workforces and the potential implementation of strict work rules a point of concern for both unions and businesses.

3. Turnover Rates.—Turnover rates for nonunionized, low-paying jobs are high at airports just as they are in other areas.[150] Having a constantly changing workforce makes it harder for unions to establish and build relationships with these employees that would lead to an agreement to allow the union to obtain authorization cards from employees.

## B. Attempts to Overcome the Obstacles—Union Initiatives to Utilize "Proprietor Rights"

### *1. Challenges to and Strategies for Unionizing Airport Employees*

*a. Short Introduction to Union Elections and Challenges Faced by Unions Seeking to Organize Airport-Based Employees.*—As previously noted, unions face unique challenges in organizing airport employees. Practically speaking, the often isolated location and unique security requirements to access the targeted places of businesses at airports make it particularly difficult for union organizers to conduct the various identification and outreach operations necessary to engage in a unionizing election campaign. In addition, the concessions management structure at some airports, where concession businesses are run by many different employers rather than one prime or master concessionaire, significantly increases the burden of organizing each group of employees and initiating the elections process with each employer. As a result, unionization through elections is an especially burdensome process at third-party developer-managed airports.

*b. How a "Labor-Peace" Requirement Assists a Union in Organizing Airport-Based Employees.*—Labor-peace requirements streamline the process for unionization in several ways. First, under labor-harmony ordinances, employers are often required to negotiate some form of agreement with the union. Securing the requirement to enter into a labor-harmony agreement at the airport-sponsor or concessions-developer level reduces the burdens of seeking out each individual airport employer. By default, each employer must confer some benefit to the union and consequently give up some rights it retains under federal labor laws. In some cases, the right to negotiate a labor peace agreement may even be a prerequisite to entering into a contract with the responsible public authority, which further decreases the leverage private employers have with the union by making the union a gatekeeper to the public contract.[151] In addition, it is possible, although not common, for labor-harmony ordinances to expressly dictate some terms of the required labor-harmony agreements, such as card check and neutrality provisions.[152]

*c. Current Trends in Union Organizing at Airports.*—As airport-concessions management models have changed over the past few decades, so have union-organizing methods. With the growth of third-party developer concessions models, in which airport sponsors contract with independent companies to serve as developer and landlord for the concessions side of the airport,[153] unions have been forced to change approaches. At airports managed by third parties, unions are no longer able to negotiate with one prime or master concessionaire. Rather than negotiate with each individual employer directly, unions have instead sought alternatives to reduce the administrative and logistical burdens of organizing different employers at an airport.

1. Unions Turning to Nontraditional Organizing Techniques.—Due to the practical and structural difficulties previously outlined, and in light of the historical success of unionizing public sectors that was discussed in Section IV.A.1.a, unions have increasingly sought to unionize private employees through public sector approaches over the last two decades, including legislative requirements to unionize. Public entities' proprietary interest in property and services they own and control provides the lynchpin for union efforts to extend their influence from public sector matters into the private sector, where they have been losing members for years.

2. Unions Couple Employee-Rights Issues to Organizing Efforts.—To attract new members at airports, unions (UNITE HERE and Service Employees International Union (SEIU) in particular) have been affirmatively taking on issues important to airport employees. Employee-rights issues, such as

[150] *See* Allegra Kirkland, *New York Airport Workers Organize to End Two-Tier System*, The Nation (Nov. 26, 2013), http://www.thenation.com/article/new-york-airport-workers-organize-end-two-tier-wage-system/.

[151] *See, e.g.,* San Jose Mun. Code Ord. 25.11.1100.

[152] *See, e.g.,* Airport Commission, City and Cty. of San Francisco, Rule 12 (Nov. 2009).

[153] *See* Resource Manual for Airport In-Terminal Concessions (Airport Cooperative Research Program, Report No. 54, Transportation Research Board, 2011), at ch. 1 for evolution of concessions management in the United States and ch. 8 for a discussion on various concessions management models.

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"living wage" requirements and healthcare benefits, including paid sick time off, have featured prominently in recent union activity.[154] Unions have helped spearhead many rights-focused campaigns, such as Fight for $15, the much-publicized campaign to urge fast food restaurants to pay employees a $15 base wage.[155] This and other such campaigns have specifically targeted airports.[156] These campaigns have allowed unions to rally new public and political support. They also serve as a new recruitment method. Research suggests that unions are moving toward this strategy as the result of an adoption of the rights-based discourse used in international human rights.[157]

3. AIRMALLed Initiative—Union Opposition to Airport Concessionaire Model.—A particularly good case study for the most recent approaches used by unions to organize at airports is the campaign led by UNITE HERE, a labor organization representing airport concessionaire employees at Baltimore/Washington International Thurgood Marshall Airport (BWI). BWI's concessions program is operated by AIRMALL USA, a concessions developer. In 2011, UNITE HERE initiated a multipronged campaign to unionize BWI that focused on multiple business levels, including individual employers, AIRMALL, and the public officials in charge of the airport.[158]

At the individual employer level, UNITE Here focused on numerous businesses by recruiting individual employees and then utilizing those individual's rights under the NLRA to engage in work-condition protests, informational demonstrations, or card-signing drives. Such unionization activities were met with opposition by management.[159] At the airport-wide level, UNITE HERE implemented a thoroughly researched campaign that criticized both AIRMALL individually and the airport-concessions developer model in general.[160] Through a series of white papers, UNITE HERE's Airport Group challenged the value proposition to public airport owners of the concessions developer model, criticized AIRMALL's business performance and purported de facto public subsidization, and recommended that airports avoid "risks posed to the quality of concessions jobs by utilizing the prime and direct leasing concessions model."[161] In addition, UNITE HERE lobbied state officials to criticize AIRMALL's business practices and urge improved worker benefits.[162]

As previously discussed, when an airport has small, widely dispersed businesses, such as may be found in a decentralized concessions program, organizing employees is a challenge. It was thus a rational approach for UNITE HERE to seek to change the nature of the on-airport concessions program. An additional effect of this strategy was to pressure AIRMALL to require individual concessionaires to enter into labor-harmony agreements with UNITE HERE.[163] As described by the media, UNITE HERE believed that "Airmall occupies a strategic spot between the concessions companies and the owners of the airport itself…."[164]

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[154] *See* Peter Jamison, David Zahniser & Emily Alpert Reyes, *L.A. Labor Leaders Seek Minimum Wage Exemption for Firms with Union Workers*, L.A. Times (May 27, 2015), http://www.latimes.com/local/lanow/la-me-ln-los-angeles-minimum-wage-unions-20150526-story.html; Jenny Brown, *Minimum Wage Momentum–at the Airport*, LABOR NOTES (Nov. 15, 2013), http://www.labornotes.org/2013/11/minimum-wage-momentum-airport.

[155] *See* Fight for $15, http://www.fightfor15.org (visited Feb. 13, 2016); Matt Surrusco, *New York Airport Workers Strike, Telling Management "Poverty Wages Don't Fly,"* TRUTH OUT (Apr. 26, 2015), http://www.truth-out.org/news/item/30438-new-york-airport-workers-strike-telling-management-poverty-wages-don-t-fly.

[156] *See* Its Our Airport, itsourairport.org (visited Feb. 13, 2016) (focusing on Sea-Tac Airport).

[157] Lance Compa, *Trade Unions and Human Rights*, in BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 209, 228–29 (C. Soohoo, C. Albisa & M.F. Davis eds., 2008).

[158] *See* Bruce Vail, *United Here Campaign Takes Flight at Baltimore-Washington Airport*, inthesetimes.com (Dec. 20, 2013):

> Overall, the BWI campaign is making process at several levels…. The on-the-ground organizing effort has built support for workers at McDonald's, Silver Diner and elsewhere, while the corporate-targeted initiative of the campaign is increasing pressure on AirMall. And the timing appears good for elected officials to make their influence felt, as well.

[159] *See* Vail, *supra* note 158 ("Action in favor of concession workers at the NLRB has been a recurring element of Unite Here's campaign at BWI. In addition to the local McDonald's franchise, Lavan Enterprises, the union has threatened unfair labor practice charges against a number of other individual concession operators.").

[160] *See* UNITE HERE, Airport Group, www.airportgroup.info (visited Oct. 29, 2015, and through archive.org); UNITE HERE!, You've Been AIRMALLed!, http://youvebeenairmalled.tumblr.com/ (visited Oct. 29, 2015).

[161] Bhav Tibrewal, Airport Group, UNITE HERE, AIRMALLed: Failures of the Airport Concessions Developer Model—Less Rent Generated Under the Developer Model" (2011); Bhav Tibrewal, Airport Group, UNITE HERE, AIRMALLed: Failures of the Airport Concessions Developer Model—Sales Not Enough to Justify Lower AIRMALL Rents (May 2011); Bhav Tibrewal, Airport Group, UNITE HERE, AIRMALLed: Failures of the Airport Concessions Developer Model—Poverty Jobs Hurt Workers and Taxpayers Under the Developer Model (Dec. 2011) (UNITE HERE, Dec. 2011 White Paper), at 2.

[162] *See* Vail, *supra* note 158.

[163] Vail, *supra* note 158 ("According to Abdul-Malik, a critical goal of the campaign is to hammer out a 'labor peace' agreement with AirMall that could set the groundwork for better labor conditions at BWI.").

[164] Vail, *supra* note 158.

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The success of the AIRMALLed campaign is said to be mixed. AIRMALL has refused to negotiate, and UNITE HERE has been forced to defend its business practices and seek other measures to address labor issues, including implementing new educational programs for employees.[165] AIRMALL has faced labor and political pressure at other airports for which it is seeking to bid for developer rights.[166] More broadly speaking, the events at BWI have brought unionization to the forefront of discussions surrounding new and renewed contracts for concessions development around the country. The union's efforts at BWI continue, most recently with efforts seeking to terminate the current concessions contract.[167]

### *2. Political Initiatives: Change the Playing Field Via Sponsor-Required Contractual Provisions*

As previously indicated, unions are leveraging their political clout to alter the labor–management dynamics at airports.[168] The last decade in particular has seen this move exemplified through efforts to establish labor-harmony and other labor-related requirements as prerequisites to doing business with airport sponsors. In doing so, unions and local governments are utilizing the market-participant doctrine to effectively adjust the labor-management relationship standards set out by federal laws such as the NLRA. Under new labor-harmony ordinances, employer rights, such as the right to hold an election and to free speech, which are enshrined as the baseline for conduct in the NLRA, may be set aside. Likewise, union rights to strike are effectively and contractually abdicated as a regular course of business in exchange for easier recognition. In a similar manner, new "ground rules" for worker retention, including a 90-day firing freeze after concessionaire succession, are becoming increasingly normal.

[165] *See AIRMALL USA Takes Issue With UNITE HERE! Report*, Airport Revenue News (May 25, 2011); Kevin Rector, *BWI Concessions Company Offers New "Enrichment" Program for Workers*, Baltimore Sun (Jan. 28, 2014).

[166] *See* Kelly Yamanouchi, *Airport Workers Rally at Atlanta City Hall*, Atlanta Journal-Constitution (Sept. 29, 2015), http://airport.blog.ajc.com/2015/09/29/airport-workers-rally-at-atlanta-city-hall/.

[167] *See Opting Out of Concession Contract Could Cost BWI Millions, CEO Ricky Smith Says,* Baltimore Business Journal (Feb. 12, 2016), http://www.bizjournals.com/baltimore/news/2016/02/12/opting-out-concession-contract-could-cost.html.

[168] *See also* Peter Dreier, *The Wage War's Two Battlegrounds: The Ballot Box and the Board Room*, Huffington Post (May 20, 2015), http://www.huffingtonpost.com/peter-dreier/the-wage-wars-two-battlegrounds-the-ballot-box-and-the-board-room-b-7347580.html.

## C. Context in Which Labor-Peace and Worker-Retention Programs Arise and Implications for Airport Sponsors

The matters discussed herein can arise in a variety of on-airport settings.

### *1. Concessions*

Unions are currently particularly focused on boosting membership among concession businesses. Several unions, particularly SEIU and UNITE HERE, have instituted concerted efforts to organize many airports' concessions workers by using labor-harmony strategies. When a master concessionaire model is in place (i.e., one company operates a large portion, if not all, of the concession sites within the airport), a union will advocate for the addition of a labor-harmony requirement to the set of prerequisites needed to have a valid agreement with the airport and thereafter will set out to organize the large group of employees that work for the master concessionaire.

When a more decentralized arrangement exists (e.g., a developer model or fee manager model), the desirability from a union perspective for a labor-harmony requirement may be more critical, due to the challenges it faces in organizing such situations (see Section IV.A.1.b). Therefore, it is in these situations that unions have focused most of their attention in recent years.

Another point with respect to concessions operations is that concessions management–labor relations are generally covered by the NLRA. Due to the NLRA's location-specific standard for unionization—and because of the applicability of the NRLA from a legal standpoint—concessions employees are potentially easier to organize.

### *2. Ground Services Workers*

Ground services workers, such as under-wing personnel (baggage handlers, lavatory service personnel, contracted maintenance workers, etc.); on-aircraft personnel (such as aircraft cleaners); and passenger service personnel (such as wheelchair-assist personnel) have also been the focus of labor-harmony requirement efforts. It appears that SEIU has made the most efforts in this arena recently.[169] Ground services management–labor relations are generally covered by the RLA if the subject services are provided directly to an air carrier. As such, non-unionized ground service employees and the unions seeking to represent them face greater legal challenges with organizing, because organizing ground

[169] *See* Filo Foods, LLC v. City of SeaTac, Case No. 89723-9 (Wash. 2015).

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service members on a national basis is an extremely time-consuming and burdensome task. The implications for the companies and the airlines that they serve are also more far-reaching and may be of more concern to both parties.

### 3. Air Carriers

Other potential types of industries and employers that may be affected by labor-peace agreements and worker-retention programs include air carriers—both mainline and commuter. In many instances, especially with respect to smaller carriers, workers may not be unionized, and the imposition of labor-harmony requirements by an airport may have a profound impact on the carrier. This is especially true because of the applicability of the RLA, where a *national* impact on the carrier may result from a union-organizing initiative.

Mainline carriers may be quite interested in such initiatives due to the potential cost impact they may feel, albeit derivatively.

It should be noted here that the employment and contracting relationships between the public entities that own airports and the private employers that manage, operate at, and provide services for those airports may vary significantly. These differences may affect the ability to apply and enforce labor-harmony agreements, worker-retention programs, and other similar provisions. The myriad ways in which airport ownership and control can be structured are beyond the scope of this digest.

### 4. Practical Impact on Airport Sponsors

Airport sponsors are faced with a myriad of issues in this arena that go beyond the exposure to legal action against them. The potential impact of these issues may be substantial and may have a long-term impact on the airport. The following is a selection of the potential impacts that airport sponsors should consider.

*a. Impact on Concessions Econometrics.*—With the nonaeronautical side of airports growing increasingly important in terms of airport financial stability and broader community economic health, cost inputs such as labor costs can have significant impacts on the financial viability of an airport.

Because the effect of labor-peace requirements often results in increases to labor costs to or near union wage levels, the impact may be to significantly raise operating costs, with implications for the financial performance of concessionaires and, consequently, concession revenues to the airport.[170] The introduction of a worker-retention program can similarly alter the cost savings anticipated from a change in concessionaires. Potentially restrictive work rules may further increase costs for concessions operators.

These and other labor-related factors that may result in high operational costs have the potential to "discourage[] companies from submitting concession proposals or reduce[] financial offers in proposals; concepts that have higher labor cost requirements may not be practical or feasible as an in-terminal concession."[171] Further, when labor-related factors are implemented, existing businesses, especially small and/or disadvantaged businesses, may be more profoundly impacted, which may result in fewer small or disadvantaged businesses as part of the mix of businesses at the airport.

*b. Impact on Costs Associated with Air Carrier Operations: Macro Airport Econometrics.*—Airport carriers may also be significantly affected by higher labor costs associated with labor-harmony and worker-retention requirements, both directly and indirectly. When the labor-harmony requirements directly impact their own employees, these higher employee costs will of course affect carriers' bottom lines. The same impact could result when contracted service providers are affected by labor-harmony requirements.

Less directly, if a labor-harmony initiative is implemented in the concessions arena and results in reduced nonaeronautical revenues (i.e., profits), this could adversely impact not just the airport but also air carriers when those revenues are shared with them (under residual or hybrid use-and-lease agreements). Higher airport-related costs and lower nonaeronautical revenue may thus impact the attractiveness of particular airports, influencing air carriers' decisions to locate to, relocate to, or invest in a particular airport.

*c. Impact on General Operational Climate at Airport.*—Beyond labor costs, there are other considerations around unionization that may negatively impact airport operations. For example:

1. Near-Term Impact.—Union-organized demonstrations, picketing, and other potentially disruptive activity at or near airport facilities, even if legal, could negatively damage the reputation and customer relations of particular airports. Although labor-harmony, worker-retention, and other similar agreements or requirements may reduce the threat of these activities occurring, during the lead-up time before such measures are in place or in the event

[170] ACRP Report 54, at 170 § 10.13.2.

[171] *Id.*

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that restrictions on union self-help measures expire under an agreement, the potential for these disruptive measures may actually increase. In addition, providing access to restricted areas may increase the threat of security risks at airports.

2. Long-Term Impact.—The ostensible benefit of incorporating labor-harmony and other measures into any agreement with airport employers is that disruption at the airport will decrease. (Airports should note that the actual scope of the prohibition against labor disruptions should be carefully examined—many prohibitions are so narrowly defined as to have little practical impact at the airport in general.)

This benefit may be offset, however, by commercial inefficiencies and inflexibility caused by the presence of unionized workers. For example, additional job security gained by employees through unionization may also limit employers' ability to adjust employment to meet new circumstances. Policies such as worker-retention pools might also restrict employers' ability to recruit the best talent for the position needed. The presence of unions at an airport may furthermore disincentivize certain businesses from locating at the airport, making it more difficult for an airport to attract the best companies and maintain competition for the opportunity to do business at the airport. Unionization may also politicize commercial decision-making at the airport, threatening its financial stability.

3. Impact on Airport Control Over Which Concessionaires Do Business at Airport.—In addition to the impacts previously stated, labor-peace and worker-retention requirements may also affect the selection and retention of concessionaires at an airport. Some franchises will not negotiate with unions, either as a principle or as applied to particular unions. Others may not be able to incur the additional costs imposed by unionization. The pool of potential concessionaires may therefore become significantly smaller.

## V. THE AIRPORT SPONSOR—SOURCES OF RISK AND POTENTIAL CLAIMS AGAINST THE SPONSOR

Airports, whether governed directly by an airport sponsor (e.g., by an authority board) or by a municipality in which an airport is located, are exposed to litigation risks from a variety of sources. The major sources of potential suits are briefly outlined in the following section.

### A. Suits from On-Airport Businesses (Concessionaires and Airlines)

The on-airport businesses that are potentially affected by labor-harmony requirements are potential sources of litigation risk. Faced with the prospect of being directed to deal with a putative union, the anticipated demands to be made by the union, and the restrictions and requirements that would follow by having a unionized workforce, these businesses have multiple motivations to challenge the legality of both the labor-harmony requirement itself and how such a requirement may be implemented.

This group obviously includes concessionaires and airlines. Other entities that may challenge labor-harmony mandates include companies servicing under-wing aircraft and aircraft cleaning companies.

Especially when a large corporation is involved, the finances of a given situation may favor the institution of litigation against the airport.

### B. Suits from On-Airport Employees

On-airport employees, or unions representing them, may sue to implement or enforce labor-harmony or worker-retention programs. These suits would focus on the loss of employee-centered rights, such as the right to have a secret-ballot election or to not join a union or on the invasion of privacy or harassment that could result from the release and use of their personal contact information. These cases could take the form of lawsuits filed in state or federal courts or complaints filed at the federal agencies that would have jurisdiction over such matters (either NLRB or NMB).

There have been no such cases thus far. This is likely due to a variety of factors, not the least of which is the tremendous litigation-related costs that an individual would face in such a battle. It is worth noting, however, that organizations such as the National Right to Work Foundation exist to aid workers in such endeavors, and it may only be a matter of time until suits are filed in this arena.

It is also worth noting that there have been numerous NLRB unfair-employment-practices actions brought against airport businesses.[172] Although not directly targeting airports, these suits may nevertheless impact airport business and operations and may ultimately lead to airport participation in such suits when a labor-peace or worker-retention agreement

[172] *See Au Bon Pain at Philadelphia Airport,* Case 04-CA-141681, Advice Memorandum (NLRB Apr. 22, 2015); Kelly Knaub, NLRB Hits Au Bon Pain With Unfair Labor Practices Suit, LAW360 (Feb. 5, 2015), http://www.law360.com/articles/618658/nlrb-hits-au-bon-pain-with-unfair-labor-practices-suit.

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has been put in place. Also of note is the fact that some labor-harmony agreements and worker-retention programs provide for arbitration or mediation as a dispute-resolution mechanism, which may bar or deter employees and unions from suing to implement or enforce such provisions.[173]

## C. Industry Groups

Responding in part to the financial impact that airport-mandated labor requirements may have on their members and probably also accounting for the challenges that employees may face in bringing suits individually, industry groups such as A4A and the International Air Transport Association (IATA) may choose to challenge locally derived regulations.

Indeed, A4A has formally instituted at least one suit in the United States,[174] and the potential exists for more to be filed in the future.

## D. Legal Means and Theories

Various potential claims exist against both airports and on-airport businesses that may enter into labor-harmony agreements. A brief summary of these claims is outlined in the following section.

### *1. Declaratory Judgment Actions Asserting Preemption*

One litigation strategy pursued by employers is to seek a declaratory judgment against a public-airport owner based on federal preemption of labor-harmony or worker-retention agreements.[175]

On-airport businesses have sued airports to reverse or overturn government-imposed labor provisions, including labor-harmony and worker-retention programs.[176] This will particularly be the case where airport sponsors appear to be overstepping the sometimes blurry boundary between proprietary interest holder and regulator.

One of the earlier cases involving labor-harmony ordinances at airports provides a good illustration of the type of suit that may be brought by an airport business against a sponsor. In *Aeroground*, a district court in the northern district of California sided with an employer with regard to a local action that it ruled constituted a regulation preempted under the NLRA.[177]

The action in dispute in *Aeroground* was a rule adopted by the San Francisco Airport Commission ("Airport") known as the "Labor-Peace/Card-Check" rule ("card-check rule"). The rule's purpose was to minimize the perceived threat of labor unrest arising out of union organizing drives at the Airport.[178] The rule prohibited unions from undertaking economic actions such as strikes, picketing, and boycotts in relation to organizing campaigns and also required certain employers operating at the Airport to enter into a "Labor-Peace/Card-Check" agreement with any union that had registered with the airport director and requested such an agreement.[179] Under the rule, the labor agreement was required to provide that the preference of the company's employees with respect to union representation be determined by a card-check procedure.[180] If a majority of the employees signed and returned the cards, the union would become the employee's exclusive bargaining representative.[181] Absent such an agreement, an employer had the right under the NLRA to insist that the issue of union representation be determined by a secret-ballot election conducted by NLRB.[182] Therefore, the card-check rule at the Airport compelled employers that desired to continue doing business at the Airport to forfeit their right to have their employees engage in a secret election conducted by NLRB.[183] In addition to mandating a

[173] *See, e.g.,* Miami-Dade Cty. Res. No. R-148-07:

> In the event a proposer is unable to reach an agreement with a labor organization regarding the terms of a labor peace agreement, the dispute between the proposer and the labor organization shall be resolved by expedited binding arbitration in which the decision shall be rendered within ten (10) days of the request for arbitration but no later than five days prior to the date the proposal is due.

[174] *See* Air Transport Ass'n of America v. Port of Seattle, Case No. 2:14-cv-01733 (JCC) (W.D. Wash., filed Dec. 1, 2014).

[175] *See, e.g.,* Aeroground, Inc. v. City and County of San Francisco, 170 F. Supp. 2d 950 (N.D. Cal. 2001) (company providing cargo-handling services for airlines at an airport successfully challenged requirement by airport that it enter into a labor-peace/card-check agreement with a union; company asserted that card-check provision was preempted by the RLA and NLRA). Unions have also attempted to use preemption to fight back against legislative efforts to prohibit labor-harmony-type agreements. *See* Southeast La. Build. & Const. Trades v. Jindal, Civil Action No. 13-370 § "K" (5) (E.D. La. May 27, 2015) (union unsuccessfully argued that state law prohibiting state governmental entities from requiring project-labor agreements (i.e., construction project-specific labor-harmony agreements) was preempted by the NLRA).

[176] *See, e.g.,* Filo Foods, LLC v. City of SeaTac, Case No. 89723-9 (Wash. 2015) (airline industry trade association filed suit seeking to overturn city-mandated training requirements for on-airport personnel; among the claims brought were that the locally required labor mandates were preempted by federal law covering collective bargaining, OSHA, and other federal laws); *Aeroground*, 170 F. Supp. 2d 950 (*see supra*, n.175 description).

[177] *Aeroground,* 170 F. Supp. 2d 950.

[178] *Id.* at 952.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.* (citing 29 U.S.C. § 159(e); § 9 of the NLRA).

[183] 170 F. Supp. 2d at 953.

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card-check procedure, the rule also included other provisions affecting the conduct of employers at the Airport, one of which required the labor agreement to compel the parties to submit to binding arbitration over disputes about the proper interpretation of the agreement or issues arising out of the card-check process.[184] Notably, the card-check rule also obligated employers to include in any subcontract a provision requiring the subcontractor to abide by the terms of the rule.[185]

Aeroground, a company that provided baggage services for the Airport, challenged the rule after the International Brotherhood of Teamsters requested Aeroground to enter into a labor agreement with it under the card-check rule, arguing that the NLRA preempted the Airport's requirement.[186] The court agreed, holding that the card-check rule was preempted under the *Garmon* doctrine (which "stands for the proposition that states and municipalities may not set forth standards of conduct that are inconsistent with the substantive requirements of the NLRA.")[187] Although the *Garmon* case involved concerted activities and Unfair Labor Practices (ULPs) under Sections 7 and 8 of the NLRA, the Aeroground court recognized that the doctrine had also been applied to conduct related to the activities regulated by Section 9 of the NLRA, such as the process for determining union representation.[188] Moreover, the "court need not decide whether the conduct at issue would be deemed to be protected or prohibited by the NLRA, since 'it is enough that the conduct upon which [Aeroground's] causes of action are based is "arguably" [protected or] prohibited.'"[189]

The court held that the card-check rule interfered with the substantive rights and requirements established by Section 9 of the NLRA, which provides a formal mode for employees to select and reject their bargaining representative through secret-ballot elections conducted under the NLRA, and that employers have the right to insist on such an election.[190] Because the card-check rule required the employers operating at the airport to forego this right by agreeing (as a condition of its permit) that union representation may be determined by the card-check procedure, the court held that the rule set forth standards that were "inconsistent with the substantive requirements of the NLRA by requiring conduct that conflicts with certain options for employers that are protected by the NLRA."[191] As such, *Aeroground* showed significant probability that the rule was preempted under the *Garmon* doctrine.

Next, addressing the market-participant exception, the court in *Aeroground* applied the *Cardinal Towing* test (set forth previously in Section II.C.2) and held that the Airport was not acting as a market participant in passing the rule and therefore was not exempt from preemption. Under the first question of the *Cardinal Towing* test—whether the challenged action essentially reflects 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—the *Aeroground* court held that the rule was not a mechanism for the Airport to efficiently procure goods and services. To the contrary, the rule required all nonexempt employers at the Airport to enter a labor agreement with a requesting union under the threat of cutting the employer off from doing business at the Airport. Unlike other cases in which the market-participant doctrine had been used to shield governmental action from NLRA preemption, the rule was not an effort by the Airport to contract directly with the employers for goods and services.[192] "[T]he Supreme Court made clear in *Boston Harbor* that its decision rested in part on the fact that the agency's action was an attempt 'to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost…[and that] the challenged action…was specifically tailored to one particular job.'"[193] That was not the case in *Aeroground*.

The *Aeroground* court reasoned that the rule operated essentially as a licensing scheme that controlled the conditions under which Aeroground and other employers could contract with private third parties:

> In *Boston Harbor*, the Court recognized that "a very different case would have been presented had the city of Los Angeles purchased Taxi services from Golden State in order to transport city employees." Similarly, a different situation

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Aeroground,* 170 F. Supp. 2d at 955 (citing *Gould*, 475 U.S. at 286).

[188] *Id.* (citing Penn Nurses Ass'n v. Penn State Educ. Ass'n, 90 F.3d 797, 803-03 (3d Cir. 1996); NLRB v. Western Meat Packers, Inc., 350 F.2d 804, 806 (10th Cir. 1965); St. Francis Hosp. v. Ct. Board of Labor Relations, 1974 U.S. Dist. LEXIS 5990 (D. Conn. 1974)).

[189] *Id.* (quoting and citing *Penn Nurses*, 90 F.3d at 802).

[190] *Id.* (citing 29 U.S.C. § 159).

[191] *Id.* at 956.

[192] *Id.* at 957 (citing *Boston Harbor,* 507 U.S. at 232 (City agency imposed labor requirements on successful bidder as a condition for being hired by the agency to complete a harbor cleanup project)); *Cardinal Towing*, 180 F.3d at 689 (City imposed specific requirements on towing company hired by the City to perform nonconsensual tows for the police; the requirement did not apply to nonconsensual tows requested by private-property owners).

[193] *Aeroground,* 170 F. Supp. 2d at 957 (citing *Boston Harbor*, 507 U.S. at 232).

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> would exist here if defendants purchased Aeroground's cargo-handling services. But defendants do not assert that they contracted directly with Aeroground in this regard; rather, defendants have attempted to influence the behavior of certain employers at the airport ostensibly to minimize labor unrest. Accordingly, the card check rule cannot be characterized as an effort by the airport to procure goods and services for some discrete city project.[194]

The court also concluded that under the second prong of the *Cardinal Towing* test—whether the narrow scope of the challenged action defeats an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem—the card-check rule was not narrow in scope. The court reasoned that the rule applied to all nonexempt employers at the Airport and had the effect of controlling the conduct of these employers in their dealings with third parties. "Such an effort is a classic example of regulation, suggesting that defendants intended the rule to encourage a general policy regarding employer–employee labor relations at the Airport."[195] The *Aeroground* court stated that the key issue is whether the law at issue enables the city or state entity to procure goods or services.[196] The court notably went on to hold that statements in the resolution stating that the sole purpose of the rule was to protect the Airport commission and its proprietary interest in the efficient operation of the Airport and the resulting revenues from these operations did not save the rule from preemption.

Since San Francisco's labor-harmony ordinance—and notwithstanding the court's ruling in *Aeroground*—a number of other local governments have enacted similar ordinances as applied to airports, including elsewhere in California, Florida, New York, Pennsylvania, and Washington.[197] These requirements, which also rely on the market-participant principle, are far less prescriptive.

### *2. Governmental Interference with Employer and Employee Rights Under 42 United States Code Section 1983*

Using the preemption concepts previously outlined, other parties have brought suits that use the federally guaranteed rights of both employees and employers as a basis to assert that the governmental entity is—by requiring labor-harmony agreements—violating § 1983 of Title 42 of the United States Code (U.S.C.).

Both employers and employees, or unions representing employees, may sue a public airport owner pursuant to § 1983. Section 1983 of Title 42 of the U.S.C. provides "a private right of action against a person who, under color of state law, deprives another of rights secured by the Constitution or by federal law."[198] Accordingly, the two elements required for a § 1983 claim are that (1) the act in question occur "under color of state law," and (2) there has been a deprivation of rights secured to the plaintiffs either by the Constitution or by federal law.[199]

The Supreme Court has previously held that "the interest in being free of governmental regulation of the peaceful methods of putting economic pressure upon one another is a right specifically conferred on employers and employees by the [National Labor Relations Act]." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 112 (1989). In particular, the NLRA "creates two protected zones that must be kept free from state regulation,"[200] based on the *Garmon* and *Machinist* principles of preemption previously discussed in Section II.B. "The *Garmon* rule creates a zone reserved for [NLRB] jurisdiction, and the *Machinist* rule creates a zone reserved for market freedom."[201] The market-participant doctrine, however, exempts state and local action from these zones, thus potentially undermining § 1983 claims.[202]

Several airport-centered cases illustrate how § 1983 claims may arise and be argued in front of a court. In *Flying Eagle Espresso, Inc. v. Host International, Inc.*, a subtenant sued an airport concessionaire and the airport owner for violating § 1983, among other things, when the concessionaire and the airport owner pressured the subtenant into accepting a labor-harmony agreement with a union seeking to unionize its employees.[203] The defendants sought to secure the subtenant's agreement to the union's terms after entering into a labor-harmony agreement with the concessionaire that required all employees of the concessionaire's subtenants to be unionized members.[204] The subtenant refused, arguing that it could not be coerced into abdicating rights afforded to it under the NLRA. The subtenant sued

[194] *Id.* at 957–58 (citing *Boston Harbor*, 507 U.S. at 227).

[195] *Id.* at 958.

[196] *Id.*

[197] *Labor Peace Agreements* at 15; Gale LaRoche, Wayne County Airport Authority, Trends in Labor Presumption & Labor Peace Agreements, Presentation, http://www.aci-na.org/sites/default/files/trends_in_labor_preemption_labor_peace_agreementsfinalwovideos.pdf (undated).

[198] Redondo-Borges v. U.S. Dep't of Housing and Urban Dev., 421 F.3d 1, 7 (1st Cir. 2005) (citing Evans v. Avery, 100 F.3d 1033, 1036 (1st Cir.1996)).

[199] *Redondo-Borges,* 421 F.3d at 7; Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980).

[200] Int'l Longshore & Warehouse Union v. Port of Portland, Case No. 3:12-cv-01494-SA, 2013 U.S. Dist. LEXIS 50295 *14 (D. Or. 2013).

[201] *Id.,* citing *Boston Harbor*, 507 U.S. at 226–27.

[202] *See id.* at 15–18.

[203] Case No. C04-1551P, 2005 WL 2318827 (W.D. Wash. 2005) (Not reported).

[204] *Id.* ¶¶ 2–3.

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the concessionaire and the airport owner in federal district court after the concessionaire decided to seek another company to fill the subtenant's space.[205]

During the proceedings, the concessionaire and the airport owner moved for a summary judgment on the subtenant's claims, including its § 1983 claims. In denying the concessionaire's and airport owner's motion for summary judgment on the § 1983 claim, the district court held that the defendants' insistence on requiring a labor-harmony agreement potentially amounted to a denial of federal protections afforded under the NLRA.[206]

Responding to arguments by the union that the NLRA preempted any § 1983 claims, the court noted that the subtenant had alleged unfair union labor practice violations under Section 8(b)(4), which may be brought in federal court.[207] The court also pointed to both the language of the NLRA itself and Supreme Court precedent indicating that § 1983 claims were not preempted when the government has interfered with protected labor rights; it also determined that private parties may be similarly liable when they join with government entities to interfere with federally protected rights.[208] Accordingly, based upon the decision in this case, the claims against the airport appear to be on solid legal ground and therefore present an area of concern for other airport owners and operators.

In another recent suit filed against an airport owner and concessionaire, a subtenant sued under § 1983 after a union refused to accept a labor-harmony agreement proposed by the subtenant that provided for a secret-ballot election pursuant to NLRB supervision, as permitted under the NLRA.[209] The union instead demanded items such as card-check and neutrality provisions as part of its labor-harmony agreement, as well as such provisions as precertification right to access the work premises.[210] The airport owner attempted to persuade the subtenant to accept the union's terms for a labor-harmony agreement and ultimately held the subtenant to be in violation of living wage laws.[211] The subtenant sued the airport and the concessionaire, arguing that the living wage did not apply to it because it was excepted under a small business exception in the ordinance, and that the airport owner's attempts to pressure the airport into accepting the terms of the union's labor-harmony agreement violated a federally protected right to a secret ballot under the NLRA.[212] In this instance, the case never resulted in a court order. Based upon the holding of *Flying Eagle Espresso* previously described, however, the types of claims asserted by the subtenant should be of concern to airport owners and operators. This is particularly so given the potential punitive damages that may be awarded against defendants in their individual capacities for reckless or callous indifference to federally protected rights under § 1983.[213]

### *3. Violations of Generally Applicable Aviation Statutes*

The ADA[214] preempts any state or local law that is "related to a price, route, or service of an air carrier."[215] Arguments have been made that the ADA's express preemption provision may invalidate labor-harmony and worker-retention agreements if their effect on air carrier fares is not "tenuous, remote, or peripheral" in manner.[216] A labor-harmony or worker-retention agreement would sufficiently affect fares if it directly or indirectly "binds the carrier to a particular price, route or service."[217] Airlines and their advocates may rely on the ADA to seek preemption of such agreements.[218]

The Federal Aviation Act (FAA)[219] and associated federal regulations set aviation safety standards and preempt the field of aviation safety regulations. Accordingly, to the extent that labor-harmony or worker-retention provisions encroach on the field of aviation safety, one could argue that they could be preempted under the FAA. A4A has previously

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *See* Complaint for Damages and Declaratory Relief, CMC Food Services LLC v. City of Oakland, Case No. 3:14-cv-03871, Doc. 1 (N.D. Cal.) (Filed Aug. 26, 2014).

[210] *Id.* ¶ 12.

[211] *Id.* ¶¶ 15, 25, 27.

[212] *Id.* ¶ 45.

[213] *See* Smith v. Wade, 461 U.S. 30, 56 (1983).

[214] 49 U.S.C. § 41713(b)(1).

[215] Pub. L. No. 95-504.

[216] *See* Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 371 (2008).

[217] *See* Dilts v. Penske Logistics, LLC, 769 F.3d 637, 646 (9th Cir. 2014).

[218] Existing case law indicates that a preemption argument based on the ADA would not meet with success. *See* Air Transport Ass'n of America, Inc. v. Port of Seattle, Case No. C14-1733-JCC, Doc. 26, slip op. at 6 (W.D. Wash. 2014) (Order Denying Motion for Preliminary Injunction).

[219] 49 U.S.C. § 40103.

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asserted the argument that local labor laws issued on safety grounds violate the FAA.[220]

### E. Potentially Mitigating Factors

As previously discussed in Section IV.B, the labor-harmony requirements enacted by ordinance or other municipal action (such as an airport authority mandate) are drafted in such a way that no federally protected right is directly impeded. Airport owners might accordingly be able to argue that they enforce labor-harmony requirements without the risk of depriving subtenants of federally protected rights under § 1983. At least one court, however, has already found such an argument unpersuasive.[221] More broadly speaking, the more binding and direct that a local requirement to engage with union representatives is, the more likely it is that a subtenant or other airport business can argue that it is being illegally coerced into giving up federally guaranteed rights.

Another argument against the risk of litigation caused by labor-harmony agreements is that federal aviation statutes do not bar airport owners' ability to impose union-friendly requirements. These arguments are based once again on the indirect nature of labor-harmony and worker-retention agreements. For example, worker-retention agreements, while potentially impacting airlines' profit margins, do not bind a carrier to a particular price, route, or service. Similarly, in a particular situation there may be too tenuous a connection between the field of aviation safety, which *is* regulated by the FAA, and labor-harmony agreements, which, on their face, are not. Arguments are often constructed using other employee-centered regulations and are factually linked to aviation-centered activity. Whether federal regulatory statutes (such as the ADA and FAA) can be successfully linked to a particular labor regulation will be highly context specific.

To the extent that federal preemption applies, it might be argued that the NLRA or RLA preempt other federal claims, such as § 1983 claims.[222] The limited precedent indicates, however, that these federal labor laws do not necessarily exclude the possibility of bringing a separate claim under § 1983.[223]

## VI. CONCLUSION

This digest has sought to identify and frame the relatively new approaches utilized by unions to establish or increase union membership at airports, as well as to outline the resulting legal implications of this trend. The mechanisms for promoting unionization, particularly labor-harmony agreements and worker-retention programs, are fraught with legally complicated considerations regarding the interplay between local regulation and federal labor law, notably the NLRA and RLA. Airports must consider the legal risks posed by adoption of labor-harmony agreements and worker-retention programs, the boundaries of legally permissible actions that the airport can take, and the risk of litigation from airport concessionaires, subtenants, and unions. Airports have already faced litigation in this area, and more can be expected as unions seek to broaden recruitment efforts and political clout at public airports.

As this digest illustrates, the airport labor arena is complex—legally, factually, and politically. The interests of the airport, the municipalities in which they operate, the employees, and the airport businesses that form the backbone of airport operations do not always align. This creates a challenge for the airport owner/operator—a challenge that requires it to navigate a myriad of obstacles. In light of this context, airports should familiarize themselves with the intricacies of labor law as applied to airports and in particular the use of labor-harmony and similar agreements. Although this digest was intended to touch upon most relevant topics, it is, necessarily, only an introduction designed to enable airports to more effectively address the issues in this arena as a beginning point for analysis.

[220] *See* Complaint for Injunctive and Declaratory Relief, Air Transport Ass'n of America, Inc. v. Port of Seattle, Case No. 2:14-cv-01733-JCC, Doc. 1, 7-8 (W.D. Wash.) (Filed Nov. 10, 2014).

[221] *See* Flying Eagle Espresso, Inc. v. Host Int'l, Inc., Case No. C04-1551P, 2005 WL 2318827.

[222] *See* Complaint for Injunctive and Declaratory Relief, Air Transport Ass'n of America, Inc. v. Port of Seattle, Case No. 2:14-cv-01733-JCC, Doc. 1, 6–7 (W.D. Wash.) (Filed Nov. 10, 2014).

[223] *See* Air Transport Ass'n of America, Inc. v. Port of Seattle, Case No. C14-1733-JCC, Doc. 26, slip op. at 6 (W.D. Wash. 2014) (Order Denying Motion for Preliminary Injunction).

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# APPENDIX A—MATRIX OF ALLOWABLE SCOPE OF AIRPORT INVOLVEMENT IN SETTING TERMS OF LABOR-HARMONY AGREEMENTS

| Airport Involvement in Labor-Harmony Issues | Required | Permitted | Prohibited |
|---|---|---|---|
| Require businesses not contracting with the airport to unionize or enter into labor-harmony agreements | | | X |
| Require as a licensing or regulatory matter that its contractors or their subcontractors unionize or enter into labor-harmony agreements | | | X |
| Require as a market participant (e.g., investor, owner, purchaser, or financier) that businesses with which it deals negotiate in good faith with unions in order to avoid labor-related disruptions | | X | |
| Require as a market participant (e.g., investor, owner, purchaser, or financier) that businesses with which it deals require their subcontractors to negotiate in good faith with unions in order to avoid labor-related disruptions | | X | |
| Require that certain provisions, such as card check or neutrality, be included in any agreement between a contractor or subcontractor and a union | | | X |
| Require its contractors or their subcontractors to forego their right to determine the unionization of their employees through a secret-ballot election pursuant to NLRB or NMB procedures | | | X |
| Restrict an employer's freedom of speech with respect to its views regarding unionization | | | X |
| Forego airport-based actions that would diminish federal labor rights of both employers and employees | X | | |
| Impose supplemental sanctions or penalties for violations of federal labor law | | | X |

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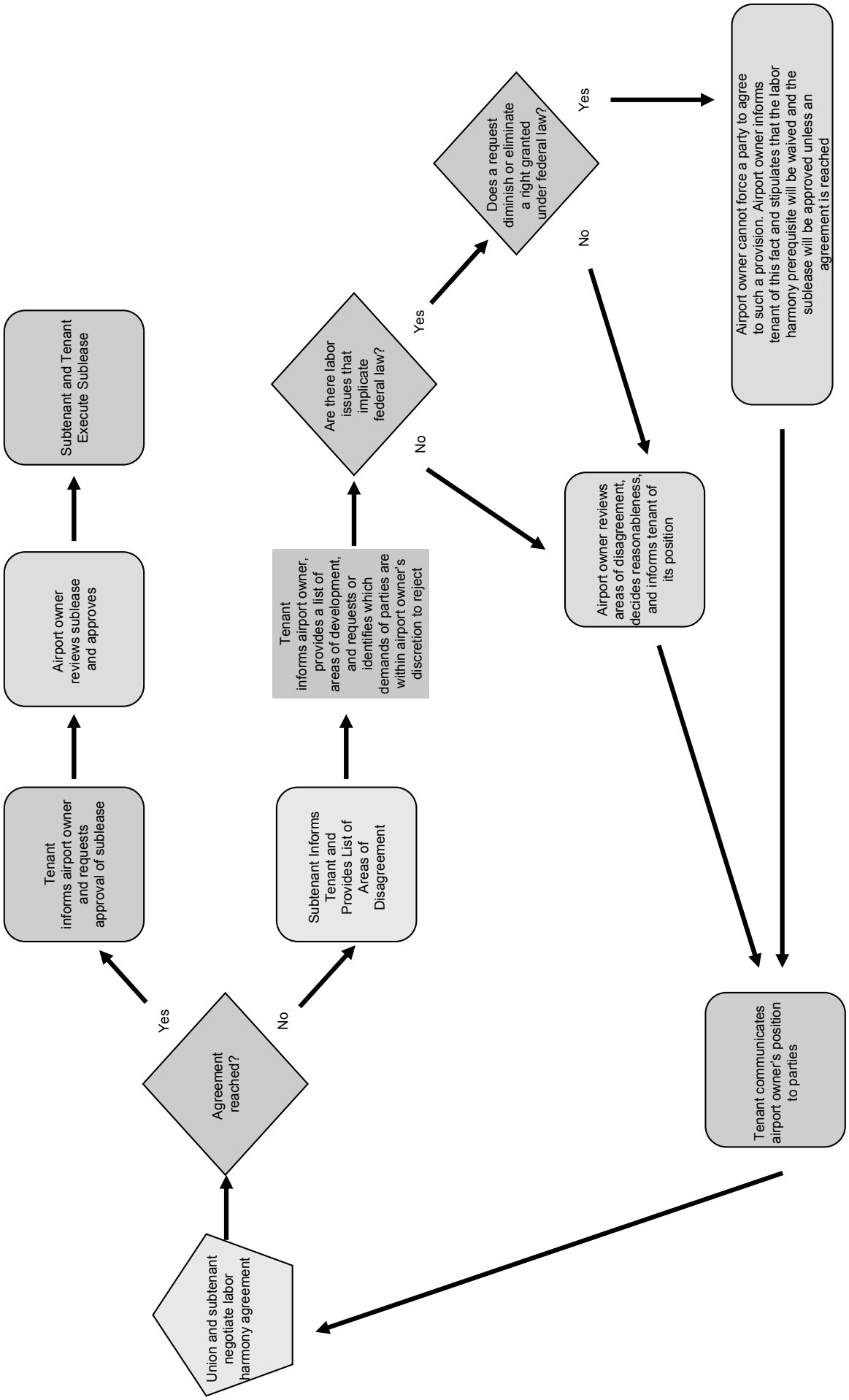
## Appendix B - Flowchart of Labor Harmony Implementation

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# APPENDIX C—SUMMARY CHART OF POTENTIAL CAUSES OF ACTION AGAINST AIRPORT SPONSORS IN LABOR PREEMPTION ARENA

| | **Party Bringing Action** | | | |
|---|---|---|---|---|
| **Cause of Action** | On-airport businesses | On-airport employees | Unions | Airport industry groups |
| Declaratory judgment asserting preemption | X | | | X |
| Governmental interference with employer/employee rights under 42 U.S.C. 1983 | X | X | X | X |
| Generally applicable aviation statutes (e.g., ADA, FAA) | X | X | X | X |

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