Preemption of Worker-Retention and Labor Peace Agreements At Airports

A Brief Summary Of Select Issues and Practical Approaches

Eric T. Smith, Esq.
Partner, Kaplan Kirsch & Rockwell LLP
Washington, DC
Eric T. Smith, Esq.
Principal Investigator

- Partner, Kaplan Kirsch & Rockwell LLP
- Practice 100% focused on airport law – narrow but very broad
- 30+ Years in aviation
- 14 years labor attorney
- Advises airports on contracts ranging from concessions to airline use & lease agreements
THOMAS W. ANDERSON, Metropolitan Airports Commission, Minneapolis, Minnesota;

DAVID BANNARD, Foley & Lardner LLP, Boston, Massachusetts;

JAY HINKEL, City of Wichita, Kansas;

MARCO B. KUNZ, Salt Lake City Department of Airports, Salt Lake City, Utah

ELAINE ROBERTS, Columbus Regional Airport Authority, Columbus, Ohio; and

E. LEE THOMSON, Clark County, Las Vegas, Nevada.
Preemption of Worker-Retention and Labor Peace Agreements At Airports

11-01 Coverage

- Introduction/Overview
- Federal Labor Protection Laws, Preemption and Proprietary Rights Exception
- Labor Harmony Agreements and Worker Retention Programs
- Applicability to Airports.
- The Airport Sponsor – Sources of Risk and Potential Claims
- Appendix A, B and C

Cover all today??
Increase in initiatives to have airports require “labor peace” or “labor harmony” as part of contracts with on-airport businesses
Concessions operations largest focus
National initiatives by SEIU and UNITE Here
Things may not always be what they appear.
The need for a well-informed senior staff, board, council, etc.
Legal foundation
Real-world examples
Practical implications

Understanding The Context Is The Key

Going to move quickly
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. 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.

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.
Why Is This An Issue?

- Push by multiple labor organizations to penetrate airports
- Certain tools used to expedite organization efforts
- Tools implemented via contractual provisions in agreements between businesses and airport – an “agreement to agree”
- Advocacy/Pressure applied to elected officials and/or senior airport personnel
- Fraught with legal and business risk

Who Should Be Concerned?

- Elected officials often do not fully appreciate legal and practical risks
- Airport executives face similar challenges but are also tasked with running airport, maintaining business relationships with on-airport businesses and airlines.
Obligatory Legal Baseline Coverage

- Railway Labor Act (RLA)
- National Labor Relations Act (NLRA)
Union Organizing – The (Very) Basics

- Focus upon NLRA
- Appropriate Unit
- Showing of Interest
- Petition for Election
- Elections
- Individual Employee Rights
- Employer Rights
Union Organizing – The (Very) Basics (continued)

- Card Check
- Neutrality
- Relationship to Labor Harmony
- Showing of Interest
- Petition for Election
- Elections
How Airports Become A Focal Point

- Concessions Models
- Challenges Faced
- Airport ownership/operation
- Use of Contractual Provisions
The Core Legal Issue – Preemption

- Labor Harmony
- Implementation – Practical Reality
- Employee Rights
  - Conflict?
- Does requirement have adverse impact upon federally-protected rights?
- Proprietor Rights & Its Limits

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.
Handling Issues

- Proactive Education
- Responding to Inquiries
- Contractor Concerns
- Negotiating Parameters
- Implementation
  - Tricky, complex and an art
Legal Research Digest

PREDICTION OF DELINQUENCY RETENTION AND LABOUR PEACE

This report was prepared under ACRP Project 10, "Longitudinal Impact of Airport Security on Community Safety," by the authors associated with the research. The digest was prepared by TRB, a unit of the National Research Council.

Forward

This report is intended to serve as an overview of the research findings and recommendations. It is designed to be a concise and accessible resource for stakeholders interested in understanding the implications of airport security on community safety.

---

Easy Reference Materials Within The Digest
# What’s Allowed, What Should The Airport Do, What Can’t The Airport Do?

## Appendix A

<table>
<thead>
<tr>
<th>Airport Involvement in Labor-Harmony Issues</th>
<th>Required</th>
<th>Permitted</th>
<th>Prohibited</th>
</tr>
</thead>
<tbody>
<tr>
<td>Require businesses not contracting with the airport to unionize or enter into labor-harmony agreements</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Require as a licensing or regulatory matter that its contractors or their subcontractors unionize or enter into labor-harmony agreements</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>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</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>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</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Require that certain provisions, such as card check or neutrality, be included in any agreement between a contractor or subcontractor and a union</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>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</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Restrict an employer’s freedom of speech with respect to its views regarding unionization</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Forego airport-based actions that would diminish federal labor rights of both employers and employees</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Impose supplemental sanctions or penalties for violations of federal labor law</td>
<td></td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>
Implementation of a Labor Harmony Provision – Appendix B

Appendix B - Flowchart of Labor Harmony Implementation

1. Union and subtenant negotiate labor harmony agreement
2. Agreement reached?
   - Yes: Tenants inform airport owner and request approval of sublease
   - No: Subtenant informs tenant and provides list of areas of disagreement
3. Subtenant informs airport owner provides a list of areas of development and requests or identifies which demands of parties are within airport owner's discretion to reject
4. Are there labor issues that impact federal law?
   - No: Tenant communicates airport owner's position to parties
   - Yes: Does a request, revision or elimination of a right granted under federal laws?
     - No: Airport owner reviews areas of disagreement, decides reasonable terms and informs tenant of its position
     - Yes: Airport owner cannot force a party to agree to such a provision. Airport owner informs tenant of this fact and stipulates that the labor harmony provisos will be waived and the sublease will be approved unless an agreement is reached

TRB ACRP
### Appendix C—Summary Chart of Potential Causes of Action Against Airport Sponsors in Labor Preemption Arena

<table>
<thead>
<tr>
<th>Cause of Action</th>
<th>Party Bringing Action</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>On-airport businesses</td>
</tr>
<tr>
<td>Declaratory judgment asserting preemption</td>
<td>X</td>
</tr>
<tr>
<td>Governmental interference with employer/employee rights under 42 U.S.C. 1983</td>
<td>X</td>
</tr>
<tr>
<td>Generally applicable aviation statutes (e.g., ADA, FAA)</td>
<td>X</td>
</tr>
</tbody>
</table>
FOR ADDITIONAL INFORMATION

Eric T. Smith
Kaplan Kirsch & Rockwell LLP
esmith@kaplankirsch.com