March 9, 2015

Port of Portland Commissioners
7200 N.E. Airport Way
Portland, OR 97218

Re: PDX Workplace Initiative – Version dated March 4, 2015

Dear Commissioners:

As the principal trade and service organization for the U.S. scheduled airline industry, Airlines for America[1] appreciates the opportunity to comment on the March 4, 2015 draft of the PDX Workplace Initiative ("WI" or "the Initiative").

On its face, while the WI does not currently apply to direct employees of the airlines themselves, it will have a direct and material impact on airlines because it targets airline service providers (ASPs) that contract with Airlines for America's members. As the services performed by the ASP employees on aircraft and for passengers mirror the services performed by airlines, A4A's airlines and their customers will bear the operational impact and additional costs of the WI.

Airlines for America believes that elements of the current draft of the Initiative—as well as proposed amendments to make the Initiative even more restrictive—exceed the Port of Portland's authority under Oregon law and are preempted by both the Airline Deregulation Act and federal labor laws. Of particular concern are Initiative terms and proposals that would impose minimum compensation standards for or otherwise interfere with ASP services, labor relations, compensation, and other terms and conditions of employment. Airlines for America also believes that the Initiative is fundamentally flawed and ill-advised. Should the Port proceed

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[1] A4A is the principal trade and service organization of the U.S. scheduled airline industry. A4A members and affiliates transport more than 90% of U.S. airline passenger and cargo traffic. The members of the association are: Alaska Airlines, Inc.; American Airlines Group (American Airlines and US Airways); Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation.; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; and United Parcel Service Co. Air Canada is an associate member.

further with the WI, it will inevitably result in redundant and wasteful red-tape, bureaucratic interference in business relationships, jurisdictional disputes, and protracted litigation.

The March 4th version of the WI is only a preliminary version, and it is unclear which elements will ultimately be considered and/or adopted by the Commission. For that reason, this letter focuses on general areas of concern, rather than specific terms. Airlines for America may supplement this letter after the March 11 meeting of the Commission.

A. The Port Lacks Authority to Regulate ASP Employment Conditions

The Port has only those powers specifically authorized by law. *Harrison* v. *Port of Cascade Locks*, 556 P.2d 160, 162 (Or. Ct. App. 1976). Those powers do not include mandating ASP employment terms and conditions.

As a limited-purpose municipal corporation, the Port "is limited in its powers and functions to those attributes delegated to it for the performance of its limited objectives." *Id.*; *accord State ex rel. Mullins* v. *Port of Astoria*, 154 P. 399, 405, 406 (Or. 1916) ("[A] port cannot exercise any power unless expressly permitted by the Legislature or allowed by the people of the entire state[.]"). The Port's purpose is to "promote the maritime, shipping, aviation, commercial and industrial interests of the port as by law specifically authorized." ORS § 778.015. To achieve that purpose, the Port can acquire, hold, use, dispose of, and convey real and personal property, make contracts, and "do any other acts and things which are requisite, necessary or convenient in accomplishing the purpose described or in carrying out the powers granted to it by law." *Id.* The Port is also specifically authorized to "acquire, establish, construct, expand or lease, control, equip, improve, maintain, operate, police and regulate airports." ORS § 836.200. The Port does not, however, have plenary police power jurisdiction. *Harrison*, 556 P.2d at 162. In particular, it has no statutory authority to regulate third party employment conditions.

Airlines for America understands that proponents of the WI rely on ORS § 778.016 to justify the Initiative. The Port's authority under that statute, however, is strictly constrained and does not include the power to mandate ASP employment standards. Section 778.016 allows the Port to establish and apply "best value" standards when awarding competitive contracts and leases, taking into account:

> (1) Experience, technical capability and past performance.
>
> (2) The qualifications, compensation and retention policies of bidding contractors and lessees with respect to the staff and subcontractors operating at the port.

> (3) Potential local and regional benefit within the port, the surrounding community, the region and the state.

ORS § 778.016. "Best value" refers to a public procurement selection process "in which proposals contain both price and qualitative components, and the award is based on a combination of price and qualitative considerations." Oregon Public Contracting Coalition Guide to CM/GC Contracting, Glossary at 84 (February 2002); *see also* ORS § 279A.015(5) (Public Contracting Code "policy" includes principle that "[i]n public procurement, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value."). Thus the Port has greater flexibility under ORS § 778.016 to *consider* factors other than price in selecting among competitive bids, provided that the RFP process includes notice of formally promulgated "best value" standards for the procurement in question. Best value principles would not, however, permit the Port to base contracting decisions *exclusively* on non-price factors, or to achieve the same result by requiring compliance with Port-determined minimum employment standards as a *precondition* for contracting.

Further, this statute has no application to ASPs, as they are by definition *airline* contractors and service providers—they do not provide contracted services to the Port itself. In the preamble to the WI, the Port expressly states that the covered employers are "certain airline subcontracted service providers;" not airport subcontractors. While it is true that the Port may license ASPs to operate at the Port, and ASPs may lease or sublease space at the airport for their operations, the Port itself plays no role in the contract selection of ASPs. Thus the relationship between the Port and ASPs is not based on competitively bid public contracts that would be subject to "best value" procurement standards under ORS § 778.016.

The Port's lack of authority to regulate ASP employment standards is reinforced by ORS § 653.017, which expressly preempts local minimum wage laws. That statute was enacted to halt the proliferation of local "living wage" laws, which a number of Oregon cities had adopted under their constitutional "local rule" authority. (The Port, of course, does not have any such constitutional authority, so it could not have enacted a minimum wage ordinance at the airport even absent the statute.) Airlines for America understands that union proponents have argued that subsection (3)(b) (the "public contracts" exception) actually *authorizes* the Port to impose minimum wage standards for ASPs. That argument turns the statute on its head, and the Port has already correctly rejected it. The "public contracts" exception in ORS § 653.017(3)(b) accommodates prevailing wage requirements for public works contracts and has no application to leases or operating licenses that the Port grants to private third parties contracting with other third parties. *See, e.g.*, ORS § 279A.010(1)(z), (aa) (limiting "public contract" and "public

contracting" to procurement); ORS § 279C.800(6)(a)(A) (public works); OAR § 839-025-0004(20)(a) (same).

In summary, as a limited-purpose municipal corporation, the Port lacks legal authority to regulate ASP labor and employment standards and practices. Even as to competitively bid contracts and leases, the Port can at most assign some weight (but not conclusive weight) to pre-determined, non-price "best value" standards. And a "living wage" proposal is expressly prohibited by Oregon law.

B. The Airline Deregulation Act Preempts Efforts to Target Airline Services whether Performed by the Airline or Airline Service Providers

The federal Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), expressly preempts any state or local law that is "related to a price, route, or service of an air carrier." Almost all of the functions performed by employees of ASPs are identical to the services traditionally and currently performed by employees of airlines: (a) loading, fueling, catering, and cleaning aircraft; and (b) passenger check-in, transport and facilitation. Because the initiative targets ASPs and the services they provide to airlines and airline customers, it relates to airline prices and services and therefore is preempted by the ADA.

Congress enacted the ADA "to promote efficiency, innovation, and low prices in the airline industry through maximum reliance on competitive market forces and on actual and potential competition." *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1428 (2014) (citation and internal quotation marks omitted). It included the ADA's preemption provision to "ensure that the States would not undo federal deregulation with regulation of their own." *Id.* (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

ADA preemption is very broad. *Morales*, 504 U.S. 384 (describing the statute's preemption clause as "conspicuous for its breadth"). It can even encompass generally applicable regulations provided that the relationship between the regulations and airline rates, routes, or services is not "tenuous, remote, or peripheral." *Id.* at 390. And local laws that *directly target* airline services are clearly preempted. *See, e.g.*, *Mass. Delivery Ass'n* v. *Coakley*, 769 F.3d 11, 17-18 (1st Cir. 2014) ("[A] state statute is preempted if it *expressly references*, or has a significant impact on, carriers' prices, routes, or services.") (emphasis added); *see also Rowe* v. *New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008) (law targeting trucking services is preempted by federal statute with language essentially identical to ADA).

Unlike a law of general application (such as a state-wide minimum wage law that applies to all workers of all employers in all industries), the WI narrowly targets a discrete subset of

employees at a single work location - Portland Airport - and aspects of it specifically target only workers and companies providing services to just one industry: the airline industry .

The state of Oregon has approximately 1,832,000 workers. [2] By contrast, at Portland Airport there are probably no more than 1,000 ASP workers servicing airlines and airline passengers, and perhaps an equivalent number of workers at the terminal concession companies. Employment regulations, including minimum compensation, that cover less than 0.002% of the workers in a state are self-evidently not "laws of general application."

As the cases noted above make clear, the ADA preempts such targeted regulation where, as here, it relates to airline prices and services. Just as the delivery rules at issue in Rowe resulted in a "direct substitution of * * * governmental commands for 'competitive market forces' in determining (to a significant degree) the services motor carriers will provide." *Rowe*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378), the WI requirements here would result in services and other terms that "differ significantly from those that, in the absence of regulation, the market might dictate." *Ibid*.

C. Federal Labor Law Preempts Local Regulation of Labor Relations

To the extent that provisions of the current or future versions of the Initiative affect ASP labor relations or terms and conditions of employment for ASP employees, they are also preempted by federal labor laws, specifically, the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*., or the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq*.

It is well settled that state and local authorities cannot intrude into the labor relations of private companies. Courts have consistently held that state or local governmental action is preempted by the RLA or the NLRA if it regulates activities protected, prohibited, or intentionally left unregulated by the federal statutes. *See San Diego Bldg & Const. Trades Council v. Garmon,*359 U.S. 236 (1959); *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976); *Bhd. of Railroad Trainmen v. Jacksonville Terminal Co*., 394 U.S. 369 (1969); *Air Transp. Ass'n of Am.* v. *City & Cnty. of San Francisco*, 266 F.3d 1064, 1076 (9th Cir. 2001).

Here, the "labor harmony" and minimum employment standards proposals and enforcement measures under consideration are preempted because they restrict employer options that are protected by the RLA and NLRA, they intrude upon subjects reserved for collective bargaining, and they interfere with the exclusive jurisdiction of the National Labor Relations Board and the National Mediation Board.

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[2] Source: U.S. Department of Labor Bureau of Labor Statistics, December 2014.

The proposed Port regulation of ASP labor relations and employment standards does not fall within the so called "market participant" exception to labor law preemption. That exception does not apply because the "totality of the circumstances," including both history and terms of the initiative, confirm that the Port is acting as a regulator advancing a social welfare agenda and *not* as a proprietor serving its own needs in the marketplace. *See Building & Const. Trades Council of the Metro Dist. v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993); *Associated Builders & Contractors v. City of Seward*, 966 F.2d 492, 496 (9th Cir. 1992). As already noted, the Port does not itself contract with or pay ASPs for *any* services to airlines at the Airport. Rather, it only seeks to regulate services ASPs provide to airlines. Further, the history of and preamble to the WI establishes conclusively that it was conceived and developed to advance a "social equity" agenda championed by unions representing or seeking to represent Airport workers, rather than any proprietary interests of the Port itself.

D. The Workplace Initiative Is Unnecessary and Redundant

Airlines for America's preliminary objections regarding the WI are limited to Initiative provisions that would impose administrative burdens, costs, and restrictions on ASPs and other private third party contractor relationships, that interfere with market forces as to airline/ASP rates and services, or that would otherwise interfere with ASP labor relations and terms and conditions of employment for ASP employees. As discussed above, such provisions would exceed the Port's authority under state law and would be preempted by the ADA and federal labor law. They would also be unnecessary and redundant.

For example:

- Worker Benefits. The draft Initiative contemplates that the Port will conduct a market analysis to benchmark airport positions and determine market-level benefits for vacation, sick leave, healthcare, and wages. Under the Initiative, that data would inform Port contracting decisions, presumably under "best value standards" adopted under ORS § 778.016. This proposed market analysis serves no valid purpose. ASPs are in the best position to determine the relevant labor market for the specific positions they need to fill, and they must offer competitive compensation packages to attract qualified employees. To the extent the Port incorporates compensation and benefit policies into "best value" contracting standards for specific procurements, it must specify those factors in the relevant RFPs. Prospective contractors would then provide the requested information with their proposals, and public access to those proposals would be governed by generally applicable public records laws.

- Labor Harmony. The current draft contemplates that ASPs would be required to submit a written plan to the Port detailing how the ASP would operate in the event of a labor

disruption, which plan would be publicly available. In addition to presenting significant labor preemption concerns, this proposal is unworkable, as labor relations evolve and labor disputes are by their nature sporadic and unpredictable. Any "plan" flexible enough to encompass all hypothetical future disputes would necessarily be so vague as to be meaningless. Moreover, requiring and publishing *detailed* plans would be extraordinarily bad policy, as in the event of a labor dispute the plans would give unions and employees a roadmap to *maximize* disruption against the airline and the ASP.

Moreover, the primary responsibility for controlling, preventing and policing disruptions within the terminals and on the roadways lies exclusively with the Port of Portland. As with all other airports, only the Port can develop, implement and enforce plans – including issuing permits for demonstrations and retaining police – to control any disruptions in the public areas. Neither the airlines nor ASPs issue permits or control the police force. The Port's recent policy statement on Free Speech - which was delivered to all workers at Portland Airport - testifies to the Port's exclusive ability to control those occurrences in terminals, roadways and other airport property.

- Safety, Training, and Equipment Standards. The Initiative would create actionable requirements permitting the Port to terminate operating agreements with ASPs for "serious and continuing" violations of "applicable" laws and regulations. This proposal would raise serious due process concerns because it does not define "serious and continuing" or "applicable" and does not specify how "violations" would be established. Any such determinations by the Port would likely trigger jurisdictional disputes and litigation. Moreover, the proposal would invite third parties to drag the Port into private disputes that have no bearing on Airport operations.

- Standardized Permitting/Contracting. The draft Initiative would require ASPs to submit a plan for the Port's review regarding the minimum working conditions at the Airport, which would be publicly available, and the Port could terminate ASP operating agreements for failure to comply with the submitted plan. It is not clear if this proposal contemplates that "minimum working conditions" in this context refers to Port-imposed conditions or simply the conditions the ASP plans to apply. If the former, the proposal is deficient because, as already discussed, the Port itself cannot mandate ASP employment terms and conditions. If the latter, the requirement is unnecessary and redundant. To the extent the Port adopts a "best value" contracting process that factors "working conditions" into public contracting decisions; it could presumably incorporate terms included in the successful proposal into the contract award. Public access to the contract terms should be determined based on generally applicable public records laws. Whether

failure to comply warrants termination should be determined by generally applicable contract terms governing performance, material breach, cure, and remedies for breach.

- Whistleblower Protections. The Initiative also contemplates revising ASP operating agreements to require the ASPs to comply with (among other applicable laws and regulations) all laws, regulations, and policies concerning employer retaliation against individuals who engage in legally-protected reporting conduct, and it would extend the Port's contractual termination rights for failure to comply. This proposal is unnecessary because federal and state laws and agencies (including the Oregon Bureau of Labor and Industries) already provide comprehensive protection and remedies to bona fide "whistleblowers," and the Port has no special expertise in this area. The proposal also would lead to jurisdictional and due process disputes, would invite third parties to drag the Port into purely private disputes that do not impact Port operations, and would increase administrative costs without adding any value.

E. Conclusion

Whatever the underlying intention, the Workplace Initiative is ill-advised and, in substantial part, unlawful. The Port has no statutory charter or authority to impose general social equity goals on selected employers who happen to operate at one location in the state of Oregon. None of the social equity concerns that are enumerated in the Preamble to the Initiative are unique to the Airport, and all of these concerns can, should, and eventually will be addressed at the federal or state level. Initiative requirements that aim directly at ASPs are preempted by the Airline Deregulation Act, which prohibits state or local regulation related to airline services or prices. Bowing to political pressure to mandate above-market employment terms undermines federal labor law favoring collective bargaining, and aspects of the initiative designed to advantage union organizing are preempted by the RLA or NLRA.

Airlines for America respectfully requests that the Port consider these legal and practical concerns as it develops its Initiative. Airlines for America looks forward to discussing these issues further at the Port's public meeting on March 11, 2015.

Sincerely,

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