T & E AGENDA: 10-06-08
ITEM: i

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: TRANSPORTATION AND ENVIRONMENT COMMITTEE

FROM: Richard Doyle
City Attorney

SUBJECT: **Airport Living Wage**

DATE: September 29, 2008

SUPPLEMENTAL MEMO

On September 16, 2008, the staff memo and draft living wage ordinance were distributed to the Transportation and Environment Committee and posted on the City's website for public review. The purpose of this supplemental memo is to highlight an issue regarding the worker retention provision in the draft ordinance and to address statements regarding the draft ordinance's collective bargaining exemption by Southwest Airlines Co. in its letter to Mayor Reed dated September 22, 2008. A copy of Southwest's letter is attached.

Collective Bargaining Exemption

The draft ordinance proposes to exempt any Airport business from the application of the minimum compensation requirements during the term of a collective bargaining agreement that expressly provides that the terms of the collective bargaining agreement will supersede the minimum compensation requirements of the living wage ordinance. This is the same exemption that has been part of the City's Living Wage Policy since its adoption.

Southwest has urged the Council to expand this exemption to apply simply if the business has a collective bargaining agreement.

No other living wage ordinance that our office has reviewed contains such a blanket exemption. In fact, the proposed scope of the exemption in the draft ordinance is consistent with other living wage ordinances; to illustrate, the living wage ordinances applicable to San Francisco International Airport, Oakland International Airport, and Los Angeles International Airport all require that the collective bargaining agreement expressly provide that it will supersede the wage requirements in the applicable ordinance in order for the employer to be exempt.

Furthermore, the blanket exemption for union employers that Southwest has proposed would likely render the minimum compensation portion of the draft ordinance unlawful and preempted by federal labor law. The generally applicable federal labor law is the

National Labor Relations Act (NLRA), which guarantees the rights of workers to join together, designate representatives and negotiate the terms and conditions of employment. The NLRA preempts local laws that regulate areas covered by the NLRA or attempt to interfere with the free play of economic forces between management and labor.

However, the U.S. Supreme Court has held that the NLRA does not preempt state laws that establish minimum labor standards that affect union and nonunion employees equally and do not encourage or discourage the collective bargaining process. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (upholding state law that required employer-provided health insurance to include mental health benefits). Providing an exemption based solely on union status would mean that only nonunion employees would be entitled to the living wage and would thus undermine the City's living wage as a minimum labor standard. The Railway Labor Act (RLA), which is the federal labor law applicable to the airline industry, has been interpreted by the courts similarly to the NLRA and likewise has been held not to preempt state or local requirements setting minimum labor standards. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994).

Worker Retention

The worker retention provision in the draft ordinance would require new service contractors at the Airport to retain the employees of their predecessor service contractors for a period of ninety (90) days when the City or Airport tenants change contractors. This provision would apply to all service contractors within designated categories who commence work on a contract after the effective date of the ordinance, and the requirement would be implemented by ordinance. In contrast, under the City's Living Wage Policy, which applies to certain City service contractors, the worker retention provision is a contractual requirement incorporated into the agreement between the City and the service contractor. Thus, under the Living Wage Policy, the City is using its contract power, and more directly acting as a market participant, in requiring worker retention. Acts of market participation are not subject to preemption by federal labor laws, but regulatory actions are. Because under the draft ordinance the worker retention requirement would apply to Airport businesses with which the City does not have a contract, the Council should be aware of the possibility of a legal challenge based on preemption.

There are two reported cases deciding whether worker retention requirements imposed by a municipality are preempted by federal law. In both cases, the cities (Washington, D.C. and New York City) prevailed and the ordinances were found not to be preempted by the NLRA. *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C.Cir. 1995); *Alcantara v. Allied Properties, LLC*, 334 F.Supp.2d 336 (E.D.N.Y. 2004). However, the federal courts within the Ninth Circuit have not weighed in on the issue, which at least raises the possibility that a challenge similar to those to the D.C. and New York ordinances could be made.

Conclusion

Worker retention requirements have been upheld in other jurisdictions, which provides support for the City's approach to mandating worker retention but does not foreclose a legal challenge within our circuit. Further, expanding the collective bargaining agreement exemption, as proposed by Southwest, would create significant legal vulnerability to the minimum compensation provision in the draft ordinance.

RICHARD DOYLE
City Attorney

By Sandra Lee
SANDRA LEE
Deputy City Attorney

Cc: Honorable Mayor and City Council
Debra Figone
William Sherry
Katy Allen

SOUTHWEST AIRLINES CO.
Mike Ryan
Vice President Labor Relations

2702 Love Field Dr.
Dallas, Texas 75235-1611
214/792-1113
214/792-4006 (Fax)

MEMORANDUM

To: Mayor Chuck Reed

From: Mike Ryan, Vice President Labor Relations
Jose Luis Sanchez, Senior Director Government Affairs State & Local
Greg Gillis, Manager Properties

Date: September 22, 2008

Re: Recognition of Existing Collective Bargaining Agreements as Enhancement of Proposed Living Wage Ordinance for San Jose International Airport

---

Southwest Airlines Co. employs over 34,000 Employees, who work at 64 airports in 32 states. Over 85% of our Employees are unionized, and Southwest has a proud history of over 35 years of positive labor relations.

Southwest is *not* opposing the Council's proposed living wage extension to the San Jose International Airport ("SJC"). Southwest does ask that the Council consider adding the following language to the ordinance recognizing existing collective bargaining agreements already in place that cover workers at SJC:

> **25.11.510 <u>Exemptions</u>**
>
> A. The minimum compensation requirements of this Part shall not apply to any Airport Business during the term of any collective bargaining agreement that is either in existence and/or ratified when this Part becomes effective or that expressly provides that the terms of the collective bargaining agreement shall supersede either the Living Wage Policy or the minimum compensation requirements of this Part.

Southwest requests the Council's consideration of this additional language for the following reasons:

I. THE OVERALL WAGES AND BENEFITS OF SOUTHWEST'S COLLECTIVE BARGAINING AGREEMENTS EXCEED THE MINIMAL VALUE OF AN ENTRY LEVEL "LIVING WAGE".

II. NOT RECOGNIZING EXISTING COLLECTIVE BARGAINING AGREEMENTS IMPAIRS THE UNIONS' AND SOUTHWEST'S ABILITY TO NEGOTIATE AN ARRAY OF WAGES AND BENEFITS PACKAGE TO COMPENSATE COVERED EMPLOYEES NATIONWIDE.

III. THE EXISTENCE OF THE CURRENT COLLECTIVE BARGAINING AGREEMENTS THEMSELVES MERIT RECOGNIZING AN EXEMPTION FROM THE ORDINANCE.

<u>Discussion</u>

<u>Wages & Benefits Under the CBAs Exceed Entry Level "Living Wage"</u>

Under existing collective bargaining agreements, Southwest Employees at SJC receive not

only hourly wages established under their contract, but also premium pay for certain shifts; health benefits; profit sharing under the airline industry's first profit sharing plan; a 401(k) Plan with 100% matching contributions by Southwest dollar for dollar up to the limits established under said Plan; salary continuation benefits beyond worker's compensation in the event of an on-the-job injury; uniform allowances; and paid holidays and free days. For example, an entry level newly-hired Employee working at SJC receives wages and benefits valued together at $14.79/hour. This overall compensation exceeds the proposed "living wage" rate of $14.08/hour, the rate without health benefits.

Not Recognizing Existing Collective Bargaining Agreements Impairs the Unions and Southwest's Ability to Negotiate a Comprehensive Wages and Benefits Compensation Package Under Those National Agreements

Each of Southwest's collective bargaining agreements was entered into prior to any effective date of the proposed living wage ordinance extension to SJC workers. The Ordinance however would increase Southwest's costs of doing business at SJC in ways which were neither anticipated nor negotiated at the time of the agreements. The Ordinance in effect nullifies the wage provisions of the existing collective bargaining agreements, imposing unexpected wage rates which were neither anticipated nor negotiated between the unions and Southwest.

The current language of the proposed Ordinance unfairly disadvantages Southwest and other unionized carriers in comparison to their non-unionized competitors, creating a greater economic hardship on carriers with existing collective bargaining agreements. The current language creates a paradox by allowing unrestricted future waivers of the living wage ordinance through collective bargaining without exempting existing collective bargaining agreements providing overall wages and benefits in excess of the minimal entry level "living wage". It is unreasonable and unconstitutional to apply the Ordinance to existing collective bargaining agreements while allowing prospective contracting parties to avoid the requirements of the Ordinance.

Southwest's Current Collective Bargaining Agreements Should Be Recognized and Given Effect

Southwest's existing collective bargaining agreements establish the wage rates not only for Southwest's SJC Employees but our Employees nationwide working at airports across the country. All of Southwest's collective bargaining agreements are agreed to under the Railway Labor Act, with the force and effect of federal law. As such, the collective bargaining agreements themselves represent and constitute a waiver of any other wage rate. This *de facto* waiver of the "living wage" should be recognized and given effect in the Ordinance.

Thank you for your consideration.