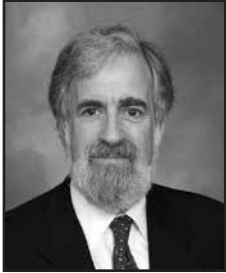




Local Labor Law Preemption and the Market Participant Exception: A Need for Clarity

By Douglas R. Painter and Robert S. Span



Local labor laws can have a significant impact on the airline industry. Those that do may be subject to federal preemption challenges under federal labor laws and/or the Airline Deregulation Act (ADA).¹ One defense to such challenges is the “market participant exception,” which exempts a local labor law from preemption

where the local governmental entity enacting it does so in connection with its own commercial activity, traditionally characterized by its procurement of goods or services. The rationale is that a local governmental entity has a right to impose labor terms on a party with which it is contracting—i.e., as a market participant.

On June 24, 2019, the U.S. Supreme Court denied certiorari from a divided Ninth Circuit case, *Airline Service Providers Ass’n v. Los Angeles World Airports*,² which arguably expands the scope of the market participant exception to the point where the exception threatens to swallow the rule. This is a concerning development for the airline industry because virtually every commercial service airport in the United States is owned and operated by a governmental authority. This article examines *Airline Service Providers* and why courts need to develop clear, consistent, and workable criteria in determining how and when to apply the market participant exception in preemption challenges.

Federal Preemption and the Market Participant Exception

Under federal law, labor-management relationships are generally governed by the National Labor Relations Act (NLRA)³ (which applies generally to most industries) and the Railway Labor Act (RLA)⁴ (which applies to railroad and air carriers), including the processes by which union representation occurs. Federal preemption challenges to local labor laws involve field and/or conflict preemption concepts⁵ and are based on related preemption doctrines stemming from two Supreme Court decisions: *Machinists*⁶ and *Garmon*.⁷ Generally, *Machinists* preemption prohibits state regulation of labor-management conduct that Congress intended to be left unregulated, while *Garmon* preemption prohibits state regulation of activity that

federal law protects or prohibits, or arguably protects or prohibits.

ADA preemption challenges derive from the ADA’s express statutory prohibition on local laws that are “related to” air carrier “prices,” “routes,” or “services.”⁸ According to the Supreme Court, ADA preemption is to be interpreted and applied broadly, in keeping with the statutory scheme’s purpose of allowing competition and market forces to promote “efficiency, innovation, and low prices.”⁹

When a local labor law is challenged on preemption grounds, the local governmental entity may argue that the law is exempt from preemption under the market participant exception, also known as the market participant doctrine. Up until recently, a governmental entity’s status as a market participant generally relied on a sufficient showing of its procurement of goods or services subject to the regulation at issue. For example, in *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc. (Boston Harbor)*,¹⁰ a governmental entity hired a construction company to remediate environmental contamination and required the company to honor prehire and other labor agreements. A labor organization challenged these labor requirements, claiming that they violated the NLRA by interfering with private labor relationships and were therefore preempted. The Supreme Court, in rejecting that claim, distinguished between labor requirements imposed on other private parties (i.e., where the state acts as a regulator) versus those imposed on a private party with which the state entity is directly transacting in a commercial manner (i.e., where the state is a market participant):

When a State owns and manages property, . . . it must interact with private participants in the marketplace. In doing so, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*. . . . To the extent that a private purchaser may choose a contractor based upon that contractor’s willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same.¹¹

Because the local entity was not acting as a regulator, but as a market participant, the Supreme Court in *Boston Harbor* found that the challenged labor requirements were exempt from preemption.¹²

Courts have established standards to determine whether a local governmental entity is a market participant. In *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, the Fifth Circuit held that a governmental entity is a market participant when (1) the challenged regulation reflects the state'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"; and (2) the "narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem."¹³ The Ninth Circuit holds that either one of these two criteria is sufficient to satisfy the market participant exception.¹⁴ Regardless, the essence of the exception has been that the challenged regulation is aimed at services or goods procured directly by the governmental entity.¹⁵

The Ninth Circuit's Blurry Expansion of the Market Participant Exception

Airline Service Providers is a divided Ninth Circuit decision extending the market participant exception to local labor requirements imposed on parties which do not contract with the governmental entity imposing them and which do not receive funds or compensation from that entity. Although the court relied on *Cardinal Towing's* market participant requirements in evaluating the challenged regulation, its expansive application of those requirements is arguably inconsistent with prior case law and appears to expand the exception to almost any regulation related to a government-operated enterprise.

In *Airline Service Providers*, the regulation at issue was a requirement (section 25) imposed by the City of Los Angeles (City) on companies providing services such as baggage handling, fueling, aircraft cleaning, and counter and gate services to airlines at Los Angeles International Airport (LAX). Section 25 mandated that these service companies enter into labor peace agreements (LPAs) containing "no-strike" and mandatory arbitration provisions with any labor organization requesting one. This was so regardless of whether the service providers' employees had consented to representation by the labor organization requesting the LPA or had even been unionized. The penalty for not agreeing to section 25 was losing licensure to operate out of LAX.

Section 25 gave labor organizations, even those that had not gone through the required processes under the NLRA or the RLA to become a representative for an employee class or craft, significant leverage with service providers, potentially forcing them to make labor

concessions in exchange for the labor terms mandated by the City. Plaintiffs Airline Service Providers Association (representing companies providing airline services at LAX) and Airlines for America (representing airlines that contracted with these service providers) brought suit against the City and challenged section 25 on preemption grounds. Specifically, the plaintiffs argued that section 25 impermissibly intrudes into labor relations governed by the NLRA and the RLA and violates the ADA's preemption clause by directly regulating airline services. On the City's motion to dismiss, the district court rejected these claims and determined that section 25 was not preempted because, among other things, it "merely seek[s] to protect [the City's] proprietary interest in . . . the efficient, revenue-generating operations of LAX."¹⁶ Accordingly, the district court dismissed the complaint without leave to amend.¹⁷

On appeal, the Ninth Circuit, in a 2–1 decision, reversed portions of the district court's opinion, but held that the market participant exception immunized section 25 from preemption because of the City's claim¹⁸ that section 25 was enacted to avoid strikes, picket lines, and work stoppages at LAX.¹⁹ According to the majority, this satisfied the two market participant requirements of *Cardinal Towing*: the City (1) had a "proprietary interest in running the airport smoothly" because "[a]irports are commercial establishments . . . [that] must provide services attractive to the marketplace";²⁰ and (2) had "defeat[ed] an inference that its primary goal was to encourage a general policy rather than [to] address a specific proprietary problem" because section 25 "focuses on specific proprietary needs" in "avoiding labor disruptions of airport services."²¹ In short, the Ninth Circuit held that the City's claimed "interests" in efficiently running LAX were alone sufficient to satisfy the market participant exception. The dissent noted that such claimed "interests" were "markedly different in kind" than those found in prior market participant cases,²² and that without the development of any factual record, the "manifest purpose and inevitable effect" of section 25 may simply be to regulate private labor relations, which is unlawful.²³

The plaintiffs filed a petition for writ of certiorari, after which the Supreme Court invited the solicitor general to express the views of the United States as to whether certiorari should be granted.²⁴ On May 21, 2019, the solicitor general filed the United States' amicus curiae brief. The United States was critical of the Ninth Circuit's decision, stating that it was "wrong" and (1) "misframed the test for the NLRA's market-participation exception";²⁵ (2) has troubling implications—"both here and in other cases"—because it allows "state and local governments to escape preemption of what are regulatory measures";²⁶ (3) allows state and local governments to evade preemption of "virtually any regulation of labor relations" at airports and other public facilities, which

Douglas R. Painter (dpainter@steinbrecherspan.com) and **Robert S. Span** (rspan@steinbrecherspan.com) are partners with Steinbrecher & Span LLP in Los Angeles, California. Their firm represented Airlines for America in *Airline Service Providers Ass'n v. Los Angeles World Airports*. Mr. Span was Chair of the Forum on Air and Space Law from 2013 to 2015.

always “could be reframed as a proprietary measure” to avoid claimed service disruptions;²⁷ and (4) raises “particularly acute” concerns, because the City is a recidivist that “continues to take an unduly expansive view of the market-participation exception,” even after the Supreme Court’s unanimous decision against it in *American Trucking Ass’n v. City of Los Angeles*.²⁸

Despite its determination that the decision was wrong, the United States declined to recommend certiorari on procedural grounds, one being that the definition of the market participant exception it urged was slightly broader than the one sought by the petitioners. Specifically, the market participant exception as proposed by the petitioners was a bright-line rule based solely on local governmental procurement of goods or services, whereas the United States, while considering procurement a quintessential case for the exception, would also allow it to apply in other limited circumstances based on “close[] scrutiny to ensure that [a local labor law] fairly serves proprietary, rather than regulatory, interests,” such as when a city imposes labor requirements on an entity carrying out a project for which the entity has borrowed money from the city.²⁹ Accordingly, the solicitor general concluded “[i]t is . . . uncertain that this case will provide an appropriate opportunity for the Court to resolve broader questions about the proper test for the market participant exception,”³⁰ notwithstanding that the Supreme Court has traditionally granted review of proposed rules or standards with which it or the United States does not entirely agree.³¹

Prior to *Airline Service Providers*, there had been no published authority holding that the proprietary interest requirement of the market participant exception can be satisfied by a governmental entity’s mere operations of a public business, such as an airport. Rather, almost all cases finding the exception involved the governmental entity’s direct procurement of goods or services, and the few which did not involved the entity’s direct and immediate financial interest in the transaction being regulated.³²

A Need for Clarity

As the solicitor general recognized, the implications of the Ninth Circuit’s decision in *Airline Service Providers* are significant and worrisome. One amicus brief in support of certiorari noted:

In the Ninth Circuit alone, there are 756 significant publicly-owned airports, and each may now be subject to labor rules like respondents’—precisely the patchwork of labor regulation that Congress sought to avoid in enacting the NLRA, RLA, and ADA. The decision below necessarily applies also to the myriad sea ports, train stations, bus depots, public schools, public parks, and public stadia in the Ninth Circuit—indeed, to any public venue

in which state or local government can claim a “proprietary interest” in the efficient provision of services. And it threatens to distort Dormant Commerce Clause and federal antitrust jurisprudence, where market participation is also a threshold issue in cases challenging state action.³³

Of particular concern to the airline industry, the Ninth Circuit’s decision could, for all practical purposes, negate the preemption clause of the ADA. That clause expressly preempts state and local regulations that are “related to a price, route, or service” of an airline.³⁴ But the Ninth Circuit’s reasoning arguably gives airport proprietors carte blanche to enact rules directly related to the “prices, routes, and services” of airlines under the guise of furthering the airport’s “proprietary interest” in avoiding service disruptions. While the ADA preemption clause allows certain, limited proprietary regulation, that exception historically has been construed narrowly and has never been construed to allow the breadth of intrusive economic regulation the Ninth Circuit’s decision appears to sanction.

The Supreme Court’s decision to deny certiorari in this case, while disappointing, leaves open the door for further case law development of this issue, including the possibility of future Supreme Court review. Two things could help evolve and clarify the current state of the law. First, claimants and courts evaluating the market participant exception in a preemption challenge should, where applicable, distinguish *Airline Service Providers* and reiterate the requirements of *Cardinal Towing* in the context of a governmental entity’s procurement of goods or services or direct and concrete financial stake in the regulated subject. This could help limit the adoption of *Airline Service Providers* by other courts and crystallize a circuit split on the issue such that the Supreme Court would be more likely to grant certiorari in a future case.

Second, as the dissent in *Airline Service Providers* makes clear, courts must examine a local labor law’s “manifest purpose and inevitable effect.”³⁵ Consistent with this requirement, courts must permit factual inquiry into a governmental entity’s claim as to the purpose and effect of a local labor law, and not, as the Ninth Circuit did in *Airline Service Providers*, take the entity’s allegations on this issue at face value. Only then can the market participant exception requirements of *Cardinal Towing* be properly analyzed and applied.

Endnotes

1. 49 U.S.C. §§ 40101 *et seq.*
2. 873 F.3d 1074 (9th Cir. 2017), *cert. denied*, No. 17-1183, 2019 WL 2570657 (U.S. June 24, 2019).
3. 29 U.S.C. §§ 151 *et seq.*
4. 45 U.S.C. §§ 151 *et seq.*
5. Generally, field preemption occurs when Congress, without expressly declaring that state laws are preempted, nevertheless legislates in a way that is so comprehensive as

to occupy the entire field of an issue, whereas conflict preemption arises when a state law conflicts with federal law. *See, e.g.,* *Glow v. Union Pac. R.R. Co.*, 652 F. Supp. 2d 1135, 1145 (E.D. Cal. 2009).

6. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976).

7. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

8. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992).

9. *Id.* at 378–79, 383–84 (holding that the words “related to” in the preemption provisions of the ADA “express a broad pre-emptive purpose” and have an “expansive sweep”).

10. 507 U.S. 218 (1993).

11. *Id.* at 227, 231.

12. *Id.* at 232–33.

13. 180 F.3d 686, 693 (5th Cir. 1999). This case involved preemption under the Federal Aviation Administration Authorization Act of 1994.

14. *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1025 (9th Cir. 2010).

15. *See, e.g.,* *White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 214 (1983).

16. *Airline Serv. Providers Ass'n v. L.A. World Airports*, No. 2:14-cv-08977, slip op. at 9 (C.D. Cal. Mar. 18, 2015).

17. *Id.* at 16.

18. Because the opinion involved a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), no factual record had been developed beyond the pleadings concerning the purpose or effect of section 25.

19. *Airline Serv. Providers Ass'n v. L.A. World Airports*, 873 F.3d 1074, 1080–81 (9th Cir. 2017).

20. *Id.* at 1080–82.

21. *Id.* at 1080–83 (alteration in original). This finding was based on the pleadings alone, as no record had been developed as to the purpose or effect of section 25 beyond the parties' allegations. *See supra* note 18.

22. *Airline Serv. Providers*, 873 F.3d at 1090 (Tallman, J., concurring in part and dissenting in part).

23. *Id.* at 1091.

24. *See Airline Service Providers Association v. Los Angeles*

World Airports, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/airline-service-providers-association-v-los-angeles-world-airports/> (last visited Aug. 19, 2019).

25. Brief for the United States as Amicus Curiae at 23, *Airline Serv. Providers Ass'n v. L.A. World Airports*, No. 17-1183 (U.S. May 21, 2019).

26. *Id.*

27. *Id.* Ironically, the Ninth Circuit previously held that the City's “business interest” as a “property manager” did *not* constitute proprietary interests sufficient to trigger the market participant exception. *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 400–01 (9th Cir. 2011).

28. Brief for the United States as Amicus Curiae, *supra* note 25, at 23 (citing *Am. Trucking Ass'ns v. City of Los Angeles*, 569 U.S. 641, 648–52 (2013)).

29. *Id.* at 18–19.

30. *Id.* at 23.

31. *See, e.g.,* *Byrd v. United States*, 138 S. Ct. 1518, 1528 (2018) (issuing a broader rule concerning expectation of privacy than the petitioner argued for); Brief for the United States as Amicus Curiae Supporting Neither Party, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (advocating for standard different than what was urged by the petitioners).

32. *See, e.g.,* *Hotel Emps. & Rest. Emps. Union v. Sage Hospitality Res., LLC*, 390 F.3d 206, 208, 215–17 (3d Cir. 2004) (finding that the city had a direct interest in the money it lent to the developer and thus could impose labor conditions on the developer's project), *cert. denied*, 544 U.S. 1010 (2005); *Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 29, 34–36 (D.C. Cir. 2002) (concluding that the government may impose labor conditions on any entity receiving governmental assistance because “the Government unquestionably is the proprietor of its own funds”), *cert. denied*, 537 U.S. 1171 (2003).

33. Brief for International Air Transport Ass'n as Amicus Curiae in Support of Petitioner at 5, *Airline Serv. Providers Ass'n v. L.A. World Airports*, No. 17-1183 (U.S. Mar. 26, 2018) (citation omitted).

34. 49 U.S.C. § 41713(b)(1).

35. *Airline Serv. Providers Ass'n v. L.A. World Airports*, 873 F.3d 1074, 1089 (9th Cir. 2017) (Tallman, J., concurring in part and dissenting in part).