



**Request for City Council Committee Action
From the City Attorney's Office**

Date: December 28, 2006
To: Ways & Means/Budget Committee

Subject: Recommendations for Applying a Requirement of Voluntary Card Check – Labor Peace Objectives

Recommendation: That the Ways & Means/Budget Committee receive and file this report.

Previous Directives: On November 13, 2006, the Ways & Means/Budget Committee directed that the City Attorney report back in three cycles to the Ways & Means/Budget Committee with a report on recommendations for applying a requirement of voluntary card check or other means of accomplishing labor peace objectives for service contracts on City-owned facilities.

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Presenter in Committee: Peter W. Ginder, Deputy City Attorney, Civil

Financial Impact (Check those that apply)

- X No financial impact (If checked, go directly to Background/Supporting Information).
- Action requires an appropriation increase to the _____ Capital Budget or _____ Operating Budget.
- Action provides increased revenue for appropriation increase.
- Action requires use of contingency or reserves.
- Business Plan: Action is within the plan. _____ Action requires a change to plan.
- Other financial impact (Explain):
- Request provided to department's finance contact when provided to the Committee Coordinator.

Community Impact

City Goal(s):

Background/Supporting Information

Recently, the City Council, by resolution, authorized staff to negotiate and enter into a contract with Avalon Security Corporation for the provision of security services at the Minneapolis Convention Center (MCC) and Minneapolis Water Works and Emergency Mobilization. The resolution recognized the City's need to avoid labor disputes which might adversely impact the revenue stream to the City from the MCC and further required that any contract for security services at the MCC contained a "labor peace" provision. The resolution required that any security contractor performing services at the MCC "shall be or become signatory to a valid collective bargaining agreement or other contract . . . with any labor organization seeking to represent security officers employed" in the security operations at the MCC.

The City previously has promulgated similar labor peace requirements or guidelines in regard to hotel/restaurant projects. See M.C.O. § 422.190. That ordinance cites specific findings and declarations regarding the need for labor peace or "proprietary interest protection" agreements in hotel/restaurant projects. Those findings recognize that the City/MCDA needs to make prudent management decisions to ensure efficient management of its business concerns and to maximize benefit and minimize risk, including the possibility of labor/management conflict arising out of labor union organizing activities. M.C.O. § 422.190 (b). The findings also recognize: a need to protect the City's proprietary interest and

economic investment in those situations where costly labor/management conflict had arisen in the past; that there are specific heightened risks in the hotel and restaurant industry because of its close relationship to tourism; that a history of costly labor/management conflict has arisen in the past in labor relations in the hotel industry in Minneapolis which have proven contentious; and, that there was a need to reduce the risk to the City/MCDA's proprietary interest. *Id.* The City's chosen method of reducing risk to its proprietary interest was to require that employers operating in a development project agree to a "lawful, nonconfrontational process to resolve any union organizing campaign expeditiously." *Id.* The alternative process was a "card-check" wherein employee preference regarding whether or not to be represented by a labor union is based on signed authorization cards. The purpose of the section was "to protect the city's/agency's proprietary interest in certain narrowly prescribed circumstances where the city/agency commits its economic resources and its proprietary interests are put at risk by certain forms of labor/management conflict." *Id.* In those cases in which the city/agency has financial interest in a hotel/restaurant development project, the entities are required to determine on a case-by-case basis, pursuant to standards articulated in the ordinance, whether a proprietary interest protection agreement is necessary. M.C.O. § 422.190 (c). Such determinations are to be made in all cases as a necessary precondition of the city/agency's participation in a development project. *Id.*

SUMMARY AND RECOMMENDATIONS

This Committee has directed the City Attorney to report on recommendations for applying a requirement of voluntary card check or other means accomplishing peace objectives for services contracts on city-owned facilities. The primary concern in this area is whether proposed card check requirements or other labor peace requirements are preempted by the National Labor Relations Act (NLRA). While the NLRA contains no express preemption provisions, it is now a common place that in passing the NLRA Congress largely displaced state regulation of industrial relations. Caselaw forbids state and local regulation of activities that are protected under the NLRA and also prohibits state and municipal regulation of areas that have been left to be controlled by the free play of economic forces.

The Supreme Court has fashioned what has come to be known as the "market participation exception" to NLRA preemption issues. This exception requires courts to distinguish between government as *regulator* and government as *proprietor* when deciding whether the NLRA preempts a given local statute, regulation or action. This distinction is critical because the NLRA does not preempt actions taken by the state when it acts as a mere proprietor or market participant. The underlying basis for this exception is the concept that the NLRA was intended to supplant state labor regulations, but not all legitimate state activity that affects labor and that permitting the states to participate freely in the marketplace is consistent with the NLRA preemption principles. Stated differently, when the state or municipality owns and manages property for example it must interact with private participants in the marketplace. In so doing, the state or municipality is not subject to preemption by the NLRA because preemption doctrines apply only to state regulations.

A municipality, to avail itself of the marketplace exception, must either own and manage the property or otherwise have a specific and significant proprietary interest in the property. Assuming the requisite ownership interest, the municipality's actions must be in support of its role as proprietor and may not constitute regulation. Caselaw authority does not specifically define the range of governmental actions which may constitute a permissible regulation, but certain principles can be gleaned from the cases:

- The challenged action should be specifically tailored to a particular job.
- The agency action should be an attempt to ensure an efficient project that can be completed as quickly and effectively as possible.
- The action should apply only to the contractor's relationship with the municipality itself and not affect or restrict the contractors dealings with other parties and the governmental action should be sufficiently narrowly focused and keeping with behavior of private parties so that a regulatory impulse can be safely ruled out.

"These principles require that the need for card check or other labor peace objectives in service contracts for City owned facilities be reviewed on a case-by-case basis. In other words, the City needs to determine whether proprietary interest protection on a particular contract is necessary. The City likely would not be able to require labor peace objectives in all of its service contracts without a case-by-case review since it could be challenged as an attempt to regular labor rather than acting as a private market participant.

The policy question for the Council is when this case-by-case determination should be made. For example, when a department is preparing a Request for Proposal (RFP), it could conduct a review of the services needed, an analysis of the above identified principles, and determine whether a proprietary interest protection agreement is necessary in the contract. Those requirements could then be placed in a RFP. Alternatively, the Council, or the appropriate Committee, could conduct a similar review when the RFP for services for City-owned property comes before it. If, at that point, the Council determines that a proprietary interest protection agreement is necessary, those requirements can be placed in the RFP to place responders on notice. Regardless, the determination would best be made before the issuance of the RFP.

LEGAL OVERVIEW

A. Introduction.

The National Labor Relations Act (NLRA) is intended to protect labor stability and to protect bargaining freedom, meaning that neither labor nor management should have to "make any concessions as a result of Government compulsion and that they are free from having contract provisions imposed upon them against their will." *NLRB v. Burns Security Services*, 404 U.S. 272, 287 (1972). The right to be free from governmental compulsion is protected by the NLRA as interpreted through caselaw. Government regulation of labor relations has consistently been held to be preempted by NLRA. The courts have, however, developed what has been termed the "market participant exception" to preemption. Under this exception, the NLRA does not preempt actions taken by local governments if the government is acting as a market participant. *Bldg. and Const. Trades Council of Metro. Dist. V. Assoc. Builders and Contractors of Mass./R.I., Inc.* 507 U.S. 218, 277 (1993) (hereinafter *Boston Harbor*).

The preemption doctrine derives from the Supremacy Clause of the United States Constitution which establishes the laws of the United States as "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S. Const. art. IV, eL 2*. When considering a preemption challenge, a court "is not to pass judgment on the reasonableness of state policy," but instead "to decide if a state rule conflicts with or otherwise 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the federal law." *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (citation omitted). Thus, in deciding whether a federal law preempts a state statute, the Court must "ascertain Congress' intent in enacting the federal statute at issue." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 738 (1985). Courts are reluctant to infer preemption. *Boston Harbor*, 507 U.S. at 224.

Preemption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Metropolitan Life Insurance Co.*, 471 U.S. at 738. The NLRA contains no express preemption provision. In analyzing a challenge under such a statute, the Court must not find a state statute to be preempted, "unless it conflicts with federal law or would frustrate the federal scheme," or unless the Court discerns "from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Boston Harbor*, 507 U.S. at 224. The Supreme Court's preemption doctrines as they relate to the NLRA have long been centered around reinforcing "the purpose of the Act[, which] was to obtain 'uniform application' of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953)).

B. Federal Labor Law Preemption.

NLRA preemption analysis has devolved into two distinct doctrines, commonly referred to as *Garmon* and *Machinists* preemption. *Garmon* preemption, which derives from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), "protects the primary jurisdiction of the National Labor Relations Board (NLRB) by displacing state jurisdiction over conduct which is 'arguably within the compass of § 7 or § 8 of the Act.'" *St. Thomas--St. John Hotel & Tourism Assoc. v Government of the United States Virgin Islands*, 218 F.3d 232, 239 (3d Cir. 2000) (citation omitted). *Garmon* preemption "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould*, 475 U.S. 282, 286 (1986) (hereinafter "*Gould*"). The doctrine is premised on Congress's overriding interest in uniform, national application of the NLRA, rather than on protecting particular conduct of private bargaining parties. See *St. Thomas*, 218 F.3d at 239.

Machinists preemption, by contrast, protects the collective bargaining process itself from interference and operates as a form of labor field preemption. It requires preemption of any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress "to be controlled by a free play of economic forces," *Machinists*, 427 at 140 (internal quotation marks and citation omitted), in a "zone free from all regulations, whether state or federal." *Boston Harbor*, 507 U.S. at 226. Under this rule, states are prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, unless such restrictions were presumably contemplated by Congress. See *Id.* at 147.

Two lines of *Machinists* preemption have developed. One line grows from *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477 (1960). This line invalidates any legislation which tilts the negotiating scales concerning the "economic weapons a party might summon to its aid." *Insurance Agents*, 361 U.S. at 490. According to the Supreme Court, "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Id.* at 489.

Thus, a state or local government's interference with the substantive or procedural aspects of collective bargaining violates Congress' intention "that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Id.* at 488. A state law which influences either the economic weapons available to the bargaining parties or the outcome of the negotiations is preempted. See *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (finding preempted a state policy preventing enforcement of state wage laws by unionized workers); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (invalidating a city's action in conditioning a franchise award on the successful settlement of an ongoing labor dispute); *Employers Association v. United Steelworkers*, 32 F.3d 1297 (8th Cir. 1994) (preempting a state statute forbidding the hiring of striker replacement workers); *United Steelworkers v. St. Gabriel's Hospital*, 871 F. Supp. 335 (D. Minn. 1994) (declaring preempted state legislation requiring a successor employer to honor the terms of a previous collective bargaining agreement). Any state attempt to interfere, directly or indirectly, with the bargaining parties' economic weapons is preempted by federal law.

In contrast, the second line of the *Machinists* doctrine carves an exception for state statutes of general application which deals with issues of fundamental state concern, such as health, safety, or welfare. This kind of legislation is permitted, because it is part of "the backdrop of state law that provided the basis of congressional action." *Taggart v. Weinacker's, Inc.*, 397 U.S. 223, 228 (1970) (concurring opinion). Preempting such legislation would "artificially create a no-law area." *Id.* The Supreme Court has noted that federal labor law "in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal Act." *Metropolitan Life Insurance Co.*, 471 U.S. at 756.

Therefore, laws dealing with general labor issues, such as unemployment compensation, minimum health benefits, and severance pay, do not trench impermissibly upon the collective bargaining process. See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (upholding a state law requiring severance pay for all employees in the event of a plant closing); *Metropolitan Life Insurance Co.*, 471 U.S. at 755 (upholding a state law requiring minimum health benefits for workers); *New York Telephone Co. v. New York State Dept. of Labor* 440 U.S. 519 (1979) (upholding a state unemployment compensation scheme as applied to striking workers). Similarly, state regulation of an industry, although it may have the indirect effect of impacting negotiations, has been allowed under the NLRA. See *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, 824 F.2d 672 (8th Cir. 1987) (holding state regulation of the telephone industry is not preempted under the NLRA); *Massachusetts Nurses Association v. Dukakis*, 726 F.2d 41 (1st Cir. 1984) (holding state regulation of hospital costs does not impermissibly interfere with the collective bargaining process). It is axiomatic that a court "cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Metropolitan Life Insurance Co.*, 471 U.S. at 757 (citation omitted).

C. Market Participant Exception².

The law has traditionally recognized a distinction between regulation and actions the state takes in a proprietary capacity - - that is to say, actions taken to serve the government's own needs rather than those of society as whole. Making this

² The discussion in this report is primarily limited to the content of the market participant exception under the NLRA. A market place exception exists in a number of other contexts such as under the Commerce Clause or ERISA. This report does not discuss the applicability of the reasoning of the market place exception under the NLRA to the other contexts or vice versa.

distinction is crucial because the NLRA does not preempt actions taken by a state when it acts as a mere proprietor or market participant. This distinction is most readily apparent when the government purchases goods and services its operations require on the open market; in general the government is not preempted when it acts as a "market participant" and not as a regulator of third parties. The Supreme Court has found that when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption. See *Boston Harbor*. However, once a state attempts to use its systemic power in a manner tantamount to regulation, such behavior is still subject to preemption. See *Gould*.

In *Gould*, the Court addressed a Wisconsin statute that forbade state procurement agencies from using state funds to purchase products manufactured or sold by "labor law violators," i.e., employers who had violated the NLRA three times within a five year period, 475 U.S. 283-84. Wisconsin argued that its statutory scheme was not unlawful because the statute merely regulated the spending power of its procurement officers. *Id.* The Court found the law preempted because it concluded that no other purpose could be credibly ascribed to the statute other than creating additional remedies for violations of the NLRA. *Id.* at 287. Notably, the prohibition was not limited to firms that violated labor laws on particular state-funded projects, but included violations on projects inside or outside the state.

In *Boston Harbor*, on the other hand, the Court held that the Massachusetts Water Resources Authority (MWRA), a state agency, acted as a market participant when it required contractors working on the cleanup of Boston harbor to agree to the terms of a project labor agreement negotiated by a project construction manager and labor union, 507 U.S. 232. In *Boston Harbor*, the MWRA was undertaking a major public construction project to provide for sewage treatment facilities to clean up Boston Harbor. *Id.* at 220-21. One of the bid specifications required that a successful bidder agree to project labor agreement terms. *Id.* at 221-22. The provision was attacked on the grounds that it was preempted by the NLRA because it intruded into the bargaining process between labor and management, which the NLRA preempts states from regulating. *Id.* at 223. The Supreme Court determined that since the MWRA would own and operate the sewer treatment facilities, it was pursuing its purely proprietary interest as a market participant. *Id.* at 232-33. The Court noted that the challenged action in the litigation was specifically tailored to one particular job, the Boston Harbor cleanup project, and that there was no reason to believe that the government was motivated by anything other than purely proprietary interests. *Id.* Also significant was 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." *Id.* at 232.

Gould and *Boston Harbor*, therefore, reflect polar outcomes despite the fact that both involved an exercise of spending or procurement power. The pivotal difference is that in the former case the state deployed its spending authority to achieve a goal far broader than merely protecting or fostering its own investment or proprietary interest, while in the latter instance the public agency limited its spending conditions to the protection of its investment or proprietary interest. Although *Gould* and *Boston Harbor* have been discussed in a number of contexts, it is difficult to come up with a general rule about when the market participation exception applies. A review from around the country of federal cases does provide some guidance about the application of the exception.

Whether or not a city's use of labor peace procedures is valid and not preempted by the NLRA depends largely on whether or not the city can be deemed to have implemented the procedure as part of its activities as a proprietor. In *Boston Harbor*, the Supreme Court said that when a city acts as a "market participant," it is allowed to act as a private employer would in dealing with market forces. However, the Supreme Court has also said that government actors may not use this power in such a way that it takes on or is actually done for a regulatory purpose. Many cases that have subsequently dealt with the issue of proprietary interests have defined them in terms of their differences from regulations, as the following examples illustrate.

Third Circuit

The Third Circuit has held that a city may require parties that receive tax increment financing from it to sign labor neutrality agreements under municipal proprietary interest ordinances. *Hotel Employees and Restaurant Employees Union, Local 57 v. Sage Hospitality*, 390 F.3d 206, 207-08 (3d Cir. 2004). The neutrality agreement contained, inter alia, a no-picketing provision and a provision that union representation would be determined using a card-check procedure. *Id.* at 209. In reaching this conclusion, the court articulated the following two-step analysis:

- (1) Does the challenged funding condition serve to advance or preserve the state's proprietary interest in a project or transaction, as an investor, owner, or financier?
- (2) Is the scope of the funding condition "specifically tailored" to the proprietary interest?

Id. at 215-16. In creating this test, the court distinguished two cases from the D.C. Circuit that involved labor regulation conditions in contracts with the federal government. The D.C. Circuit prohibited the federal government from requiring certain labor concessions from contractors that applied to all of their dealings (even those in which the federal government was not a party), but it allowed the government to require certain labor provisions in all federally funded contracts which did not extend to the contractors' nongovernment projects. *Id. at 215.* In highlighting the distinction, the Third Circuit said that:

The pivotal difference is that in the former case the state deployed its spending authority to achieve a goal far broader than merely protecting or fostering its spending authority or proprietary interest, while in the latter instance the public agency limited the spending conditions to the protection of its investment or proprietary interest.

Id. at 214. Thus, the Third Circuit's test is primarily concerned with ensuring that any action taken to protect the governmental unit's proprietary interest is narrowly tailored to further that interest. In *Sage Hospitality*, however, the Court significantly stated that it was relying on Pittsburgh's on-going proprietary interest as issuer of TIF bonds. *Id. at 216.* The City's interest in a successful project generating the highest projected stream of increased tax revenue was held to be only a generalized government interest – not a sufficient proprietary interest because it was not comparable to a financial interest that an ordinary market participant would have. Actions that reach more broadly are generally considered regulatory in nature. In this case, the court held that the city could require the party receiving tax funding to submit to certain labor provisions because these labor provisions helped to protect its substantial investment and were analogous to the protections that a private entity would take in a similar situation. *Id. at 217.* It was also important for the court that the labor agreements applied only to the contractor's relationship with the city itself and did not in any way affect or restrict its dealings with other parties. *Id.* As a result, the court held that the city's activities were deemed to be proprietary in nature and therefore not preempted by the NRLA.

Seventh Circuit

The Seventh Circuit adopted a purposive approach in striking down a county ordinance that required certain labor provisions in contracts with organizations in which the county argued it had a proprietary interest. *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005). In this case, the court held that "the spending power may not be used as a pretext for regulating labor relations." *Id. at 279.* As was the case with the Third Circuit, the Seventh Circuit was concerned with government actions that overreached in their attempt to address labor-related issues. In considering whether or not the labor provisions were a "reasonable, good-faith measure for enabling Milwaukee County to get a better quality of service from its contractors," the court concluded that the government could not have been motivated by such practical concerns when the agreements it required were "not limited to the provision of services to the County." *Id. at 280.* Although the labor provisions only applied to unions whose members did work for the county, the unions were thereafter required to follow certain requirements with respect to employees who did no work for the county and to work projects not for the county. This scope led the court to conclude that it was "inescapable that the County is trying to substitute its own labor-management philosophy for that of the National Labor Relations Act." *Id. at 281.* This crossed over into the regulatory realm for the court and therefore invoked preemption requirements of the NLRA. *Id. at 282.* The Court was also harshly critical of labor-peace agreements in general (they are not "tried and true" and not recognized by the NLRA) and believed that other contractual terms (e.g., liquidated damages clauses) could better address those issues. *Id. at 281 and 282.*

Fifth Circuit

The Fifth Circuit has adopted the following two-part test to determine whether a government action is proprietary or regulatory:

- (1) 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?
- (2) 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?

Cardinal Towing & Auto Repair v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999) (although this case does not involve NLRA preemption issues, it is useful because of its extensive discussion of *Boston Harbor*). The two prongs of this test illustrate that the Fifth Circuit is similarly concerned with overreaching and overly broad use of the spending power that the Third and Seventh Circuits have expressed. The court went on to say that the purpose of the test is "to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the behavior of private parties, that a regulatory impulse can be safely ruled out. *Id.*

A United States District Court in California applied the Fifth Circuit's version of the test to a challenge to San Francisco's requirement that employers contracting with the municipal airport agree to participate in card checks. *Aeroground, Inc. v. County of San Francisco*, 170 F. Supp. 2d 950 (D.N.CA. 2001). The court enjoined the County from enforcing the provision after concluding that the ordinance was a regulatory, rather than a proprietary, activity and was therefore preempted by the NLRA. *Id.* at 959. It noted that the test outlined above is designed 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 safely be ruled out." *Id.* at 957. It concluded that, in this case, the county exhibited such an impermissible regulatory purpose because the card check provision could not be construed as an effort to procure goods and services for the airport in an efficient and economic manner. *Id.* It was particularly important for the court in this case that the County was not contracting directly with Aeroground, because this made it much more difficult to characterize the provision as designed to secure the provision of goods or services. *Id.* at 958. It also concluded that the scope of the agreement was excessive and violated the second prong of the test because the agreement applied to all employers at the airport and had "the effect of controlling the conduct of these employers in their dealings with third parties." *Id.* at 958. The court also noted that the card check requirement was "not part of a particular project for which defendants hired Aeroground." *Id.* at 959. As such, the court held that the county's actions were regulatory in nature and therefore preempted by the NLRA.