

AGENDA REPORT

Resolution: Adoption of a Labor Peace Rule for Airport Concession Tenancy Agreements. **(Aviation)**

MEETING DATE: 5/18/2017

AMOUNT: No Revenue Impact

PARTIES INVOLVED: Various Current and Future
Airport Concessions Tenants

SUBMITTED BY: Bryant L. Francis C.M., Director of Aviation
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Danny Wan, Port Attorney

APPROVED BY: J. Christopher Lytle, Executive Director

ACTION TYPE: Resolution

EXECUTIVE SUMMARY

Staff seeks Board action to pass a resolution adopting a “Labor Peace Rule” that requires all Concessionaires* operating in the Terminal Complex** at Oakland International Airport (the “Airport” or “OAK”) to enter into a “Labor Peace Agreement” with labor organizations that represent or are seeking to represent concession employees at OAK’s concession locations. This proposed Labor Peace Rule is intended to be forward-looking with an effective date of July 1, 2017, and will apply to all new concession opportunities and to existing Concessionaires when their contracts with the Port are amended. This staff recommendation is revised to reflect comments at the May 4, 2017 Board meeting.

BACKGROUND

Staff presented its original proposed resolution to adopt a Labor Peace Rule (“Rule”) during the Board’s May 4, 2017 meeting. Pursuant to Board discussions and directions at that meeting, staff has revised Section III(A)(4) of the Rule. The Section provides for a procedure that excuses a Concessionaire from the labor peace requirement if it has attempted in good faith to negotiate a labor peace agreement with a labor organization, but the labor organization refuses

* “Concessionaire” means all individuals and businesses operating or seeking to operate food/beverage, retail, news/gifts and/or duty free concessions in the Terminal Complex at the Airport, together with all their tenants, lessees, subtenants, subleases, successors and assigns.

** “Terminal Complex” means all buildings and structures located within the Airport open to the public for the purpose of flight ticket purchase, passenger enplanement and deplanement, and those other services related to public passenger air travel.

to negotiate reasonably. The purpose of the Section is to resolve an impasse that may delay the selection of a qualified concessionaire.

The purpose of the entire Rule is to prevent labor disruption at the food and beverage concessions at the Airport and to timely select a Concessionaire reasonably able to assure labor peace. The Port has a financial and proprietary interest in business operations that have concessions in the Airport because these operators base their concession payments to the Port in part on the revenue they generate and because the passenger experience at Airport concessions contributes to the decisions made by potential Airport passengers as to which San Francisco Bay Area airports to patronize. The Port has an overwhelming interest in reducing the risk that such labor disputes have a negative impact on the Airport.

In recent years, throughout the state of California and elsewhere in the United States, there has been an increase in labor disputes in the hospitality industry, including with concessionaires operating at airports. Often times, airport operators are caught in the middle of these disputes, losing essential revenue by airline passengers and other customers who refuse to cross picket lines and/or avoid making purchases from impacted concessionaire businesses.

In CY2012-13, OAK experienced several labor-related actions caused by disputes between organized labor and Concessionaires who did not come to a labor peace agreement prior to commencing tenancy. Disruptions at the Airport included (i) large group (up to 150 people) leafleting and picketing with signs and bullhorns, and chanting on the curbside and within the Terminal Complex, and (ii) people interfering with and discouraging Port employees from coming to work.

In response, the Board adopted Resolution No. 14-18 – A Labor Peace Agreement Policy for Airport Concession Tenancy Agreements (February 27, 2014). Resolution No. 14-18 requires – unless in violation of federal or state law – that all OAK Concessionaires have a signed Labor Peace Agreement with the labor organizations representing or seeking to represent concession workers in the Terminal Complex at the Airport under the following circumstances:

1. When an existing Concessionaire's tenancy agreement is amended;
2. Prior to a new/proposed Concessionaire bidding for an Airport concession opportunity; or,
3. As part of any new Concessionaire's tenancy agreement.

Comparable airports and municipalities in the state of California, including Long Beach, Los Angeles and San Francisco, have enacted similar labor peace legislation that is designed to protect airport operator revenues and efficient operations by ensuring any future labor disputes will not adversely impact concession operations.

Time Sensitivity: Since the current agreements with food and beverage concession operators at the Airport will expire May 31, 2018, it is essential that prospective concessionaires have ample time to review and understand the Port's labor peace policies and procedures and that such polies and procedures facilitate timely Labor Peace Agreements between the Airport's Concessionaires and labor organizations.

ANALYSIS

Since its adoption, the terms and conditions of the Labor Peace Agreement Policy has served its purpose to the general satisfaction of labor organizations, concessionaires and the Port. Given that staff anticipates numerous proposers would be interested in responding to the upcoming Food & Beverage Concession Opportunity Request for Proposals in 2018, it is timely to update the concession labor peace requirement to more clearly set forth the procedures that proposers are expected to follow. The new proposed Rule is not a general regulation of labor practices; but rather, the Rule specifically identifies and protects the proprietary interest of the Airport in preventing labor disruptions in the operation and management of the airport food and beverage concessions.

The Rule provides for the following:

- ➔ Identifies the proprietary interest of the Airport and requires potential concessionaires to enter into Labor Peace Agreement intended to prevent labor disruptions of the Airport's food and beverage concession operations, but not to influence or dictate the terms of labor relations between a Concessionaire and its employee or employee representatives.
- ➔ Makes the Rule effective July 1, 2017, so that any new concessions or material amendments to existing concessions would have to comply with the new Labor Peace Rule, but Concessionaires holding a valid concession agreement with the Port as of the Effective Date of the Resolution would be grandfathered under Resolution No. 14-18 unless a material amendment is made to the agreement.
- ➔ Requires a Concessionaire to enter into a Labor Peace Agreement prior to the Board approving any occupancy/operating agreement between the Port and the Concessionaire.
- ➔ Adds procedure to excuse a concessionaire from the labor peace requirement with respect to a labor organization when a hearing officer finds that the Concessionaire has attempted in good faith to negotiate labor peace but the labor organization has refused to negotiate or has failed to negotiate reasonably. Staff previously recommended that the Airport Director make the findings. This revised recommendation provides for the Executive Director to appoint a hearing officer who is not an Airport employee so that he or she is more neutral and removed from the daily operations of the Airport. The hearing officer is required to hold a hearing after notice to the affected parties before making findings. This procedure seeks to avoid undue delays to the selection of a qualified concessionaire in case of an impasse between a concessionaire and a labor organization without influencing or dictating the terms of labor relations. At the Board's May 4, 2017 meeting, some Board members suggested that the Rule should provide for an appeal of the hearing officer's findings to the Board. Staff does not recommend this because of the additional delays inherent in an appeal procedure. However, should the Board decide for an appeal procedure, the first two sentences of the last paragraph of Section III(A)(4) would be replaced with the following:

“The findings of the hearing officer are appealable to the Board by either the Concessionaire or the subject Labor Organization subject to the Board’s acceptance of an appeal application in writing. The findings may be based on any evidence the hearing officer (or the Board in the case of an appeal) deems relevant or credible whether or not the Concessionaire or subject Labor Organization presented evidence or appeared at any hearing or before the Board. The provision of a hearing is at the discretion of the Executive Direction and the acceptance of an appeal application is at the discretion of the Board, in order to facilitate the Port’s proprietary interest in the timely compliance with this Rule.”

- ➔ Requires the Concessionaire to include in any sublease or similar agreement with any tenant, lessee, subtenant, sublessee, successor and assign a provision requiring compliance with the Rule.
- ➔ Exempts (i) certain Concessionaires because they may be subject to other labor agreements, (ii) Concessionaires who do not have regularly staffed operations^{***}, and (iii) any agreement between the Port and public agencies.
- ➔ Instructs the Director of Aviation to reference the Labor Peace Rule in all future Requests for Proposals for Airport concession opportunities.

The Port Attorney’s Office, and the Social Responsibility and Aviation Divisions staff, believe this Labor Peace Rule can be implemented and enforced with minimal disruption to the Airport’s concessions program. The Labor Peace Rule is limited to protect the proprietary interest of the Port when putting Concessionaires in place to provide food/beverage, retail and duty free services at the Airport without labor disruption.

BUDGET & STAFFING

By passing a resolution to adopt the proposed Labor Peace Rule, there should be no revenue impact to the FY2016-17 Operating Budget, or future budgets. The proposed action does not have any staffing impact.

MARITIME AVIATION PROJECT LABOR AGREEMENT (MAPLA)

The matters included in this Agenda Report do not fall within the scope of the Port of Oakland Maritime and Aviation Project Labor Agreement (MAPLA) and the provisions of the MAPLA do not apply.

STRATEGIC PLAN

The action described herein would help the Port achieve the following goals and objectives in the Port’s Strategic Plan

^{***} Examples of Concessionaires who do not have regularly staffed operations would include pay telephone service providers, the in-terminal advertising contractor, and vending machine operators; each of these Concessionaires occasionally dispatch different employees or contractors to install, service, maintain and/or repair their concession.

(<http://www.portofoakland.com/pdf/about/strategicPlan2011-2015.pdf>)

Goal C: Promote Equitable Community Access to Employment and Business Opportunities

- Objective 1: Comply with all federal, State, local and Port workforce mandates.
- Objective 2: Conduct comprehensive communication and outreach to stakeholders and strategic partners to improve workforce and small business opportunities.
- Goal C: Objective 3: Integrate workforce mandates into all Port agreements, policies and processes at the front end.

LIVING WAGE

Living Wage requirements, in accordance with the Port's Rules and Regulations for the implementation and enforcement of the Port of Oakland Living Wage Requirements (the "Living Wage Regulations"), do not apply because the requested actions are not an agreement, contract, lease, or request to provide financial assistance within the meaning of the Living Wage Regulations.

ENVIRONMENTAL

The California Environmental Quality Act (CEQA) Guidelines, Section 15061(b) (3) states that CEQA only applies to projects with the potential for causing a significant effect to the environment. Where it can be seen with certainty that there is no possibility that the activity may have a significant effect on the environment, the activity is not subject to CEQA. Therefore, adopting the Labor Peace Agreement Policy is not a project under CEQA, and no further environmental review is required for this action.

GENERAL PLAN

This action does not change the use of any existing facility, make alterations to an existing facility, or create a new facility; therefore, a General Plan conformity determination pursuant to Section 727 of the City of Oakland Charter is not required.

OWNER-CONTROLLED INSURANCE PROGRAM (OCIP)/ PROFESSIONAL LIABILITY INSURANCE PROGRAM (PLIP)

This action is not subject to the Port's Owner Controlled Insurance Program (OCIP) as it is not a capital improvement construction project.

OPTIONS

1. Pass a resolution adopting a "Labor Peace Rule" in the form attached to this Agenda Report that requires all Concessionaires operating in the Terminal Complex at Oakland International Airport to enter into a "Labor Peace Agreement" with labor

organizations that represent or are seeking to represent concession employees at the subject concessions; this is the recommended action.

2. Pass a resolution adopting a “Labor Peace Rule” that requires all Concessionaires operating in the Terminal Complex at Oakland International Airport to enter into a “Labor Peace Agreement” with labor organizations that represent or are seeking to represent concession employees at the subject concessions, but under different terms and conditions from the Labor Peace Rule attached to this Agenda Report.
3. Do not pass a resolution adopting a new “Labor Peace Rule”, but keep in force the existing Board adopted Resolution No. 14-18 – A Labor Peace Agreement Policy for Airport Concession Tenancy Amendments (February 27, 2014) for all Concessionaires operating in the Terminal Complex at Oakland International Airport.

RECOMMENDATION

It is recommended that the Board pass resolution adopting a “Labor Peace Rule” in the form attached to this Agenda Report that requires all Concessionaires operating in the Terminal Complex at Oakland International Airport to enter into a “Labor Peace Agreement” with labor organizations that represent or are seeking to represent concession employees at the subject concessions, as approved by the Port Attorney.

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Appendix A to Resolution No. XXXXXX

LABOR PEACE RULE

I. PURPOSE

The Board of Port Commissioners, consistent with the findings set forth in Resolution No. XXXXXXXX that it is essential for the protection of the Port's proprietary and financial interests, adopts this Labor Peace Rule mandating that Concessionaires and Labor Organizations agree to enter into and abide by Labor Peace Agreements in the circumstances specified below.

II. DEFINITIONS

Whenever used in this Rule, the following terms shall have the meanings set forth below.

- (A) **"Airport"** means Oakland International Airport.
- (B) **"Airport Director"** means the Director of Aviation at the Oakland International Airport.
- (C) **"Board"** means the Board of Port Commissioners.
- (D) **"Concession" or "Concessionaire Agreement"** means any lease, license, sublease or similar agreement providing for the operation of food/beverage, retail, news/gifts and/or duty free services and concessions within the Airport's Terminal Complex.
- (E) **"Concessionaire"** means all individuals and businesses operating or seeking to enter into a Concession, together with any such individual or business's tenants, lessees, subtenants, sublessees, successors and assigns where the rent or lease payment payable to the Port depends on the volume of revenues from Concession services provided by such Concessionaire.
- (F) **"Executive Director"** means the Executive Director of the Port.
- (G) **"Labor Disruption"** means any concerted activity, including strikes, picketing, handbilling, boycotts of, or other interference with, any Concessionaire operations or those of any of its Subcontractors at the Terminal Complex or the operations of the Airport at the Terminal Complex.
- (H) **"Labor Organization"** means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with Concessionaires concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

- (I) **“Labor Peace Agreement”** means a written agreement between a Concessionaire and a Labor Organization that prohibits a Labor Organization, its members and any employees represented by the Labor Organization from engaging in any Labor Disruptions (1) during any organizing, membership drive or negotiation of a collective bargaining agreement; and (2) in the case where the Labor Organization has entered into a collective bargaining agreement with the Concessionaire, during the entire term of the Concessionaire Agreement.
- (J) **“Port”** means the City of Oakland, a municipal corporation acting by and through its Board of Port Commissioners.
- (K) **“Request for Proposal”** means any request for proposals, request for qualifications, invitations to bid, or similar request or invitation issued by the Port for a Concession.
- (L) **“Rule”** means this Labor Peace Rule.
- (M) **“Subcontractor”** means any person or business entity, not an employee that enters into a subcontract, sublicense, or sublease or similar agreement with a Concessionaire to perform duties within the Airport’s Terminal Complex related in any way to a Concessionaire Agreement.
- (N) **“Terminal Complex”** means areas in, adjacent to, and immediately surrounding all buildings and structures (including but not limited to Buildings M101, M102, M103, M104, M114, M130, M152, M157, M158, M363, M367, M368, and XU70) located at the Airport and open to the public for purpose of flight ticket purchase, passenger enplanement and deplanement, including Sterile Areas and adjoining Ramps, public lobby waiting, baggage check-in and pick up, and those other services related to public passenger air travel.

III. REQUIREMENT TO KEEP LABOR PEACE AND PREVENT LABOR INTERRUPTIONS

(A) Concessionaire Duties

- (1) Prior to entering into a Concessionaire Agreement, a Concessionaire shall enter into a Labor Peace Agreement with any Labor Organization that has requested such a Labor Peace Agreement. The Concessionaire shall enter into the Labor Peace Agreement within thirty (30) days from the request.
- (2) The Concessionaire shall require its tenant, lessee, subtenants, sublessees, successors, and assigns to include in the sublease or similar agreement a provision to comply with the requirements of this Rule.
- (3) The Concessionaire shall agree in its bid or application for a Concession and the Concession Agreement that the Port has a proprietary interest in the timely placement of a Concessionaire and operations of the Concession under a Labor Peace Agreement. Undue delay in reaching a Labor Peace Agreement with a Labor Organization would interrupt the provision of

services to Airport passengers and subject Concessions to Labor Disruptions.

- (4) In the event that a Concessionaire is unable to negotiate a Labor Peace Agreement with any Labor Organization within the thirty (30) day period set forth in Section III(A)(1) above, it may request to be excused from such obligations with respect to that Labor Organization by delivering a written request to the Executive Director. Upon the receipt of the written request from the Concessionaire, the Executive Director may appoint a hearing officer (who shall not be an employee of the Port working at the Airport) who shall hold an informal hearing after notice to the Concessionaire and the subject Labor Organization. The Concessionaire may be relieved of and excused from its obligations under Section III(A)(1) with respect to the subject Labor Organization if the hearing officer finds, after holding the noticed hearing, that:
 - a. the Concessionaire has attempted in good faith to reach a Labor Peace Agreement with the subject Labor Organization, and
 - b. the Labor Organization has (i) refused to negotiate in good faith to reach a Labor Peace Agreement or (ii) placed condition(s) on Labor Peace Agreement that are not related or not conducive to preventing Labor Disruptions in light of practices at other airports in the country that have concession labor peace requirements.

The findings of the hearing officer shall be final and may be based on any evidence or fact he or she deems relevant or credible whether or not the Concessionaire or subject Labor Organization presented evidence or appeared at the hearing. The provision of a hearing is at the discretion of the Executive Director to facilitate the Port's proprietary interest in the timely compliance with the Rule. This Section III(A)(4) neither implies any legal duty of the Port nor confers any constitutional, legal, or contractual right of the Concessionaire to enter into a Concession Agreement or of any party to contest the findings of the hearing officer in court or otherwise.

(B) Airport Director Duties

- (1) The Airport Director shall include in any Concessionaire Agreement a provision requiring any Concessionaire to abide by the requirements imposed under Section III(A) of this Rule as a condition of entering into or modifying any Concessionaire Agreement.
- (2) The Airport Director shall include the description or reference to this Rule in any Request for Proposal. All Requests for Proposals will include a summary description of and reference to the requirements of this Rule. Failure to include the description or reference to this Rule in any such Request for Proposal shall not exempt any Concessionaire otherwise subject to the requirements of this Rule.
- (3) The Airport Director shall not enter into or recommend to the Board any Concessionaire Agreement with a Concessionaire without finding that

(a) the Concessionaire has entered into a Labor Peace Agreement with all Labor Organizations that, to the actual knowledge of the Port, has requested a Labor Peace Agreement with the Concessionaire, (b) the Concessionaire is excused from compliance pursuant to Section III(A)(4) above, or (c) that any exemption from this Rule as set forth in Section III(D), below, applies.

- (4) The Airport Director shall grant exemptions from this Rule as set forth in Section III(D), below.

(C) Labor Organization Duties

- (1) Any Labor Organization seeking enforcement of this Rule must request a Labor Peace Agreement with a Concessionaire under provisions of this Rule and must submit to the Airport Director a copy of the written request it has sent to the Concessionaire showing the date of the request and specifying the Request for Proposal with respect to which the request is made.
- (2) Any Labor Organization seeking enforcement of this Rule shall not engage in Labor Disruptions at the Port in violation of any applicable Labor Peace Agreement.

(D) Exemptions

The provisions of this Rule shall not apply to any of the following:

- (1) A bargaining unit of any Concessionaire which has already recognized a Labor Organization for that bargaining unit;
- (2) A Labor Organization that has not submitted a written request to enter into a Labor Peace Agreement to a Concessionaire covered under this Rule or that has not submitted evidence of such written request to the Airport Director as set forth in Section III(C)(1) of this Rule;
- (3) Any Concessionaire whose operations at the Airport are subject to the Railway Labor Act either by final decision by a court or agency of competent jurisdiction, or by mutual agreement between the Concessionaire and a Labor Organization which is the exclusive bargaining representative of its employees. In such cases, the Labor Peace Agreement shall be voluntary;
- (4) A Concessionaire Agreement under which the Concessionaire does not operate on a regular basis with a defined complement of employees within the Terminal Complex;
- (5) Any agreement between the Airport and a public agency; or
- (6) Any Concessionaire Agreement where the Airport Director determines that the risk to the Airport's financial or other nonregulatory interest resulting from labor/management conflict is so minimal or speculative so as not to require a Labor Peace Agreement to achieve the Airport's proprietary, investment, or other nonregulatory interest.

IV. ENFORCEMENT

- (A) The Airport Director or his/her designee shall investigate complaints alleging that this Rule has been violated, and shall take any action necessary to enforce compliance, including referring such violation to the Port Attorney for civil action.
- (B) In addition to any other remedies available to the Airport, the Port may terminate the Concessionaire Agreement upon thirty (30) days' notice to the Concessionaire to cure its breach where the Concessionaire has failed to (1) enter into a Labor Peace Agreement as required by this Rule or (2) include in a sublease or similar agreement the provision requiring compliance with this Rule as required by Section III(A)(2) of this Rule.
- (C) Where a Concessionaire has failed to prevent a Labor Disruption that is directly or indirectly caused by the Concessionaire's violation of this Rule or breach of its obligations under the Concessionaire Agreement, or by its violation of laws or of rules and regulations of the Port, the Port may consider the Concessionaire in breach of the Concession Agreement, provide concession services through means or person other than breaching Concessionaire, and terminate the Concession Agreement upon thirty (30) days' notice to the Concessionaire to cure its breach.
- (D) Any challenge to the applicability of this Rule to a particular Concessionaire or Labor Organization shall be brought to the Board only after first seeking an exemption from the Airport Director as provided for in this Rule. Any such challenge must be commenced with the Board within 15 days after notification that such exemption has been denied by the Airport Director.

V. CONSTRUCTION

Nothing in this Rule shall be construed as requiring any Concessionaire to change the terms and conditions of employment for its employees, recognize a Labor Organization as the bargaining representatives for its employees, adopt any particular recognition process, or enter into a collective bargaining agreement with a Labor Organization. Nothing in this Rule permits or requires the Port or any Concessionaire to enter into any agreement in violation of the National Labor Relations Act of 1935. This Rule shall not apply to any Concession in which the Port's proprietary interest in preventing Labor Disruptions is so minimal or speculative so as not to warrant concern for the Airport's proprietary, investment or other non-regulatory interest.

VI. EFFECTIVE DATE

The provisions of this Rule shall apply to any Concessionaire Agreement proposed to be awarded, awarded, modified, extended, or renegotiated after the effective date of this Rule.

VII. SEVERABILITY

If any part or provision of this Rule, or the Application thereof to any person, business entity or circumstance, is held invalid by any court of competent jurisdiction, the

remainder of this Rule including the application of such part or provisions to other persons, business entities or circumstances, shall not be affected thereby and shall continue in full force and effect.