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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BF FOODS, LLC, FILO FOODS, LLC, ALASKA AIRLINES, INC., and
WASHINGTON RESTAURANT ASSOCIATION,
Respondents/Cross-Appellants,

v.

CITY OF SEATAC, KRISTINA GREGG, CITY OF SEATAC CLERK,
Appellants/Cross-Respondents,

and the

PORT OF SEATTLE,
Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,
Appellant/Cross-Respondent.

**APPELLANT/CROSS-RESPONDENT SEATAC COMMITTEE
FOR GOOD JOBS' ANSWER TO *AMICUS CURIAE* BRIEF OF
AIRLINES FOR AMERICA**

Dmitri Iglitzin, WSBA # 17673
Jennifer Robbins, WSBA # 40861
SCHWERIN CAMPBELL BARNARD IGLITZIN &
LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

 ORIGINAL

I. ARGUMENT

A. Introduction.

The amicus brief filed by Airlines for America (“A4A”) adds nothing to the arguments made to this Court by the Respondents/Cross-Appellants in support of their contention that SeaTac Municipal Code (“SMC”), Ch. 7.45 (“the Ordinance”) is preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b) (“ADA”) – arguments that the SeaTac Committee for Good Jobs (“Committee”) addressed and refuted in its Reply Brief and Cross-Response Brief of Appellant (“Cross-Response Brief”) at pages 52-61.

A4A also suggests that the Ordinance is preempted by the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (“RLA”), because it interferes with “the collective bargaining process generally, and the RLA representation process in particular.” *See* Brief of Amicus Curiae Airlines for America (“A4A Brief”) at 15. For the reasons set forth below, this argument is equally without merit and does not provide an independent basis for this Court to affirm those portions of the trial court’s ruling that found the Ordinance invalid or unenforceable in part.¹

¹ The Committee maintains that this Court’s consideration of the RLA preemption challenge to the Ordinance is improper, because it was raised only by an amicus on appeal and not by any party. *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (“It is further well established that appellate courts will not enter into the discussion of points raised only by amici curiae.”); *Walker v. Wiley*, 177 Wash. 483, 491, 32 P.2d 1062 (1934) (issue argued by amici but not counsel for appellant is waived or abandoned).

B. A4A's Airline Deregulation Act Arguments Lack Merit.

In its Cross-Response Brief, at page 52, the Committee explained that there is a two-step process for determining whether a state or local law or regulation is preempted by the ADA. A law is preempted if it *either* (1) has “reference to” an airline price, route, or service, or (2) has a “connection with” prices, routes, or services that is more than tenuous, remote or peripheral. *Morales v. TWA*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992); *ATA v. San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001).

A4A does not dispute that this is the proper analytic framework to be applied, yet A4A substantially ignores the framework in its brief, instead simply stringing together a series of unsupported assertions to argue that the Ordinance “relates to” air carrier “services” and “prices.” *See, e.g.*, A4A Brief at pp. 4-5.

1. The Ordinance Does Not “Refer To” Airline Prices or Services.

A4A fails to acknowledge that the Ordinance does *not* refer to carrier rates or services, however broadly those terms might be defined, but instead refers only to the wages and benefits paid by contractors to their employees. *See generally* Cross-Response Brief at pp. 53-56. Significantly, every case cited by A4A finding ADA preemption dealt

with a law that regulates the manner in which airline (or trucking) services are provided, or the price charged for those services by airlines. In contrast, the Ordinance at most indirectly affects only the costs to airlines in acquiring certain services -- not the manner of providing those services or the prices airlines charge for the services they provide.²

A4A's reliance on *Rowe v. New Hampshire Motor Transport Assoc.*, 552 U.S. 364, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008), the primary authority it cites in support of its argument on this point, is not persuasive. *Rowe* found preempted a state statute governing delivery of tobacco products which required a specified recipient-verification service and prohibited delivery unless the sender or receiver had a state license. The statute in *Rowe* dictated to whom deliveries could be made; in fact, the Court found that "carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Id.* at 372. The Court found that these restrictions affected "the essential details of a motor carrier's system for picking up, sorting, and carrying goods—essential details of the carriage itself." *Id.* at 373.

² Because the Ordinance similarly does not refer to the services provided by those contractors, this Court need not reach the disputed question of whether, as A4A contends, and notwithstanding the unequivocal test of the Act, ADA preemption applies even if the services in question are being provided by a third party, not by an airline itself. *See* A4A Brief at 10; Cross-Response Brief at 54, n.37.

The Ordinance does none of these things, but instead relates only to the wages paid by non-airline entities. It does not attempt to regulate or control the frequency and schedule of flights provided by airlines, the selection of markets for the airlines, or the services provided by airlines to their passengers. It thus does not run afoul of the ADA the way the state statute in *Rowe* did.

Northwest, Inc. v. Ginsberg, 134 S.Ct. 1422 (2014) is equally unhelpful to A4A. In that case, the plaintiff claimed that an airline breached an implied covenant of good faith and fair dealing by revoking his membership in the airline's frequent flyer program. The Court held that the plaintiff's membership in that program was directly connected to both the airline's "rates" (because through the program, the price the airline charged him for tickets would be reduced) and "services" (because through the program, the airline would give the plaintiff greater "access to flights and to higher service categories"). *Id.* at 1431. Because nothing in the Ordinance compels any airline to reduce or raise its prices or provide greater or lesser access to flights or higher service categories, *Ginsberg* is inapposite to the questions now before this Court.

Air Transport Ass'n v. Cuomo, 520 F.3d 218, 222 (2nd Cir. 2008), also cited by A4A, provides even less support for A4A's assertion that the Ordinance refers to airline "services." In *Cuomo*, the Court found that a

state law requiring airlines to provide food, water, electricity and restrooms to passengers during lengthy ground delays related “to the service of an air carrier.” But that law directly regulated provision of these services; it did not, like the Ordinance, leave the nature of those services untouched while simply requiring subcontractors to pay higher wages to the people providing same. The contrast between a law that regulates the nature of services to be provided, such as the laws in *Rowe*, *Ginsberg*, or *Cuomo*, and a law that addresses the wages and working conditions of non-airline entities that employ people to provide such services, while refraining from addressing any aspect of the nature of such services, could not be more extreme.³

DiFiore v. American Airlines, 646 F.3d 81 (1st Cir. 2011), did find an action applying a tipped-worker protection law to skycaps preempted. However, the court did not reach this conclusion based on the fact that this law regulated the employment relationship between the skycaps and the airline contractor or based on the fact that the tip law would potentially (or inevitably) increase the airline’s costs. Instead, the Court held:

³ A4A’s citation to *Hawaiian Inspection Fee Proceeding*, Order 2012-1-18, Docket DOT-OST-2010-0243-0029 (Jan. 23, 2012) is even less persuasive. In that matter, Hawaii’s Inspection Fee Statute, among other provisions, imposed fees on airlines to fund the inspection of incoming freight and also forced the airlines to bill shippers (their customers) for those fees. Not surprisingly, the U.S. Department of Transportation held that the statute “directly regulates air carriers by commanding air carriers to conform their service of shipping freight by air transportation in ways not dictated by the market.” Needless to say, the Ordinance imposes no such (or similar) obligations on airlines with respect to the services those airlines provide.

[T]he tips law as applied here directly regulates how an airline service is performed and how its price is displayed to customers—not merely how the airline behaves as an employer or proprietor. To avoid having state law deem the curbside check-in fee a “service charge” would require changes in the way the service is provided or advertised.

646 F.3d at 88. The tip law thus did much more “than simply regulate the employment relationship between the skycaps and the airline.” *Id.* at 87.

In contrast, the Ordinance does not “directly regulate[]” how any airline service “is performed” or how an airline’s price “is displayed to customers.” The Ordinance is silent on both of those matters, seeking solely to require certain companies that may be airline subcontractors to pay a minimum wage to their employees. Significantly, the First Circuit in *DiFiore* took pains to state:

We do not endorse ~~American's~~ American's view that state regulation is preempted wherever it imposes costs on airlines and therefore affects fares because costs “must be made up elsewhere, i.e., other prices raised or charges imposed.” This would effectively exempt airlines from state taxes, state lawsuits of many kinds, and perhaps most other state regulation of any consequence.

Id. at 89.⁴

⁴ A4A’s citation to *National Federal of the Blind v United Airlines, Inc.*, No. C 10-04816, 2011 WL 1544524 (N.D. CA April 25, 2011) adds nothing to its argument. Assuming that the court was correct in concluding that making ticketing kiosks available to passengers is an airline service, imposing the obligation on airlines to provide kiosks that can “readily be used by a passenger with a disability” or to “provide equivalent service to [such a] passenger,” 2011 WL 1544524 *3, directly regulates the provision of that service, whereas the Ordinance imposes no regulation of any service provided by any airline.

The bottom line is that imposing increased labor costs on an airline contractor, no matter what role that contractor is playing in the airline's operations, simply is not a "reference" to either the services provided by, or the rates set by, an airline, and no court anywhere in the country has held otherwise. As the court in *Amerijet International, Inc. v Miami-Dade County*, ___ F.Supp.2d ___, 2014 WL 866406 (S.D.Fla. 2014), stated, rejecting the claim that a living wage ordinance covering airport contractors was ADA preempted, interpreting the ADA as broadly as A4A proposes "would preempt every law that regulates a business providing services to airlines, whether it is a food vendor, janitor or cargo handler" *Id.* at *5-6.⁵ A4A's contention that the Ordinance is preempted because it "refers to" prices, routes, or services should therefore be rejected.

2. The Ordinance Has Only A Tenuous, Remote or Peripheral Connection To Services or Prices.

A4A's analysis of the question of whether the Ordinance has a "connection with" prices, routes, or services that is more than tenuous, remote or peripheral is equally flawed.

As an initial matter, A4A does not address, much less rebut, the legal principle that, as explained in the Committee's Cross-Response

⁵ A4A attempts to distinguish *Amerijet International* on various unpersuasive grounds, *see* A4A Brief, pp. 10-11, but has not and cannot explain away the pertinence of either its holding or the language quoted above.

Brief, a statute is not preempted by the ADA under the “connection with” analysis unless it compels or binds carriers to certain fares, routes, or services. *See Dan’s City Used Cars, Inc. v. Pelkey*, ___ U.S. ___, 133 S. Ct. 1769, 1780, 185 L.Ed.2d 909 (2013) (rejecting a claim of ADA preemption on the basis, *inter alia*, that the state laws invoked by the plaintiff did not “freez[e] into place services that carriers might prefer to discontinue in the future”) (quoting *Rowe*, 552 U.S. at 372); *ATA*, 266 F.3d at 1071 (“the question is whether the Ordinance compels or binds [plaintiffs] to a particular price, route or service”); *Helde v. Knight Transportation, Inc.*, ___ F.Supp.2d ___, 2013 WL 5588310 *3 (W.D.Wa. 2013) (“the proper inquiry is whether the regulation binds carriers to particular prices, routes, or services, thereby interfering with the industry’s competitive market forces”) (citing *American Trucking Ass’ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 396-397 (9th Cir. 2011)). It is undisputed that the Ordinance does not require or compel any of these things.

Nor is there any evidence in the record even remotely suggesting that the costs imposed by the Ordinance indirectly on airlines would “acutely interfere” with airline prices, routes or services - the standard A4A suggests might apply. *See* A4A Brief at 11.

A4A cites *ATA* for the proposition that ADA preemption is “more likely to be found” if a wage or employment law “specifically targets the

airline industry.” A4A Brief at 11. While *ATA* noted that the ordinance at issue in that case applied “to the majority of City contractors in countless industries,” 266 F.3d at 1073, that was not the basis for the Court’s conclusion, which instead was predicated— as this Court’s should be — on the absence of any evidence in the record indicating that the costs of providing the mandated benefits would be so great as “to compel the Airlines to change their routes and services.” *Id.* at 1075.⁶

A4A also argues that the relationship between the Ordinance and air carrier services and prices is not “tenuous,” “remote,” or “peripheral” because the Ordinance “takes direct aim at a core market development resulting from deregulation: air carriers’ use of contractors to provide services to passengers.” A4A Brief at 12. The argument is entirely speculative, however, and (not surprisingly) is supported by no decisional authority of any kind. In other words, there is apparently not one court anywhere in the country that has agreed with A4A that state or local economic measures are per se preempted by the ADA if they might impact a carrier’s decision to use contractors.

Moreover, neither A4A nor Respondents/Cross-Appellants have presented this Court with any evidence upon which this Court could base a

⁶ *Cuomo*, 520 F.3d 218, also cited by A4A in support of this proposition, does not in fact contain any suggestion that it matters whether the law in question targets the airline industry specifically, versus being a law of more general application that just happens to encompass airline employers, among others.

conclusion that the Ordinance is, as a factual matter, likely to decrease air carriers' use of contractors. As was noted by the Committee in its Cross-Response Brief at 60, this argument is premised on the contention that the Ordinance changes the economic realities of the market so dramatically that an airline that might otherwise choose to contract out work might instead bring that work in-house and pay its employees lower wages than those set by the Ordinance – a contention wholly unsupported by any evidence in the record.

In any event, A4A cannot show that the Ordinance *compels* airlines to stop using contractors. Absent such proof, Respondents/Cross-Appellants' and A4A's argument is unavailing in light of the authority cited above (*see, e.g., Dan's City Used Cars, Inc.; ATA; Helde*).

Finally, A4A contends that “the monetary compensation requirements mandated by the Ordinance will directly impact air carriers in terms of the amount of money they must pay to third party contractors and other carriers for core passenger services.” A4A Brief at 12. Yet an “impact on an air carrier” is nowhere identified as a basis for ADA preemption; only impacts on airline prices, routes or services matter under the statute. *See also Helde*, 2013 WL 5588310, at *3 (“The fact that defendant's costs will increase, even with the attendant possibility that defendant might choose to pass those costs along to consumers” does not

provide a basis for finding the regulation in question ADA-preempted).

Thus, even if there were evidence in the record to support this assertion, which there is not, it has no legal relevance and, like the rest of A4A's arguments, does not provide a basis for concluding that the Ordinance is preempted by the ADA.

C. A4A's Railway Labor Act Arguments Lack Merit.

The Committee has previously briefed to this Court the errors in Respondents/Cross-Appellants' argument that the Ordinance is preempted in its entirety by the National Labor Relations Act ("NLRA"). *See* Cross-Response Brief at 40-52. A4A now apparently asserts that the Ordinance is similarly preempted by the RLA.

As an initial point, A4A has failed to demonstrate that any RLA-covered employers are actually encompassed within the Ordinance's definition of "Transportation Employer." On its face, the Ordinance excludes "certificated air carriers" performing services for themselves. SeaTac Municipal Code § 7.45.010(M)(1). While entities that are not themselves certificated air carriers could potentially come within the jurisdiction of the RLA, that only occurs if those entities are "directly or indirectly owned or controlled by, or under common control with a carrier or carriers." *See e.g., Air Serv Corporation*, 39 NMB 450 (2012); *Talgo, Inc.*, 37 NMB 253 (2010); *Bradley Pacific Aviation, Inc.*, 34 NMB 119 (2007).

A4A has not identified any particular “Transportation Employer” covered by the Ordinance that it contends falls within the jurisdiction of the RLA. The question of whether the Ordinance is potentially preempted by the RLA with regard to such an employer is therefore entirely theoretical and this Court should decline to rule on it. *See, e.g., Hart v. Dep’t of Soc. & Health Servs.*, 111 Wn.2d 445, 450, 759 P.2d 1206 (1988) (advisory opinions are greatly disfavored).⁷

Second, A4A has not presented any authority to support its claim that the Ordinance interferes with RLA requirements or processes. A4A’s argument seems to be that the Ordinance is preempted because it interferes with the RLA representation process – “whether employees of a derivative carrier will be represented by a union in the first place.” A4A Brief at 16. A4A provides absolutely no explanation, however, as to how the

⁷ A4A cites *Aircraft Serv. Int’l, Inc. v. Int’l Bhd. of Teamsters, Local 117*, 742 F.3d 1110 (9th Cir. 2014) to support its assertion that one company that fuels flights in and out of Seattle is subject to the RLA. However, that company’s status as a derivative carrier subject to the RLA was simply accepted as a given by the trial court in that case. *See Aircraft Serv. Int’l, Inc. v. Int’l Bhd. of Teamsters, Local 117*, 2012 WL 5194163, at *3, n.3 (W.D.Wash. 2012) (“Neither side disputes that ASII is a “carrier” as that term is defined in the RLA.”). Subsequent rulings of the National Mediation Board, which is the entity that primarily determines whether RLA jurisdiction exists, cast the parties’ 2012 assumption in the *Aircraft Serv. Int’l* litigation in doubt and suggest that the universe of companies subject to RLA jurisdiction may be much smaller than was previously believed. *See, e.g., Bags, Inc.*, 40 NMB No. 44 (2013) (Bags’ curbside skycap services, wheelchair services and unaccompanied minor services operations and employees at Seattle-Tacoma International Airport not subject to the RLA); *Huntleigh USA Corp.*, 40 NMB No. 36 (2013) (Huntleigh’s baggage handling, wheelchair attendance, and skycap operations and employees at George Bush Intercontinental Airport in Houston, Texas not subject to the RLA); *Aero Port Servs., Inc.*, 40 NMB No. 37 (2013) (Aero Port’s cargo security services and employees at Los Angeles International Airport not subject to RLA).

Ordinance could conceivably impose union representation on employees in contravention of RLA rules and procedures. While A4A explains at some length the requirements the National Mediation Board (“NMB”) imposes on organizing efforts, it does not explain how the Ordinance countermands or interferes with the NMB’s authority or requirements. Clearly, the Ordinance does not take away a carrier’s alleged right to (for example) insist that a union obtain NMB certification to represent a craft or class throughout its entire nationwide system before becoming obligated to negotiate with it (*see* A4A Brief at 18).

A4A does suggest that the Ordinance is unlawful because it provides an added incentive for employers to voluntarily recognize a union at a single location. However, as was explained in the Committee’s Cross-Response Brief at 44-47, “opt-out” provisions contained in minimum wage and working conditions laws such as the Ordinance have repeatedly been declared lawful by the United States Supreme Court and others.⁸ In light of that authority, A4A’s contention that a law that gives a union the ability to bargain terms and conditions of employment different from those otherwise applicable under state or local law “impermissibly tilts the playing field in favor of union organizing and collective

⁸ NLRA precedent is relevant to this RLA preemption contention of A4A because the two laws treat the issue of whether minimum labor standards are preempted the same. *See ATA*, 266 F.3d at 1077 n.5.

bargaining,” A4A Brief at 17, is simply and demonstrably wrong. A4A cites not one case to the contrary, either in the context of the RLA or in any other legal context.

Aeroground, Inc. v. City & County of San Francisco, 170 F. Supp.2d 950 (N.D. Cal. 2001), certainly is not such a case. In *Aeroground*, the law in question required certain employers to enter into “labor peace/card check” agreements. This was seen as imposing standards inconsistent with the substantive requirements of the NLRA by depriving employers of the right to insist on a secret ballot election. *Id.* at 956. Putting aside the fact that *Aeroground* dealt with NLRA, not RLA, preemption, and therefore falls outside of the purported scope of this portion of A4A’s Brief, there is clearly no parallel between the requirement at issue in that case and the minimum wage and working condition standards imposed by the Ordinance.

A4A’s only other argument appears to be that the RLA flat-out precludes state and local governments from setting minimum workplace standards that would apply to RLA-covered employees. This directly contradicts the Supreme Court’s ruling in *Hawaiian Airlines v. Norris*, 512 U.S. 246, 257, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994), that “substantive protections provided by state law, independent of whatever labor agreement might govern, are not pre-empted under the RLA.” *See also*

ATA, 266 F.3d at 1076 (“substantive protections provided by state law, independent of whatever labor agreement might govern, are not preempted under the RLA”) (holding that the RLA does not preempt city ordinance requiring the provision of employment benefits to the domestic partners of employees).

As contrary authority, A4A cites only one case, *State of Cal. v. Taylor*, 353 U.S. 553, 560, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957), and it fundamentally mischaracterizes that decision. *Taylor* did not hold “that the state could not legislate the terms and conditions of employment for the employees of a railroad that the state itself owned,” as A4A claims, A4A Brief at 20; it held only that the RLA supersedes state civil service laws which conflict with its policy of promoting collective bargaining. 353 U.S. at 566-657. This holding, which is consistent with the NLRA preemption doctrines discussed by the Committee in its Cross-Response Brief at 40-52, the decisional authority regarding which applies with equal force to A4A’s RLA arguments,⁹ in no way supports A4A’s assertion that the minimum wage, sick/safe leave, worker retention and other minimum employment standards set forth by the Ordinance are preempted by the RLA.¹⁰

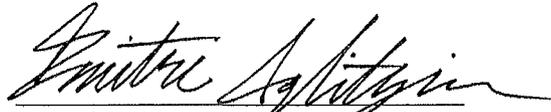
⁹ See note 8, *supra*.

¹⁰ Indeed, *Taylor* itself distinguished the issues it was addressing from those addressed by *Terminal Railroad Ass’n of St. Louis v. Bhd. of Railroad Trainmen*, 318 U.S. 1, 63 S.Ct.

II. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Committee's Cross-Response Brief, the Committee asks this Court to reject A4A's contention that the Ordinance is preempted by the ADA or the RLA.

Respectfully submitted this 5th day of June, 2014.



Dmitri Iglitzin, WSBA No. 17673
Jennifer Robbins, WSBA No. 40861
SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
Ph. (206) 257-6003
Fax (206) 257-6038
Iglitzin@workerlaw.com
Robbins@workerlaw.com

*Attorneys for Appellant/Cross-Respondent
SeaTac Committee For Good Jobs*

420, 87 L.Ed. 571 (1943), which held, in *Taylor's* words, "that the Railway Labor Act did not preclude a State from establishing minimum health and safety regulations in the interests of railway employees." *Taylor* noted that the earlier dispute, unlike *Taylor*, "did not concern a conflict between federally protected collective bargaining and inconsistent state laws." 353 U.S. at 560, n.8.

DECLARATION OF SERVICE

I, Jennifer Woodward, declare under penalty of perjury under the laws of the State of Washington that on June 5, 2014, I caused the foregoing Appellant/Cross-Respondent SeaTac Committee For Good Jobs' Answer to Amicus Curiae Brief of Airlines For America to be filed via email with the Clerk of the Supreme Court, and a true and correct copy of the same to be delivered via email, and placed in the US First Class mail, per agreement of counsel, to:

Harry J. F. Korrell
Rebecca Meissner
Taylor Ball
Roger A. Leishman
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
harrykorrell@dwt.com
RebeccaMeissner@dwt.com
TaylorBall@dwt.com
rogerleishman@dwt.com

Cecilia Cordova
Pacific Alliance Law
601 Union Street, Suite 4200
Seattle, WA 98101
cecilia@cordovalawfirm.com

Kristopher Tefft
1401 4th Ave E, Suite 200
Olympia, WA 98506-4484
Kris.tefft@wsiassn.org

Tim G. Leyh
Shane Cramer
Calfo Harrigan Leyh
& Eakes, LLP
999 3rd Ave, Suite 4400
Seattle, WA 98104-4022
Timl@calfoharrigan.com
Shanec@calfoharrigan.com

Wayne D. Tanaka
Ogden Murphy Wallace
P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, WA 98164
wtanaka@omwlaw.com

Herman Wacker
Alaska Airlines
19300 International Boulevard
Seattle, WA 98188
Herman.Wacker@alaskaair.com

Frank J. Chmelik
Seth Woolson
Chmelik Sitkin & Davis P.S.
1500 Railroad Avenue
Bellingham, WA 98225
fchmelik@chmelik.com

Christopher Howard
Averil Rothrock
Virginia Nicholson
Schwabe Williamson & Wyatt
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
choward@schwabe.com

Timothy O'Connell
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101-3197
tjoconnell@stoel.com

Mary Mirante Bartolo
Mark Johnsen
City of SeaTac Attorney's
Office
4800 South 188th Street
SeaTac, WA 98188-8605
mmbartolo@ci.seatac.wa.us
mjohnsen@ci.seatac.wa.us

Patrick D. McVey
James E. Breitenbucher
Riddell Williams P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154
PMcVey@riddellwilliams.com
JBreitenbucher@riddellwilliams.com

Robert J. Guite
Sheppard Mullin
Richter & Hampton LLP
Four Embarcadero Center,
17th Floor
San Francisco, CA 94111-4109
RGuite@sheppardmullin.com

M. Roy Goldberg
Sheppard Mullin
Richter & Hampton LLP
1300 I Street NW
Suite 1100 East
Washington, DC 2005-3314
RGoldberg@sheppardmullin.com

Douglas W. Hall
Ford Harrison
1300 19th St. NW, Suite 300
Washington, DC 20036
dhall@fordharrison.com


Jennifer Woodward, Paralegal

OFFICE RECEPTIONIST, CLERK

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Subject: Case No. 89723-9, BF Foods et al v. City of SeaTac - Appellant/Cross-Respondent Committee's Answers to Amicus Briefs

Good Afternoon,

Attached for filing in Case No. 89723-9 (BF Foods et al v. City of SeaTac), on behalf of Appellant/Cross-Respondent SeaTac Committee For Good Jobs, are the following:

1. Committee's Answer To Amicus Curiae Brief Of Airlines For America
2. Committee's Answer To Amicus Curiae Brief Of Association Of Washington Business
3. Committee's Answer To Amicus Curiae Brief Of Masterpark LLC
4. Committee's Answer To Amicus Curiae Brief Of Washington Public Ports Association

Please let me know if you have any difficulty with the attachments.

Sincerely,

Jennifer Woodward

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