

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

**MINUTES**

**Thursday, September 27, 2018**

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**MINUTES of the Meeting of The Port Authority of New York and New Jersey held Thursday, September 27, 2018 at 2 Montgomery Street, City of Jersey City, County of Hudson, State of New Jersey**

**PRESENT:**

**NEW JERSEY**

Hon. Kevin J. O'Toole, Chairman  
 Hon. Richard H. Bagger  
 Hon. Kevin P. McCabe  
 Hon. Raymond M. Pocino

**NEW YORK**

Hon. Jeffrey H. Lynford, Vice Chairman  
 Hon. Leecia R. Eve  
 Hon. Daniel J. Horwitz  
 Hon. Gary LaBarbera  
 Hon. George T. McDonald  
 Hon. Rossana Rosado

Richard Cotton, Executive Director  
 Michael E. Farbiarz, General Counsel  
 Linda C. Handel, Secretary

Adam L. Barsky, Chief of Staff to the Executive Director and Special Counselor  
 Justin E. Bernbach, Director, Government and Community Affairs, New York  
 John Bilich, Chief Security Officer  
 Benjamin M. Branham, Chief of Public and Government Affairs  
 Radomir Bulayev, Assistant Director, Capital Project Management, Rail Transit  
 Molly C. Campbell, Director, Port  
 Steven J. Coleman, Deputy Director, Media Relations  
 Nicole Crifo, Deputy Chief Ethics and Compliance Officer  
 Jennifer Davis, Chief Intergovernmental Affairs Officer  
 Clarelle D. DeGraffe, Deputy Director, Rail Transit  
 John C. Denise, Audio Visual Supervisor, Marketing  
 Michael P. Dombrowski, Audio Visual Specialist, Marketing  
 Diannae C. Ehler, Director, Tunnels, Bridges and Terminals  
 Amy H. Fisher, First Deputy General Counsel  
 Robert E. Galvin, Chief Technology Officer  
 Mercedes Guzman, Secretary to the Executive Director  
 Mary Lee Hannell, Chief, Human Capital  
 Morgan D. Keane, Deputy Chief of Staff to the Executive Director  
 Louis Klock, Deputy Superintendent of Police, Public Safety  
 Scott Ladd, Assistant Director, Media Relations  
 Cristina M. Lado, Director, Government and Community Affairs, New Jersey  
 Huntley A. Lawrence, Director, Aviation  
 Ronald Marsico, Director, Media Relations  
 Stephen Marinko, Assistant General Counsel  
 Michael G. Massiah, Chief Diversity and Inclusion Officer  
 Hugh G. McCann, Director, World Trade Center Operations

Daniel G. McCarron, Comptroller  
 Elizabeth M. McCarthy, Chief Financial Officer  
 James E. McCoy, Deputy Secretary, Office of the Secretary  
 Mary K. Murphy, Director, Planning and Regional Development  
 Maria Oliveri, Associate Board Management and Support Specialist, Office of the Secretary  
 Suchetha Premchan, Principal Board Management and Support Specialist, Office of the Secretary  
 Roger E. Prince, Deputy Director, Tunnels, Bridges and Terminals  
 Aaron F. Sherburne, Director, Operations Services  
 Peter D. Simon, Chief of Staff to the Chairman  
 Mark Spector, Director, Real Estate Development Initiatives  
 James A. Starace, Chief Engineer/Director of Engineering  
 Debra M. Torres, Chief Ethics and Compliance Officer  
 Derek H. Utter, Chief Development Officer  
 Lillian D. Valenti, Chief Procurement and Contracting Officer  
 Sheree R. Van Duynes, Manager, Policies and Protocol, Office of the Secretary

Guests:

Hon. Andrew M. Cuomo, Governor, State of New York  
 Edmund Caulfield, Associate Counsel, Authorities Unit, Office of the Governor of New Jersey  
 Michael Wojnar, Assistant Secretary for Transportation, Office of the Governor of New York

Speakers:

Hon. Ras Baraka, Mayor, City of Newark  
 Murray Bodin, Member of the Public  
 Rev. Timothy Graff, Archdiocese of Newark  
 George Pilieri, IBEW  
 Camille Rivera, RWDSU  
 Charlene Talarico  
 Neile Weissman, Complete George

Topic:

City of Newark Issues  
 Transportation Issues  
 Minimum Wage Increase  
 Contract Negotiation  
 Minimum Wage Increase  
 Human Resources Policies and Procedures  
 Widening Paths on George Washington Bridge

The public meeting was called to order by Chairman O’Toole at 12:13 p.m. and ended at 1:28 p.m. The Board also met in executive session prior to the public session.

### **Report on Prior Meeting’s Minutes**

Copies of the Minutes of the meeting of July 26, 2018 were delivered to the Governors of New York (in electronic form) and New Jersey (in paper form) on July 27, 2018. The time for action by the Governors of New York and New Jersey had expired at midnight on August 10, 2018.

The actions set forth on pages 110 through 132 of the Minutes of the meeting of July 26, 2018 adopting a Port Authority Plan of Financing were approved for the purposes of the public approval provision of Section 147(f) of the Internal Revenue Code of 1986 and the regulations with respect thereto, upon expiration of the gubernatorial review period.

### **Moment of Silence**

In observance of the 17th anniversary of the September 11, 2001 terrorist attacks on The World Trade Center, the Chairman requested a moment of silence in memory of the 84 Port Authority employees lost on that day, and the first responders and recovery workers who were lost due to illnesses relating to their work at the World Trade Center site, as well as for those who perished as a result of the bombing of The World Trade Center on February 26, 1993.

## AIRPORT MINIMUM WAGES

In 1921, the States of New York and New Jersey entered into a Compact, approved by the United States Congress, acting pursuant to the federal Constitution. The Compact created the Port Authority --- and charged it with the obligation to “operate any . . . transportation facilities” within the Port District, and to do so in the public interest, in “high trust for the benefit of the nation.” Authorized by the Compact, the Port Authority has built and operated bridges and tunnels; sea ports and a commuter rail system; and the World Trade Center. And the Port Authority has built and operated airports --- that collectively serve over 130 million people each year; that connect New York and New Jersey to broader global streams of commerce and culture; and that are a fundamental pillar of regional prosperity.

The Port Authority’s obligation to properly operate transportation facilities --- safely and efficiently, in the interest of the public --- has been constant. But how this obligation is discharged necessarily varies from one generation to the next, as new opportunities and new technologies emerge, and new challenges, too.

During recent decades, certain challenges have had an especially outsized impact on the operation of the Port Authority’s three major airports, John F. Kennedy International Airport, LaGuardia Airport, and Newark Liberty International Airport (“Airports”). Since September 11, 2001, for example, securely operating the Airports has been an especially relentless and singular focus --- an irreducibly important challenge that simply must be met, every day, without fail. And as storms have grown more intense as a result of climate change, the challenge of operating the Airports before, during, and after severe inclement weather has itself intensified.

Meeting these challenges, and others, calls for excellence from Port Authority staff. Port Authority police officers who patrol the Airports, and Port Authority intelligence analysts who assess threats. Port Authority engineers who keep runway lights operating amidst driving snow, and Port Authority managers who keep planes safely coming and going even as severe thunderstorms bear down on the region.

But the Port Authority directly employs only a small fraction of the tens of thousands of men and women who work at the Airports. And the safe and efficient operation of the Airports emphatically depends, in part, on privately-employed workers. Privately-employed baggage handlers, cargo screeners, and aircraft cabin cleaners must be affirmatively focused on the need to spot subtle clues that something may be amiss from a security perspective --- and to respond immediately and appropriately if something is indeed wrong. Privately-employed skycaps, wheelchair attendants, and customer service representatives must be prepared to be a key part of the response to any emergency, ready to calmly and authoritatively handle such a situation --- directing customers in a crisis, and decisively assisting with a rapid evacuation, even in dangerous or chaotic conditions. And privately-employed airplane fuelers, plane washers, and mechanics must perform their tasks safely and efficiently --- getting to work and getting the job done, even as blizzards or thunderstorms pound the region.

The safe and efficient operation of the Airports has always required a great deal of privately-employed Airport workers. That they be experienced. That they be well trained. That they be motivated and energetic and committed to making the Airports work for the public.

But it has become harder and harder to attract, keep, and motivate Airport workers. While the cost of living in the New York/New Jersey area has soared, the wages of Airport workers have not. The results have been predictable. As is discussed more fully below, employee turnover at the Airports has been absolutely extraordinary by any reasonable measure, with workers coming and going in great numbers every month. This systematic workforce churn saps away experience, precludes a variety of training opportunities, and undermines worker morale and motivation --- all to the detriment of the safe and efficient operation of the Airports.

Confronted with severe worker turnover at the Airports, the Port Authority has done precisely what any private or public entity would do. It has closely considered, for years now, the question of whether and to what extent Airport wages should be raised --- to retain workers, and to ensure that the Airports operate safely and efficiently, as they must.

This consideration has taken place against two sets of overarching background facts.

First, there are increasing indications of serious issues at the Airports. A sprawling global terror plot against one of the Airport's fuel storage tanks that, though thwarted, sought to make use of an Airport "insider." A panicked 2016 stampede by Airport workers in response to (erroneous) reports of an active shooter. And a poor response at JFK during 2018 to a serious — but not off-the-charts — winter storm.

These data points, among others, suggest that a long-gathering storm has now begun to arrive in earnest. Inaction in the face of this would be irresponsible, a derogation of the Port Authority's statutory obligation to safely and efficiently operate the Airports on behalf of the public.

Second, the Port Authority's consideration of how to ensure safe and efficient Airport operations has taken place in light of the experience of other airports. Virtually every major airport in the United States has grappled with the same set of problems ---post-9/11 security imperatives; the need to operate safely in inclement weather; and high workforce turnover. Over and over, throughout the United States, this cluster of problems has been solved in the same way --- by raising the minimum wage paid to airport workers, to reduce turnover and to help ensure that workers are appropriately experienced, skilled, trained, and motivated. And the Port Authority has been part of this broader trend --- acting in 2014 and 2015 to raise the minimum wage at the Airports.

The results of these national efforts to lift airport minimum wages have been striking. As noted below, studies have demonstrated a powerful causal connection between improvements in airport safety, security, and operations, on the one hand, and rising airport minimum wages, on the other. Lifting airport-workers' wages is now a tried and tested tool, widely-used for responding to a recurring set of serious problems at airports around the United States --- problems that now beset the Port Authority's Airports, too.

During 2014 and 2015, to structure its then-ongoing consideration of whether and to what extent to raise wages at the Airports, the Port Authority embarked on two separate public comment periods. These comment periods culminated in the issuance of a set of minimum wage rules.

These 2014/2015 rules are still binding. When they were enacted, these rules lifted wages for thousands of privately-employed Airport workers.

But persistent and rising turnover at the Airports, the soaring cost of living in the New York/New Jersey metropolitan region, the security and operational challenges enumerated above, and years worth of in-person comments at Port Authority Board meetings --- all of these have together suggested the possibility that the 2014/2015 minimum wage rules have become insufficient.

Accordingly, earlier this year the Port Authority published a set of proposed amendments to the 2014/2015 minimum wage rules. These amendments, which were made public on March 22, 2018, have been subjected to an extraordinary range of comment. Over the last six months, scores of people have come to public Port Authority meetings to discuss the proposed March 2018 minimum wage amendments. And, over the course of two distinct comment periods, nearly 800 written comments have been submitted, by workers and by business people, by academic experts and by elected leaders. In addition, expert outside legal advice on the proposed minimum wage amendments has been solicited and provided to the agency.

Throughout, the Port Authority has made the process of seeking public comments not just a transparent one, but an interactive one as well, marked by real back-and-forth. The Port Authority has provided the public with summaries of written comments, and at the end of June 2018, the Port Authority made public an analysis of four potentially complex issues raised by commenters, and sought comments on those issues during a 30-day supplemental comment period.

In keeping with this spirit, the Port Authority released this week an extensive Analysis and Justification, which had previously been provided to the Board for its consideration.

In amending existing minimum wage standards, the Port Authority would not be acting as a sovereign regulator or legislature. Rather, the Port Authority would be acting as the proprietor of the Airports. As the proprietor of the Airports, the Port Authority can require counter-parties to Airport agreements to honor the contractual commitments they have made to abide by Port Authority rules --- including Port Authority rules with respect to minimum wages.

None of this should be surprising or controversial. A “proprietary” approach is the precise legal basis that the Port Authority publicly announced it was relying upon in 2014, when it first adopted the currently-binding minimum wage rules. And those minimum wage rules have been complied with at the Airports --- across the board, without objection, for years. This record of compliance makes it crystal clear: it has been well and widely understood, throughout the Airport community, that entities that have contractually committed to honor the Port Authority’s rules cannot somehow cherry pick after the fact; they must abide by *all* of the Port Authority’s rules, whether those rules relate to minimum wages or other subjects.

The Analysis and Justification provided to the Board and released publicly earlier this week recommends that the current Airport minimum wage rules be changed, and explains why. We have carefully considered the Analysis and Justification, and we now fully adopt its conclusions and its reasoning as the Board’s own. For ease of reference, the Analysis and Justification contains an Executive Summary, at pages 4-9.

Among the findings of the Analysis and Justification are the following:

- The Port Authority’s Airports face an alarmingly high turnover rate --- and that rate is accelerating. Security data shows that more than 30 percent of privately-employed Airport workers turn over every year. And this turnover rate has increased by 50 percent since 2010 --- and is rising every year. Moreover, there are powerful indications of even higher Airport turnover --- a union that represents approximately 8,000 Airport workers reports annual employee turnover for some employees of 65%. These turnover rates are far higher than is acceptable for any complex business, and they are intolerable for the Airports, where all employees are tasked with important security duties. Other airports report turnover rates as low as six percent. And the Transportation Security Administration attracted negative congressional attention when its turnover rate was between seven and eight percent; the Port Authority Airports’ current turnover rate is *more than four times as high*.
- Every Airport worker --- not just designated security personnel --- plays a key security role. This is in part because formal airport security safeguards simply can not always work. In one study, security screening failed to detect weapons or other prohibited items a significant percentage of the time. And the Government Accountability Office reports that there are more than 2,500 breaches of U.S. airport perimeters each year. To ensure safety and security, the Port Authority must rely on the *entire* Airport workforce, in addition to its professional security personnel and formal security screening.
- But multiple studies demonstrate that high turnover --- the kind of turnover that the Port Authority Airports today experience --- results in poorer performance with respect to safety and security. After examining airports throughout the United States, one study found that for every percentage point increase in turnover among security screeners, detected security breaches fell by 0.62 percent. Another study, of Sea-Tac Airport, found 12.7 security breaches for every 1,000 new workers --- compared with only 7.1 per 1,000 experienced workers. And, to cite a final example, a study by the Government Accountability Office found that employee turnover was a factor in the more than 20 percent increase in the rate of runway safety violations between 1998 and 2007.
- As noted, high workforce turnover directly undermines security, and peer airports around the country have responded to this urgent problem --- by increasing minimum wages to reduce turnover. San Francisco International Airport (SFO) was the first airport to take this approach --- and it saw turnover decline by fully *60 percent*. Los Angeles International Airport also increased its minimum wage, and it now reports “a decidedly lower rate of turnover across the board.”
- Reducing the Airports’ employee turnover rate would allow the Port Authority to take a number of concrete steps that the Chief Security Officer believes would *substantially* improve security, including: implementing toughened background

checks; expanding training for Airport workers; and expanding vetting of employees who work in the non-public areas of the Airports.

- Increasing the minimum wage and reducing the Airports’ turnover rate would enhance security --- and would also decrease the risk of accidents at the Airports and improve customer service. An authoritative study found that 29% of responding employers at SFO reported that employee handling of airport equipment had gotten “better” or “a lot better” after SFO’s minimum wage increase. And about *half* of all employers reported that customer service at SFO was better or much better after minimum wages were increased.

Against this backdrop, it was recommended that the attached “Amended Rules for Implementation of Minimum Wage Policy for Non-Trade Labor Service Contracts – LaGuardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport” (“Rules”) be adopted.

The Board is adopting these Rules based on the findings and analysis contained in the Analysis and Justification. In response to comments received during the supplemental comment period, extensive changes have been made to the Rules to ensure that tipped workers get the full cash minimum wage to which they are entitled. In addition, at the effective date of this Resolution, the Board is enacting important changes in its “street pricing” policy, and commencing a study of the policy with an eye on possible future changes. These street pricing matters are described more fully in Part VIII.C of the Analysis and Justification.

The effective date of the Rules will be November 1, 2018 for all covered workers at LaGuardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport. JFK and LGA employers, who, because of a change in New York State’s minimum wage law that is due to take effect on January 1, 2019, will be allowed to satisfy their increased 2018 minimum wage obligations to Airport workers either by paying such workers contemporaneously during November and December 2018, or, for wages earned during November and December 2018, paying Airport workers the required increase of .60 cents an hour on a retroactive basis, with payment made to the workers by their first regular payday of 2019.

The Rules envision changes to Airport minimum wages, to be implemented on the following schedule:

<b>Airport</b>	<b>11/18</b>	<b>9/19</b>	<b>9/20</b>	<b>9/21</b>	<b>9/22</b>	<b>9/23</b>
JFK/LGA	\$13.60	\$15.60	\$16.20	\$17.00	\$18.00	\$19.00
EWR	\$12.45	\$15.60	\$16.20	\$17.00	\$18.00	\$19.00

Pursuant to the foregoing report, the following resolution was adopted, with Commissioners Bagger, Eve, Horwitz, LaBarbera, Lynford, McCabe, McDonald, O’Toole, Pocino and Rosado voting in favor. General Counsel confirmed that sufficient affirmative votes were cast for the action to be taken, a quorum of the Board being present.

**RESOLVED**, that the attached “Amended Rules for Implementation of Minimum Wage Policy for Non-Trade Labor Service Contracts – LaGuardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport” (“Rules”) be and hereby are adopted; and it is further

**RESOLVED**, that the Executive Director direct that the attached Rules be immediately issued as a Bulletin by the General Managers of each Airport so that the Rules become an integral part of the Airport Rules and Regulations; and it is further

**RESOLVED**, that to ensure that important airport rules can be readily accessed by the public, the Rules should also be added to the Airport Rules and Regulations; and it is further

**RESOLVED**, that the Port Authority’s “street pricing policy” be and hereby is revised as set forth in Part VIII.C of the Analysis and Justification publicly released on September 25, 2018, and that a study be immediately commenced with an eye on possible future changes in the street pricing policy, as set forth in Part VIII.C of the Analysis and Justification.

**Amended Rules for Implementation of Minimum Wage Policy for Non-Trade Labor Service Contracts - LaGuardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport**

**Summary:**

The Port Authority of New York and New Jersey has adopted a Minimum Wage Policy ("Policy"). By these Rules for Implementation of Minimum Wage Policy for Non-Trade Labor Service Contracts-LaGuardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport ("Rules"), the Policy is being implemented with respect to LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport (collectively, "Airports"), to enhance safety, security, and quality of service at the Airports. As set forth below, the Policy will apply to employees who perform either "Covered Services" or "Port District Covered Services."

**Compensation:**

The minimum wage for workers performing Covered Services or Port District Covered Services is increased to \$19.00, to be implemented according to the following schedule:

<b>Airport</b>	<b>11/18</b>	<b>9/19</b>	<b>9/20</b>	<b>9/21</b>	<b>9/22</b>	<b>9/23</b>
JFK/LGA	\$13.60	\$15.60	\$16.20	\$17.00	\$18.00	\$19.00
EWR	\$12.45	\$15.60	\$16.20	\$17.00	\$18.00	\$19.00

Workers who perform "Covered Services" are workers who perform the "Covered Services" listed in the Addendum to these Rules, within the geographical boundaries of one of the Airports.

Workers who perform "Port District Covered Services" are workers who perform the "Port District Covered Services" listed in the Addendum to these Rules, within the geographical boundaries of the Port District.

**Applicability:**

These Rules shall apply only to lessees, permittees, and contractors, as well as the subcontractors and sublessees of those entities (collectively, "Contractors") who provide Covered Services or Port District Covered Services.

In all events, Covered Services shall include services provided by non-trade employees whose work requires that they obtain access to the Airfield Operations Area (AOA) whether such AOA access is obtained by the issuance of a badge or an escort.

These Rules are issued by the Port Authority solely in its proprietary capacity, under the power granted by its governing Compact to operate transportation facilities and own and control real property. Acting in their governmental or regulatory capacities, agencies may have various powers – to initiate prosecutions, for example, or to gather evidence using criminal or administrative subpoenas. The Port Authority is not exercising any such powers with respect to enforcement of its minimum wage rules. Rather, the Port Authority is acting in a purely proprietary capacity. Accordingly, while the Port Authority will enforce its minimum wage rules very aggressively, it will do so only using the means that would be available to a similarly-situated private party. These means include initiating a breach of contract law suit, based on the theory that a given Airport employer's non-compliance with the minimum wage rules is a material breach of the employer's binding legal agreement or agreements with the Port Authority.

**Exclusions:**

The Policy implemented by these Rules will not apply in instances where other applicable laws or regulations provide higher minimum rates for employees falling within the Policy and Rules, as demonstrated by the employer.

**Tipped Employees:**

A Contractor seeking to demonstrate compliance for employees, who receive tips, shall have the burden of proving that the employee received compensation (including tips) in amounts equal to the minimum wage levels set forth in these rules.

The federal government and certain states allow an employer to count all or part of an employee's tips towards its minimum wage obligations and some states set a maximum "tip credit" toward the minimum wage. For purposes of these rules, only if a Contractor/Employer takes advantage of the applicable "tip credit" for federal, state or local minimum wage compliance, will the Covered Service worker's receipt of tips be considered in determining whether the Contractor/employer is compliant with the Port Authority Minimum Wage Policy.

Contractors/Employers who seek to take advantage of the payment of "tips" or a "tip credit" towards compliance with the Minimum Wage Policy and these Rules, will be required to certify that they are in compliance with the applicable (federal, state or local) minimum wage requirements governing the receipt of a credit for tips for their Covered Service workers.

"Tipped Employees" are those who engage in occupations in which tips are customarily and regularly received from patrons.

Contractors who employ Airport tipped workers and seek to benefit from a tip credit must maintain detailed, contemporaneous records that establish for each employee: (a) how many hours the employee worked in a given pay period, and what the employee was paid; (b) the tips the employee received during the pay period; and (c) supporting documentation to substantiate (a) and (b). With respect to (b), supporting documentation may come in a variety of forms. As to Airport workplaces that rely upon real-time logging of tips through an electronic POS system, supporting documentation may be in the form of the records generated by the POS system. As to all other Airport workplaces, such supporting documentation must include copies of written reports provided by an employee to his or her employer ("Employee Tip Report"). An Employee Tip Report must describe the tips the employee has received during a given shift, and should be prepared and submitted to the Contractor as the shift ends or as soon thereafter as is reasonably practicable.

In addition to any other record-keeping requirements imposed by federal, state, or local law, records described in the preceding paragraph must be retained by the Contractor for two years. Records related to an employee must be immediately

made available by the Contractor to that employee upon the employee's request.

Should a Contractor disagree with an Employee Tip Report, the Contractor must inform that employee in writing of the reasons for the disagreement within 48 hours of the Report being received by the employer. If the Contractor does not do so, the Employee Tip Report will be treated as valid.

If a Contractor determines that it must "top off" an employee's pay for a given pay period because the employee has not received sufficient tips, the Contractor must make the required supplemental payment as promptly as is reasonably practicable. The supplemental payment should be made on the day the employee is paid for the pay period in question. If that is not reasonably practicable, the supplemental payment should be made no later than the employee's next regularly-scheduled pay day.

Contractors who elect to take a tip credit must inform all tipped employees in writing of how the tip credit works, including an explicit statement that if the tips an employee receives are insufficient, the Contractor is obligated to "top off" the employee's wages until the employee's pay equals the minimum wage required by these Rules. Contractors must retain a record documenting that this communication was made. In addition to any record-keeping requirements imposed by federal or state law, these records must be retained by the Contractor for two years.

Contractors must fully and promptly cooperate with all Port Authority audits as to wage payments to Airport workers, including by complying with all reasonable requests for documents or interviews. In the context of such audits, employers must produce clear and convincing evidence that they have retained all required records and that they have in place effective systems for ensuring that all of their tipped employees are receiving the wages to which they are entitled. If this burden is not met, the Port Authority shall prepare an audit report, to be provided to the employer in question; any impacted employees; relevant state Department of Labor officials; and the Port Authority's Director of Aviation, who shall determine what Port Authority remedies may be appropriate. These remedies may include a breach of contract lawsuit or, in

the case of especially serious or persistent violations, denial of permission for the employer to continue operating at the Airports.

**Martin Luther King, Jr. Day:**

All Contractors subject to the Policy and these Rules shall provide its workers performing Covered Services or Port District Covered Services a paid holiday for Martin Luther King, Jr. Day.

**Implementation:**

These Rules are applicable to all current and future employees of Contractors providing Covered Services or Port District Covered Services. In addition, the Port Authority will take further appropriate steps, including, but not limited to, the inclusion of appropriate provisions in new or amended agreements, permits, contracts, and consents, as a condition for such Contractors doing business at the Airports. In the future, all agreements entered into between the Port Authority and those Contractors, including leases, permits, contracts, and consents, shall contain a clause which states that the Contractor has reviewed the Policy and Rules and that it will comply with the Policy and Rules, as amended by the Port Authority from time to time. Additionally, Contractors shall be required to include such a clause in their subleases and subcontracts.

The effective date for all minimum wage increases is November 1, 2018.

Beginning on January 1, 2019, employers at John F. Kennedy International Airport and LaGuardia Airport ("New York Airports"), will generally be required to institute thoroughgoing changes to their payrolls, because of changes to take effect on January 1 with respect to New York State minimum wage law. For some New York Airports employers, altering their payrolls on November 1, 2018 (to accommodate the Port Authority's new minimum wage rules) and then again on January 1, 2019 (to accommodate New York State's new minimum wage rules) would be a large administrative burden and expense. Accordingly, Contractors at the New York Airports may elect to defer their obliged payments under these Rules to employees at the New York Airports until January 1, 2019. Contractors who choose

this option must continue to pay their New York Airports employees at their currently scheduled rates until January 1, 2019. Thereafter, the employers must retroactively pay their employees the difference between (a) the employees' currently-scheduled pay rates, and (b) \$13.60 per hour, for each hour worked between November 1, 2018, and January 1, 2019. That retroactive payment must be made on the first regular payday after January 1, 2019. Any Contractor who wishes to elect this deferred-payment option must inform the Port Authority of this decision by October 29, 2018.

The Port Authority acknowledges that there may be circumstances which warrant an exception to the Rules, which exception may be granted by the Port Authority, for good cause, at its sole and absolute discretion.

**Certification:**

By November 1, 2018, and, at least, on an annual basis thereafter, a responsible officer of each Contractor providing Covered Services or Port District Covered Services shall deliver to the Port Authority a statement certifying, in a form to be approved by the Port Authority, that it is in compliance with the Policy and Rules. The Port Authority reserves the right to audit such compliance at any time.

**Severability:**

Should a court of competent jurisdiction determine that any part of the Policy and/or these Rules is invalid, illegal, or unenforceable, such determination shall in no way affect or impair the validity, legality, and enforceability of the remaining parts of the Policy and/or these Rules.

**Amendments to Rules:**

The Port Authority reserves the right to amend these Rules, from time to time.

## **ADDENDUM – COVERED SERVICES**

### **Passenger Related Security Services**

- Escorts
- Catering Security
- Passenger Aircraft Security
- Fireguards
- Terminal Security
- Traffic Security

### **Cargo Related and Ramp Services**

- Cargo Screening (including Guards) and Warehouse Security
- Baggage and Cargo Handling
- Load Control and Ramp Communication
- Aircraft Mechanics and Fueling of Aircraft
- Provision of water, cooling/heating, power
- Equipment and toilet services to Aircraft
- Passenger Aircraft Servicing
- Cabin Equipment Maintenance
- Guiding Aircraft in and out of Gates
- Gateside Aircraft Maintenance
- Ramp area cleaning

### **In-Terminal and Passenger Handling Services**

- Baggage handling
- Skycap
- Wheelchair attendant
- Ticketing agent
- Customer Service Representatives
- Queue Managers
- ID Checkers
- Porter Service for Baggage
- Passenger and Employee Shuttle Drivers

### **Cleaning Services**

- Building Cleaning
- Aircraft and Cabin cleaning
- Plane washers

**Concession Services**

- Food Service (including, food and beverage service, wait service, busing, cashiers)
- Retail Service (including news/gifts and duty-free)
  
- Cleaning for concession services
- Security for concession services
- Airport Lounge Services (Food, Retail, Cleaning and Security Services)

**Airport Catering Workers**

With respect to food or beverages prepared and packaged for the specific purpose of in-flight consumption by Airport aircraft crew or Airport passengers in aircraft departing from the Airports ("In-Flight Meals"):

- Preparing and packaging In-Flight Meals
- Inspecting In-Flight Meals, to ensure food safety and to detect contraband
- Cleaning dishes, utensils, and glassware used for In-Flight Meals
- Cleaning and operating kitchens or other nearby facilities (such as warehouses) used for the preparation, packaging, and storage of In-Flight Meals
- Direct delivery of In-Flight Meals to Airport locations where they are needed, from kitchens where they are prepared or from nearby facilities (such as warehouses) where they are stored

**ADDENDUM – PORT DISTRICT COVERED SERVICES**

**Airport Catering Workers**

With respect to food or beverages prepared and packaged for the specific purpose of in-flight consumption by Airport aircraft crew or Airport passengers in aircraft departing from the Airports (“In-Flight Meals”):

- Preparing and packaging In-Flight Meals
- Inspecting In-Flight Meals, to ensure food safety and to detect contraband
- Cleaning dishes, utensils, and glassware used for In-Flight Meals
- Cleaning and operating kitchens or other nearby facilities (such as warehouses) used for the preparation, packaging, and storage of In-Flight Meals
- Direct delivery of In-Flight Meals to Airport locations where they are needed, from kitchens where they are prepared or from nearby facilities (such as warehouses) where they are stored

## INTRODUCTION

From its headquarters at the World Trade Center, the Port Authority operates three of the nation's busiest airports - John F. Kennedy International Airport, LaGuardia Airport, and Newark Liberty International Airport ("Airports"), collectively serving well over one hundred million people each year. With the authority to operate these Airports comes the high responsibility to keep them safe and secure in a post-9/11 world. To that end, the Port Authority's Chief Security Officer oversees a wide-ranging operation, commanding nearly 2,000 police officers, security specialists, and threat analysts.

But the Port Authority directly employs less than 10% of the tens of thousands of men and women who work at the Airports. Because no screening protocol can ever be foolproof, airports must rely on *all* airport workers to learn the airport, follow safety and security procedures, and distinguish normal activity from behavior that is out of place. This effort extends beyond the formal screening area to the ticket counter, the public areas of the terminals, and the runway. Workers of all stripes need to be able to spot subtle clues that something may be amiss. Skycaps and customer-service representatives must be ready to direct passengers in an emergency, assisting with evacuation, even in a dangerous or chaotic situation. And airplane fuelers, plane washers, and mechanics must perform their tasks safely and expeditiously, getting to work and getting the job done, even as blizzards or thunderstorms pound the Airports.

The safe and efficient operation of the Airports has thus always required that these privately employed Airport workers be experienced, well trained, and properly motivated. Airport security is only as strong as its weakest link: a novice baggage handler who fails to spot and report a threat that would be apparent to a more seasoned or vigilant observer; a cash-strapped custodian bribed to prop open a door; or a catering worker who slips contraband into a food cart destined for a crowded passenger jet.

The dangers are real. The Port Authority's New York and New Jersey Airports are uniquely high-profile targets for domestic and international terrorism. And they face other serious challenges ranging from crowd control to preparing for

active shooters and severe inclement weather in the face of global climate change. In recent years, the Airports have been the site of a thwarted plot to blow up fuel-storage tanks that made use of an Airport "insider"; a panicked response to reports of an active shooter in 2016; and a poor response at JFK during a 2018 winter storm that exposed systemic failures across the board.

To make matters more difficult, the Port Authority must meet its safety and security responsibilities while operating in one of most expensive places to live in the country. While the cost of living in the New York/New Jersey area has soared, the wages of Airport workers have not. The results have been predictable: untenably high turnover. Based on evidence from the annual issuance of security badges, more than one-third of the privately employed Airport workforce now turns over every calendar year – an unacceptably high rate for any business, let alone for an airport charged with mitigating constant security threats. Moreover, this already high turnover rate has increased by a staggering 50 percent between 2010 and 2017, rising steadily each year. And evidence suggests that a turnover rate of one-third may well understate the problem. One union that represents approximately 8,000 airport workers reports annual employee turnover at 65%, while one employer reports an annual turnover rate of 160%.

This constant churn saps away experience, precludes training opportunities, and undermines morale and motivation – all to the detriment of the safe and efficient operation of the Airports. New workers must be trained and must learn the airport. Until they do so, they are not able to recognize abnormal activity or help direct an emergency evacuation. New workers are also less vetted workers, enhancing the risk of an insider threat. A recent high-level review by state and federal officials of security protocols at JFK International Airport cited the "high turnover rate among airport staff" as a cause for serious concern.

About 20% of contracted service employees at the Port Authority's Airports now live below a regionally adjusted poverty line and have been forced to rely on government-sponsored food subsidies or food stamps. This means that they are less likely to stay in their jobs long enough to be properly trained and vetted and are more susceptible to bribery or compromise. It also means that the Port Authority's workers are less able

to respond effectively to winter storms, hurricanes, and other inclement weather. And studies show that this turnover means that workers are less likely to avoid workplace injuries and damage to expensive equipment, and less able to provide the high levels of customer service that the public has a right to expect.

In all these respects, the Port Authority's Airports are falling behind their peer airports nationwide. Virtually every major airport in the United States has grappled with the same problems – of post-9/11 security imperatives; of the need to operate safely in inclement weather; and of workforce turnover. Over and over, airports around the United States have solved this related cluster of problems in the same way: by raising the minimum wage paid to airport workers. And the results have been encouraging, demonstrating a strong connection between improvements in safety, security, and efficient operations, on the one hand, and rising airport minimum wages on the other. Lifting airport workers' wages is now a tried and tested tool for responding to a recurring set of problems at airports around the United States.

During 2014 and 2015, the Port Authority closely considered these issues. The agency initiated two separate public comment periods, which culminated in a set of 2014 and 2015 rules that lifted wages for thousands of Airport workers. See "Rules for Implementation of a Minimum Wage Policy for Non-Trade Labor Service Contracts—LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport" ("2014 Minimum Wage Rules" or "Rules"). These Rules were established under the Port Authority's authority to act as proprietor of the Airports and were incorporated into all existing contracts for the use of airport facilities. For years, these Rules have been complied with by Airport contractors across the board.

But the continuously rising turnover at the Airports, the soaring cost of living in the region, and the security and operational failures enumerated above suggest that the 2014 Rules have proven inadequate to the task. Accordingly, the Port Authority published a new set of Proposed Rules in March 2018, as amendments to the 2014 and 2015 rules ("March 2018 Proposed Minimum Wage Rules" or "Proposed Rules").

Since their publication, the Proposed Rules have been subjected to a range of public comment and criticism. Scores of people have come to meetings of the Port Authority Board to comment on the issue. And nearly 800 written comments have been submitted. In addition, expert legal advice on the Proposed Rules has been solicited and provided to the agency. Throughout, the Port Authority has made the process of seeking comments on the Proposed Rules an interactive and transparent one, marked by real back and forth. And in keeping with the spirit of open and evidence-based decision-making, the Port Authority is today releasing this Analysis and Justification, which has previously been provided to the Board of Commissioners for its consideration.

With respect to the Proposed Rules, the comments that have been received have supplied a wide range of information, enabling the Port Authority to make a reasoned, well-informed decision about whether and to what extent the Proposed Rules should be adopted. This Analysis and Justification concludes that the Proposed Rules should be adopted as modified, and explains why.

#### **EXECUTIVE SUMMARY**

This Analysis and Justification proceeds as follows.

**Part I** describes the Port Authority's comprehensive deliberative process with respect to minimum wage matters, including comments made by members of the public at Port Authority Board meetings; several rounds of written comments from the public; and internal study. **Part I.B.** also provides a brief summary of the various comments that have been received since March 2018, and which are discussed throughout this Analysis and Justification.

**Part II** describes the nature of the serious security threats facing the Airports.

**Part II.A** begins by discussing how, as a general matter, airports around the world have faced and continue to face high risks of terrorist attacks. **Part II.B** describes how this risk is particularly high for the Port Authority's Airports, which are especially high-profile targets. Countering these threats requires an understanding of them, and so **Part II.C** details some of the specific categories of threats faced by major

airports, including the Port Authority's Airports. These threats include outside intruders; "insider threats" from compromised workers; off-site workers with access to items destined for secure airport areas; and workers who are simply ill-equipped to manage security emergencies by, for example, helping to facilitate an orderly evacuation. Finally, **Part II.D** explains how reducing the danger that flows from each of these threats requires, among other things, an experienced, motivated, and well-trained cohort of stable, long-term airport workers – a workforce populated by workers who spend years building a career at an airport, not a workforce marked by systematic, disproportionate turnover.

**Part III** describes the evidence that establishes a direct connection between workforce turnover at airports and airport security, demonstrating that reducing turnover in the airport workforce is essential to maintaining adequate airport security over time.

**Part III.A** demonstrates that rapidly increasing workforce turnover at the Airports is already at levels untenable for a private business – let alone for a system of airports that serves over 130 million people each year and must be secured against terrorism and other threats. Surveying expert assessments and peer airports' experience, **Part III.B** shows that high worker turnover – of the kind that has become an unfortunate fact of life at the Port Authority's Airports – undermines airport security. Focusing on public comments received this year, **Part III.C** explains how the Port Authority is no exception to larger trends – that the generally observed inverse relationship between airport security and workforce turnover applies at the Port Authority's Airports. And, finally, **Part III.D** itemizes the security benefits of reducing turnover at the Airports, collecting strong evidence that a reduction in turnover will produce a workforce at JFK, Newark Liberty International, and LaGuardia that is:

- more experienced and hence more skilled with respect to discerning out-of-the-ordinary conditions that can be the only warning signs of a severe security breach;
- better trained to identify, report, and respond to security threats;

- more carefully vetted to reduce the likelihood of "insider threats" materializing;
- and more capable of avoiding accidents and responding appropriately in the face of any emergency, from a terrorism attack to an "active shooter" scenario to severe inclement weather.

In short, the Port Authority's Airports face especially pointed security threats of a kind best addressed by a stable workforce (Part II). Unfortunately, though, the Port Authority's Airports are marked by especially high turnover – and, given the relationship between high workforce turnover and diminished security, this means that the Airports are simply not being operated in a manner that is as effective from a security perspective as it should be (Part III).

This implies the need to act decisively and quickly to reduce Airport workforce turnover. The question is how. **Part IV** surveys the substantial evidence showing that increased wages decrease worker turnover. This includes evidence from peer airports, from the Port Authority's Airports, and from other industries. Raising wages reduces turnover; reducing turnover enhances security.

Although maintaining the safety and security of the Airports is the paramount consideration, **Part V** discusses other important operational and business benefits of raising Airport minimum wages. The evidence mustered in **Part V.A** shows that there is an important positive correlation between a decrease in workforce turnover and an increase in productivity, economic competitiveness, and customer service – all of which are necessary to ensure that the Port Authority's Airports, and the region they serve, remain at the forefront of global transportation. **Part V.B** discusses an added benefit of higher minimum wages: a more unified system of Airports, thus allowing the Port Authority to fulfill its legal obligation under its Compact to ensure "integration" of the Airports "so far as practicable."

While the Port Authority has consistently noted the causal link between reducing turnover and enhancing security, no comments received during 2018 have challenged that connection. Rather, certain commenters have suggested that an increase in the minimum wage will reduce the number of Airport

jobs. Such a reduction could lessen some of the security benefits of reducing Airport workforce turnover. But **Part VI** demonstrates that an increase in the minimum wage at the Airports is highly unlikely to lead to job loss.

**Part VII** discusses the Port Authority's legal authority to amend its existing minimum wage policy to require higher wages. **Part VII.A** first explains that the Proposed Rules would be adopted in the Port Authority's proprietary capacity – as proprietor of the Airports, akin to a private business, rather than as a sovereign regulatory body making rules with the force and effect of law. On this score, the Port Authority's Compact gives it "full power and authority" to lease or operate transportation facilities within the Port District, including "all details" regarding "the operation of the air terminals." Next, **Part VII.B** demonstrates that the Proposed Rules are part of the proprietary standards that counterparties to the Port Authority's existing Airport contracts, permits, and leases have agreed to follow. **Part VII.C** shows that this contractual authority is further buttressed by the fact that contractors have for years certified the compliance and acknowledged their obligations under the 2014 Rules, which themselves reserve the Port Authority's power to amend those Rules from time to time. **Parts VII.D and VII.E** briefly explain why, in light of all of the above points, state and federal preemption analysis is inapplicable.

**Part VIII** addresses the four issues that the Board of Commissioners identified, in June 2018, as warranting a supplemental set of public comments. **Part VIII.A** concludes that the response to issues related to tipped workers should focus on strengthening already-extant "tip-credit" rules, so as to ensure that tipped workers promptly get the wage payments to which they are entitled. **Part VIII.B** concludes that, in light of both administrative complexity and prevailing trends in minimum wage policy, a benefits offset is not advisable. **Part VIII.C** concludes that the "street pricing" policy should be modified to provide additional pricing flexibility; in the short term, Airport businesses would set their rates based on the street prices for equivalent items sold in Manhattan, and in the medium term the Port Authority would commission a study designed to inform potential further long-term changes to the policy. **Part VIII.D** concludes that no small-business exception is necessary because there is little evidence of substantial harm caused by the absence of such an exception.

Finally, **Part IX** presents the text of the Port Authority's Proposed Rules – justified in light of the evidence set forth in this Analysis and Justification, modified to reflect the suggestions set out in Part VIII, and rooted in the Port Authority's legal authority as the proprietor of the Airports. If adopted, the Proposed Rules would expand the categories of workers covered by the minimum wage rules and would gradually increase the minimum wage payable to covered workers to \$19 over the next five years. The increases would take place as follows:

Airport	11/18	9/19	9/20	9/21	9/22	9/23
JFK/LGA	\$13.60	\$15.60	\$16.20	\$17.00	\$18.00	\$19.00
EWR	\$12.45	\$15.60	\$16.20	\$17.00	\$18.00	\$19.00

The area in which the Port Authority's Airports operate is one of the highest-cost areas in the nation. The federal government estimates that the cost of living in this New York/New Jersey area ranges from 30 percent higher than the national average in Newark to more than twice the national average in Manhattan.<sup>1</sup> The median cost of a home in the New York/New Jersey metro area, for example, is about twice as high as the median cost nationwide.<sup>2</sup>

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<sup>1</sup> See, e.g., Table 728. Cost of Living Index—Selected Urban Areas, Annual Average: 2010, Statistical Abstract of the United States, U.S. Census Bureau, at 478-79, <https://bit.ly/2QPIG01>; see also *The Economist, Worldwide Cost of Living 2018*, <https://bit.ly/2O6iKim> (listing New York as the only North American city in the top ten most expensive cities in the world, based on a "Worldwide Cost of Living" index that compares more than 400 individual prices across 160 products and services).

<sup>2</sup> See, e.g., New York-Newark-Jersey City, NY-NJ-PA Metro Area, Census Reporter (2017), <https://bit.ly/2QVGm7Q>.

It is against this backdrop that the wage levels set out above will provide a sufficient improvement to the financial stability of the Airports' workforce to achieve the Port Authority's goal of ensuring the safe and efficient operation of the Airports. An Airport worker earning \$16.20 an hour, for instance – the proposed wage for the year between September 2020 and September 2021 – would earn roughly \$32,400 per year.<sup>3</sup> Assuming that worker is the breadwinner for a household of two parents and two children, his or her annual salary of \$32,400 would be reasonably above the current federal poverty level of \$25,100,<sup>4</sup> but less than half of the New York/New Jersey area's median income of \$75,368.<sup>5</sup> By the standards of the area in which the Port Authority's Airports operate, the above-listed minimum wage increases are significant – but they are not excessive.

Indeed, the Port Authority's wage schedule is generally comparable to the minimum wages offered by peer airports in other high-cost cities.<sup>6</sup> And the reasonableness of the wage levels set by the Proposed Rules is reflected by the comments the Port Authority has received from the public. Although there have been some objections to the increased wage level in general terms, no commenter has offered an alternative wage schedule.

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<sup>3</sup> This figure assumes a 40-hour workweek for fifty weeks out of the year.

<sup>4</sup> See Annual Update of the HHS Poverty Guidelines, Department of Health and Human Services, 83 Fed. Reg. 2642 (Jan. 18, 2018), <https://bit.ly/2xGVTzO>.

<sup>5</sup> See New York-Newark-Jersey City, NY-NJ-PA Metro Area, Census Reporter (2017), <https://bit.ly/2QVGm7Q>.

<sup>6</sup> See Memorandum from Tony Griffin to Chairman and Members of the Airports Authority Board of Directors, Transmittal of Report of the Ad Hoc Committee on Labor Issues to the Airports Authority Board of Directors, at 7 (Apr. 14, 2017), <https://bit.ly/2BU401m>.

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## ANALYSIS AND JUSTIFICATION

I. In considering revisions to the existing minimum wage rules, the Port Authority has engaged in an exhaustive public-comment and internal-review process

A. *The Port Authority's process*

Over the years, the Port Authority's Board of Commissioners has carefully and extensively deliberated on the issue of minimum wages for workers employed by Airport contractors and subcontractors.

In 2014 and 2015, when the Port Authority most recently adopted its currently-binding minimum wage rules, the Board initiated an extensive public-comment process. Minimum wage proposals were disseminated publicly, and those public proposals were subjected to two periods of public comment, one of 60 days and one of 30 days. These comments were posted on the public website of the Port Authority, were analyzed on behalf of the Board by Port Authority staff, and formed an important body of evidence.

Based on this evidence, and relying on the authority vested in the Port Authority as proprietor of the Airports it operates, the Board adopted the 2014 Rules "to promote safety and security in the airport working environment as well as enhance quality of service for the traveling public."<sup>7</sup> These 2014 Rules have been uniformly complied with, by all employers at the Airports.

In the years since the 2014 Rules were issued, the Port Authority has heard from hundreds of people as to wages at the Airports. Business people, workers, union officials, and elected leaders have all attended the Board's monthly meetings in New York and New Jersey and weighed in on whether wages at the Airports should be further adjusted, beyond the terms set in 2014. These in-person comments have provided the Board with a particularly vivid and valuable source of information. And these comments have been made available to the broader public.

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<sup>7</sup> See Memorandum to All Commissioners of the Port Authority from Patrick J. Foye, Executive Director, regarding Comments Received on the Proposed Rules for Implementation of the Minimum Wage Policy, dated July 18, 2014.

Commenters' statements at Board meetings are live-streamed on the Port Authority's public website, and are archived there, so that the public can continue to scrutinize them.

As with the 2014 Rules, the Proposed Rules now under consideration have been subjected to two periods of public comment.

First, a set of Proposed Rules were publicly considered by the Board at its meeting on March 22, 2018. At this meeting, the Board explained that it was considering an increase in wages because the persistence of low wages was having a "negative impact on the Port Authority's operation of the Airports." In particular, the Board observed that, although "nothing is more important than the safe and secure operation of the Airports," the high rate of turnover and low wages at the Airports made it difficult to retain "well-trained and highly motivated Airport workers" and threatened "over-all Airport security."

Against this backdrop, the Board resolved on March 22 that, after years of public consideration of the issues, a "strong case has been made for implementing" the Proposed Rules. It noted that decades of academic study "on the relationship between wages and work performance" had established "that a rise in wages reduces worker turnover, and improves worker performance and productivity, including with respect to customer service and the proper use of sensitive and valuable equipment." And it explained that these studies were reinforced by the Port Authority's own Chief Security Officer, who reported that, "in light of the most pressing current security threats to the Airports, well-trained and highly-motivated Airport workers can substantially enhance over-all Airport security." At the same time, the Board also directed that the Proposed Rules be made publicly available "on the public website of the Port Authority" and that the public be afforded a 60-day window for public comment, between April and June 2018.

During this 60-day comment period, the Port Authority heard from scores of people who personally came to Board meetings to directly address the Proposed Rules.

In addition, during the 60-day comment period the Port Authority received over 700 written comments on the Proposed Rules — from employers and employees, labor unions and trade associations, leading industrial relations scholars, and

elected officials. All of these written comments were contemporaneously posted on the Port Authority's public website. Moreover, the referenced public comments were summarized in writing for the Board by Port Authority staff. For the public's benefit, the Board made this internal summary available in June of 2018. The summary provided an analysis of the various comments that had been received, and described in detail the themes and concerns the commenters had raised.

On June 28, 2018, following the close of the 60-day comment period, the Board met again to consider the Proposed Rules. The Board observed that "the overwhelming majority of the public comments - 98% - support" the Proposed Rules. These comments, the Board noted, provided "systematic, first-hand evidence that tends to bolster the Board's March 2018 conclusion that a strong case has been made that Airport minimum wages should ultimately be raised for covered workers." And the Board observed that the comments on the whole emphasized that the Proposed Rules "would enhance the safe and efficient functioning of the Airports" by, among other things, "greatly reducing employee turnover, improving employee morale, and buttressing Airport security."

Before proceeding to a final determination on the Proposed Rules, however, the professional staff of the Port Authority "strongly recommended" that the Board solicit "additional public comments" on a range of topics. In a staff memorandum recommending this step, the staff noted that "a particular subset of [four] issues raised in the course of the public comments" - those "related to tipped workers; benefits offsets; 'street pricing;' and small employers" - were not "called out by the proposed Wage Proposal itself or in the posting of the Proposal for comment on April 11, 2018." Instead, the staff memorandum observed, "these four issues were raised in the first instance by public commenters, some of whom made relevant suggestions during the last few days of the comment period." Given that these issues were "potentially significant and plainly complex," the staff recommended that the Board permit a supplemental 30-day public comment period. Doing that, the staff explained, was "essential to the process of reasoned, well-informed decisionmaking" and would afford the public "a full and fair opportunity to be heard on the issues that have now been brought to the fore by commenters."

The Board accepted this advice. It resolved to undertake a supplemental 30-day public comment period "specifically focus[ed] on [four] issues related to tipped workers, benefits offsets, street pricing, and small employers; on the effective date of any change to the Port Authority minimum wage at the Airports; and on any other matters commenters deem relevant." The Board directed that all comments be timely provided to the Board by Port Authority staff and that they be contemporaneously posted on the public website of the Port Authority. And it directed the Executive Director to "provide the Board with a holistic analysis of all comments that have been received - during the initial 60-day comment period, as well as the added 30-day period." Finally, it resolved that "the Board will act, no later than its September meeting, with respect to the minimum wage at the Airports."

In addition, as it solicited further comments, the Board provided the public with a staff memorandum that laid out certain specific questions and concerns with respect to the four above-enumerated issues, and offered a preliminary analysis as to some of them.

Between July and August 2018, the Board received over 60 supplemental written comments addressing the four issues referenced above, as well as other issues. These comments, like those from earlier comment periods, are publicly posted on the Port Authority's website. In addition to the written comments, some people came to the Board's public July 2018 meeting, and made live, in-person comments on minimum wage issues. The vast majority of these comments, which are summarized below, again supported the Proposed Rules. Many of the comments also specifically addressed the four policy topics on which the Board had solicited input, providing the Port Authority with an opportunity to further refine its thinking on those issues.

Consistent with its commitment to a reasoned and evidence-based deliberation, the Port Authority has carefully considered and evaluated the initial and supplemental comments, presentations given at numerous public meetings, staff views, expert and academic opinions, and the views and experience of peer airports around the nation. Based on its experience with the 2014 Rules and after consulting with inside as well as outside counsel (the nationally prominent law firm Gupta Wessler PLLC) the Port Authority is confident that the

2018 Proposed Rules are legally and contractually appropriate and authorized by the Port Authority's compact.

Although the Port Authority is unaware of any legal obligation to produce an Analysis and Justification of this kind, it is doing so – consistent with the Board's June 2018 request – to afford the public and its contracting counterparties a holistic understanding of the Port Authority's evidence and reasoning with respect to minimum wage matters. In light of its exhaustive review, the Port Authority is issuing this Analysis and Justification to explain why it believes adopting the Proposed Rules, as modified, is necessary to ensure the safe and efficient functioning of the Airports. As always, anyone who wants to comment on any aspects of the Proposed Rules, including the Analysis and Justification, is welcome to attend the upcoming Board meeting on September 27, 2018.

*B. The public's comments*

As noted above, by the time the two 2018 public-comment periods had ended, the Port Authority had received more than 760 comments.<sup>8</sup>

The Port Authority has previously made available a June 22, 2018 memorandum prepared by Port Authority staff that summarizes the comments received in the initial 60-day comment period.

The overwhelming majority of comments received during the initial, 60-day comment period supported the Proposed Rules. The comments discussed the critical security role played by workers who would be covered by the Proposed Rules. In addition, they offered reasons to think that the Proposed Rules would increase productivity and improve customer service at the Airports. Commenters who opposed the Proposed Rules described their concerns that increased wage requirements would drive up labor costs, which might lead to cuts in jobs or hours. And, as alluded to above, commenters in favor of and opposed to the Proposed Rules described concerns with several aspects of the Proposed Rules, including their effect on tipped

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<sup>8</sup> Several of the comments received were in Spanish. The Board has been provided with a translation of those comments.

workers and their interaction with the Airports' street-pricing policy.

The Board received additional comments during the supplemental, 30-day comment period. A memorandum summarizing these comments is attached to this Analysis and Justification as Exhibit 1. Although fewer comments were received during the supplemental comment period, their content was similar. The overwhelming majority of comments were in favor of the Proposed Rules. As in the first round, comments came from workers and businesses, academic scholars, elected officials, and labor unions. Workers at Newark Liberty International Airport wrote in to support the Proposed Rules as a measure to "ensure our airports run as efficiently and safely as possible."<sup>9</sup> Catering workers noted that, because they "prepare and deliver food for many long distance flights," people in their role are entrusted with passenger safety.<sup>10</sup> Other commenters wrote to describe the high turnover rates at the Airports due to low wages, with one union mentioning that it had heard reports from employers facing turnover rates as high as 90.4% and 160%.<sup>11</sup>

Additionally, commenters in the supplemental, 30-day comment period discussed some of the specific issues the Board had raised. For example, several commenters stated that the Board should not allow tips to count toward the minimum wage, describing in particular the unfairness for workers employed as skycaps and wheelchair attendants. Other commenters encouraged the Port Authority not to adopt an offset to the wage requirement based on benefits provided by employers.

Specific descriptions of many of the public comments that have been received appear throughout this Analysis and Justification where relevant to issues discussed. In addition, and as described below, several adjustments have been made to Proposed Rules to respond to issues raised by public commenters.

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<sup>9</sup> See, e.g., Comment ID 20180807007.

<sup>10</sup> See, e.g., Comment ID 20180716002.

<sup>11</sup> Comment of Hector Figueroa, President, 32BJ SEIU (June 8, 2018), at 5 ("SEIU Comment").

## II. Threats facing the Port Authority Airports

There are any number of safety and security threats, from violent robberies to petty larceny. But many of these threats are generic. They require attention, and vigilance, but they are well and widely understood, and they are not specific to airports. Accordingly, such threats are not the focus here. Rather, this Part describes the nature of the serious safety and security challenges that face the Port Authority Airports in especially pointed ways. These challenges include appropriately responding to an active shooter in the crowded confines of the Airports, and safely operating during severe inclement weather. In addition, these challenges of course include terrorism. In the modern era, terrorism is a distinct and particularly severe type of security threat, and that threat is especially acute at airports.

Part II.A begins by discussing how, as a general matter, airports around the world have faced and continue to face high risks of terrorist attacks. Part II.B demonstrates that this risk is particularly acute for the Airports of the Port Authority, which are both high-profile targets in their own right and are also close to high-profile metropolitan areas. Countering threats requires understanding them, and so Part II.C details some of the specific categories of threats that airports face — outside intruders; insider threats from compromised workers; off-site workers with access to items destined for an airport's secure area; and workers that are, simply, ill-equipped to efficiently handle safety emergencies. And, finally, Part II.D explains how reducing the danger that flows from each of these types of threats requires an experienced, motivated, and well-trained cohort of airport workers.

### A. *Airport threats are adaptive and persistent*

Since the dawn of commercial aviation, attackers have used our aviation system to perpetrate terrorism.<sup>12</sup> Over time,

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<sup>12</sup> See Mary Schiavo, *A Chronology of Attacks Against Civil Aviation*, 1 *Aviation Security Management* 142 (Andrew R. Thomas ed. 2008).

terrorists have moved from hijacking planes, to attacking planes directly, to attacking airports themselves.

The shift in focus comes after several decades during which terrorists exploited weaknesses in airplane-based security. One of the earliest airplane attacks was the hijacking of an El Al plane in 1968 by three attackers who used firearms to gain control of the plane during flight.<sup>13</sup> By the 1970s, the hijacking of commercial airliners had become a near-weekly occurrence.<sup>14</sup> Over the next decade, terror-motivated airplane bombings became a newer and more disturbing trend, as exemplified by Libyan terrorists bombing Pan Am Flight 103 in 1988, killing all on board.

Despite a reduction in the number of incidents during the 1990s, the events of September 11, 2001 demonstrated all too clearly that vulnerabilities in our airports persist, and can have devastating and far-reaching consequences.<sup>15</sup>

In response to the tragedy of 9/11, governments, airports, and airlines devised and implemented major changes in security. But airport vulnerabilities remain unfortunately widespread. Unlike airplanes, which are closed systems, airports are dynamic systems where passengers and airport workers must continually move between security zones. Attackers thus increasingly focus on exploiting vulnerabilities in airport workforces and security systems.<sup>16</sup>

The data on terror-motivated airport attacks is striking. Experts refer to airport attacks as "ground attacks." Whereas hijacking and sabotage have "sharply declined to negligible

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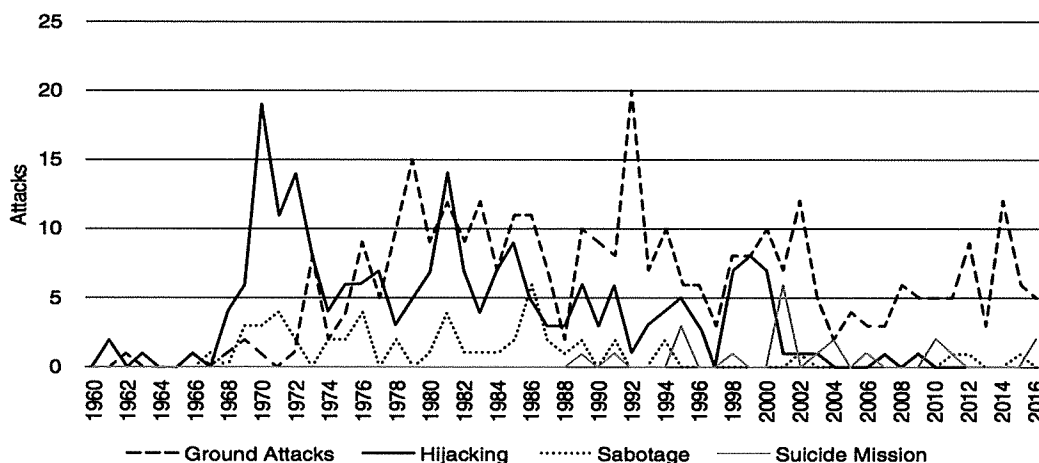
<sup>13</sup> Brian M. Jenkins, *The Terrorist Threat to Commercial Aviation*, RAND Corporation, at 1 (1989).

<sup>14</sup> See Schiavo, *Chronology of Attacks Against Civil Aviation*, at 164-196.

<sup>15</sup> Jacques Duchesneau & Maxime Langlois, *Airport Attacks: The critical role airports can play in combatting terrorism*, 2 *Journal of Airport Management* 342, 343-345 (2017).

<sup>16</sup> See U.S. House of Representatives, Homeland Security Committee Majority Staff Report, *America's Airports: The Threat from Within* (Feb. 2017), <https://bit.ly/2kp3JWh>.

levels since the 9/11 attacks," the number of airport-based terror attacks "has not followed the same trend and continues to fluctuate on a pre-2000s pattern."<sup>17</sup>



A few recent examples illustrate the point. In 2016, two gunmen opened fire at a security checkpoint outside Ataturk airport in Istanbul, Turkey. They then detonated explosives that killed themselves and dozens of innocent civilians, while a third attacker set off explosives in the parking lot nearby.<sup>18</sup> The attack on Ataturk came a few months after a similar attack on the Brussels airport. There, two men carrying bombs in large suitcases entered the departure hall and detonated the bombs by the check-in rows near the entrance. This attack was carried out in combination with an attack on a metro station in Brussels. Altogether, 31 innocent people were killed and hundreds more injured.<sup>19</sup>

After the 2016 Ataturk attack, the director of the U.S. Central Intelligence Agency warned that the United States is

<sup>17</sup> See Duchesneau & Langlois, *Airport Attacks*, at 344; *id.* at 345 fig. 1.

<sup>18</sup> Tim Arango, Sabrina Tavernise, and Ceylan Yeginsu, *Istanbul Airport Attack Leaves at Least 41 Dead*, N.Y. Times, June 28, 2016, <https://goo.gl/mBtqpt>.

<sup>19</sup> *What Happened at Each Location in the Brussels Attacks*, N.Y. Times, Mar. 22, 2018, <https://goo.gl/mgwYN1>.

at risk for similar large-scale attacks.<sup>20</sup> And continued global instability has caused concern that the threat to U.S. airports has grown even higher in recent years.<sup>21</sup>

In short, airports face evolving and persistent security threats – threats that cannot be addressed solely by securing aircraft.

B. *These threats are particularly acute at Port Authority Airports*

While there are ongoing and serious threats to airports nationwide, as detailed above, the New York/New Jersey metropolitan region is among the most persistently targeted and threatened area in the United States. As the events of September 11 painfully demonstrated, the metropolitan region is “a permanent target for anti-American terrorists.”<sup>22</sup> In the last year alone, a pipe-bomb explosion targeted the Port Authority Bus Terminal, which serves New York and New Jersey, and a truck attack targeted a major area roadway.<sup>23</sup> The previous

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<sup>20</sup> Daniel Klaidman, *CIA chief Brennan looks at Turkish attack and sees a warning for Americans*, Yahoo News, June 29, 2016, <https://yhoo.it/293htS7>.

<sup>21</sup> Alan Levin, *Terror Threat to U.S. Airports Said to Grow as al-Qaeda Rebounds*, Bloomberg, Mar. 2, 2017, <https://bloom.bg/2lipLz1>.

<sup>22</sup> Krishnadev Calamur, *Terrorists Are Still Obsessed with New York City*, The Atlantic Magazine, Dec. 11, 2017, <https://goo.gl/dgoZ1f>. See also, e.g., David Kocieniewski, *6 Men Arrested in a Terror Plot Against Fort Dix*, N.Y. Times, May 9, 2007, <https://nyti.ms/2MLr0Ve> (describing terror attack that targeted New/New Jersey area); Jason George & Damien Cave, *A Surprise at Prudential: It's a Terror Target*, N.Y. Times, Aug. 3, 2004, <https://nyti.ms/2LWeXz9> (same); New York State, Homeland Security & Emergency Services, *Homeland Security Strategy 2017-2020*, at 19, 21, <https://on.ny.gov/2wqHhEc> (describing terrorists' focus on areas that hold a “central position in the global economy”).

<sup>23</sup> Bart Jansen, *Timeline: New York City a Target for Decades*, USA Today, Dec. 11, 2017, <https://goo.gl/HrP3zA>.

year, federal officials stopped an ISIS plot that targeted, among other things, area transportation infrastructure in New York City.<sup>24</sup> The Port Authority Airports – which serve as the gateway to the region for tens of millions of people each year, and form our nation’s busiest airport system – remain especially attractive terrorist targets because of their global visibility and the large numbers of people traveling through them.

Although many specific airport incidents remain confidential for security reasons, one publicly disclosed case provides a stark example of the confluence between the heightened threat to U.S. airports in general and the especially acute threat to New York/New Jersey airports in particular.

During the summer of 2007, four men were charged by the U.S. Department of Justice and convicted of plotting to blow up fuel tanks, terminal buildings, and the web of fuel lines running beneath JFK Airport.<sup>25</sup> The leader of their plot, Russell Defreitas, had been a cargo handler employed by Evergreen Service Company at JFK, and so the conspirators relied in part on his insider knowledge. The conspirators had made connections with a terrorist group abroad and had begun to establish financing. Defreitas led an informant on a tour of the perimeter of JFK, pointing out potentially lax security points and a primary target: fuel tanks.<sup>26</sup> The group’s plan was nothing less than “the destruction of the whole of Kennedy,” and a loss of life that would dwarf [9/11]. They anticipated a symbolic impact so strong that, “this whole country will be in mourning.”<sup>27</sup>

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<sup>24</sup> See Complaint, *United States of America v. Abdulrahman El Bahnasawy*, 16-MAG-3302 (S.D.N.Y. May 20, 2016), <https://bit.ly/2OhSEWF>; Benjamin Weiser, *Three Men Charged in 2016 Plot to Bomb New York City*, N.Y. Times, Oct. 6, 2017, <https://nyti.ms/2Mrte7g>.

<sup>25</sup> Cara Buckley & William K. Rashbaum, *4 Men Accused of Plot to Blow Up Kennedy Airport Terminals and Fuel Lines*, N.Y. Times, June 3, 2007, <https://nyti.ms/2xyCuUV>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

The plot to blow up JFK, its fuel tanks, and a jet fuel artery could have caused "unthinkable" devastation.<sup>28</sup> Federal authorities called it "one of the most chilling plots imaginable."<sup>29</sup> The plan focused first on an attack designed to disable JFK's control tower – the nerve center "from which security officials monitor fuel tank locations."<sup>30</sup> Then, the attackers planned to "use two explosions to blow up the double tanks and provide enough oxygen to ignite the fuel inside."<sup>31</sup>

Thankfully, the conspirators failed to realize their vision. But the incident nevertheless highlights the unique threat to Port Authority Airports. They are an attractive target both because of their singular symbolism and because of the potentially devastating effect of an attack on one of the nation's busiest airport systems.

*C. The threats are multifaceted*

Preventing and countering the threats described in the previous two subsections requires a granular understanding of the nature of those threats. This section breaks down the overall threat described above into several different types of threats: threats from "outsiders," namely people outside an airport who seek to do harm in the airport; threats from airport workers, who can be considered "insiders"; threats from off-site workers who have special access to equipment or material bound for airports; and employees who are unprepared to deal with security emergencies when they occur.

*1. "Outsider" threats*

One familiar type of threat is the "outsider" threat – the threat of a person from outside the airport community who seeks to do harm in the airport. The attacks in Istanbul and

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<sup>28</sup> Pete Williams & Associated Press, *U.S.: 'Unthinkable' Terror Devastation Prevented*, NBC News, June 3, 2007, <https://nbcnews.to/2Q081D5>.

<sup>29</sup> *Id.*

<sup>30</sup> Anthony Faiola & Steven Mufson, *N.Y. Airport Target of Plot, Officials Say*, The Washington Post, June 3, 2007, <https://wapo.st/2wCsx5L>.

<sup>31</sup> *Id.*

Brussels, discussed in Part I.A, are examples of this category of threat.

There are many measures in place to stop these outsiders, which can be thought of as forming three layers. First, the physical features of airport security may be obvious – fences, barbed wire, and concrete barriers. Second, there are security professionals – security screenings, other guarded posts, checkpoints, and patrolling officers. And third, there are all the other workers at the airport – a final set of “eyes” and “ears” throughout the airport premises.

When it comes to intruder threat detection and prevention, people are more important than things. Every airport worker, not just those who formally work in security as police officers or for federal security agencies, is part of a second line of defense – a threat perimeter composed of people.

It may not be intuitive that non-security workers have a key security role to play, but their role is essential. “No one knows individual airports better than the aviation workers on the ground.”<sup>32</sup> And as a practical matter, there simply are many more of those workers than security personnel. Their situational awareness is a key security asset; if they see someone out of place, or trying to smuggle in an item that doesn’t belong, an experienced airport worker can detect such problems and issues and alert security.

This layer of non-security workers is critical because it is well-documented that the other two layers – physical perimeters and security screenings – do not catch everything. In one test by covert agents, TSA screeners “failed to detect weapons and other prohibited items 95 percent of the time.”<sup>33</sup> The Government Accountability Office has explained that there are more than 2,500 breaches of U.S. airport perimeters each year.<sup>34</sup> Indeed, another series of covert tests showed that

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<sup>32</sup> See U.S. House of Representatives, Homeland Security Committee Majority Staff Report, at 6.

<sup>33</sup> Jada F. Smith, *Head of T.S.A. Out After Tests Reveal Flaws*, N.Y. Times (June 2, 2015), <https://nyti.ms/1I3TMHr>.

<sup>34</sup> Government Accountability Office, *Aviation Security: Airport Perimeter and Access Control Security Would Benefit*

"even when proper procedures were followed, checkpoint screening often failed to detect concealed explosives."<sup>35</sup> And the weapons that TSA screens for are only one type of threat. As the House Homeland Security Committee's extensive study emphasized, the responsibility to secure airports lies with *all* airport workers.<sup>36</sup>

Because passenger screening unfortunately cannot succeed in identifying all threats, it is imperative for the airports to have vigilant and experienced workers beyond the screening area. Worker safeguards in non-public areas include "challenge programs" that require workers to challenge individuals without badges.<sup>37</sup> Badges themselves may enable threats – indeed, TSA regulations *assume* that 5 percent of all badges in non-public areas are lost, stolen, or unaccounted for.<sup>38</sup> The Port Authority relies on all workers to identify "behavioral indicators" of badged individuals who may pose a threat.<sup>39</sup> An experienced and vigilant worker can spot a "new face" or a person who seems out of place.

## 2. "Insider" threats

In addition to "outsider" threats, there are "insider" threats – individuals who have inside access to the airports and want to either do harm to the airport, or who enable others to come in and do harm. Defreitas, the leader of the JFK bomb

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*from Risk Assessment and Strategy Updates*, at 14 (2016), <https://bit.ly/2NrBDJg>.

<sup>35</sup> See Congressional Research Service, *Airport Passenger Screening: Background and Issues for Congress*, at 11 (Apr. 23, 2009).

<sup>36</sup> See U.S. House of Representatives, Homeland Security Committee Majority Staff Report, at 11.

<sup>37</sup> See Government Accountability Office, *Aviation Security*, at 44; 49 CFR § 1542.211(d)

<sup>38</sup> See U.S. House of Representatives, Homeland Security Committee Majority Staff Report, at 11-12.

<sup>39</sup> See The Public-Private Analytic Exchange Program, *Aviation Insider Threat: What we Know, Our Findings, and What We Recommend*, at 5 (2017), <https://bit.ly/2PIa3ZK>.

plot discussed in the previous section, is an example of an "insider" threat. Incidents from across the country show that this risk is persistent, and that insiders have the potential to wreak extreme damage by virtue of their access to secure areas.

Who are insiders that pose a threat to the Airports? A few examples illustrate what our Chief Security Officer means when he explains that "an airport is only as safe as its weakest link, which in many cases is a compromised or radicalized employee."<sup>40</sup> One is Terry Lee Loewen of Wichita, Kansas. In December 2013, he was arrested and charged with plotting to detonate a vehicle-bomb at the airport where he worked as an avionics technician. He had explained to an FBI informant that his security badge was essential to his plot because it gave him access to the secure "sterile area" of the terminal and to the tarmac. Although his plan was fortunately thwarted by law enforcement, it highlights the unique risks presented by airport workers given the access they have to sensitive areas.<sup>41</sup>

Cases of airport workers acting as a "lone wolf" or going on to join terrorist groups are not isolated incidents. The House Homeland Security Committee has chronicled many of them.<sup>42</sup> For instance, a wheelchair operator at an airport in Minneapolis struggled financially before joining al-Shabaab in Somalia, becoming the group's first suicide bomber from the U.S.<sup>43</sup> In another example, a worker who fueled and cleaned planes – and held a security badge that granted him unlimited

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<sup>40</sup> Letter from John Bilich, Chief Security Officer to Board, dated Sept. 21, 2018.

<sup>41</sup> See Cassandra Lucaccioni, *61st Terrorist Plot Against the U.S.: Terry Lee Loewen Plot to Attack Wichita Airport*, The Heritage Foundation (Dec. 18 2013), <https://goo.gl/XRc2kw>.

<sup>42</sup> See U.S. House of Representatives, *Homeland Security Committee Majority Staff Report*, at 8-9.

<sup>43</sup> Andrea Elliott, *A Call to Jihad, Answered in America*, N.Y. Times (July 11, 2009) <https://nyti.ms/2vpBT16>.

access to planes on the tarmac—was recruited to fight for ISIS.<sup>44</sup>

Other instances of non-terror crime reveal how airport employees could easily become involved in terrorist plots that entail smuggling guns and explosives onto planes. One baggage handler in Atlanta helped to smuggle more than one hundred guns, including an AK-47 assault rifle, onto commercial flights to JFK airport over the course of several months.<sup>45</sup> In another case, a Dallas airport worker collaborated with other workers to smuggle what he believed to be cocaine onto flights destined for Newark and other airports—and then he agreed to smuggle plastic explosives in similar fashion for a \$4,000 fee.<sup>46</sup> A group of TSA agents and other airport workers in San Juan had smuggled more than 20 tons of cocaine onto flights before they were finally caught in 2016.<sup>47</sup> In Orlando, a worker bypassed security and took an assault rifle, other weapons, and a bag of drugs with him on a flight.<sup>48</sup>

Finally, a very recent incident at Sea-Tac demonstrates that all airport workers are relevant from a security perspective. At Sea-Tac, a ground-crew contractor towed an airplane out of its hangar, boarded it, and began the takeoff sequence before air-traffic control noticed that the aircraft was out

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<sup>44</sup> See U.S. House of Representatives, Homeland Security Committee Majority Staff Report, at 8-9.

<sup>45</sup> Joe Sharkey, *Gun Smuggling on Plane Reveals Security Oversight*, N.Y. Times, Dec. 29, 2014.

<sup>46</sup> Press Release, U.S. Dep't of Justice (Sept. 22, 2016), <https://bit.ly/2of8iXv>; U.S. House of Representatives, *Homeland Security Committee Majority Staff Report*, at 9.

<sup>47</sup> Press Release, U.S. Dep't of Justice (Feb. 13, 2017), <https://bit.ly/2lG28QN>.

<sup>48</sup> Office of Inspector General, Department of Homeland Security, *TSA's Security Screening Procedures for Employees at Orlando International Airport and the Feasibility of 100 Percent Employee Screening*, at 11 (Oct. 2008), <https://bit.ly/2BNicUQ>.

of place.<sup>49</sup> The worker successfully took off and flew the plane for more than an hour before tragically crashing into a nearby island. The Sea-Tac spokesman noted that about 12,600 workers are badged for access to aircraft.<sup>50</sup> Whatever the outcome of the investigation, the security threats present in a massive airport workforce are clear.

### 3. *Off-site workers with special access*

Another threat that is of special concern comes in the form of off-site airport workers with special access to material bound for the airport. Airport catering workers, who work either at the airport or in nearby offsite locations to prepare in-flight meals for various airlines, are the most typical example of this threat. According to the Department of Homeland Security, "law enforcement agencies have recognized the vulnerabilities associated with these [workers] for years."<sup>51</sup> Catering workers have direct access to material that is loaded onto airplanes daily, and could abuse this access by smuggling explosive devices, weapons, or other contraband into the airport operational area or onto an airplane. As John Martin, the Airport Director of SFO, noted, "promoting safety" requires paying special attention to catering employees, who "put food on food carts that go directly to planes."<sup>52</sup>

This concern is far from theoretical. One investigation by the federal government resulted in the indictment of a ring of 58 individuals using airplanes as part of a smuggling operation.<sup>53</sup> Thirteen of those employees were contractors with the Sky Chef company, a company that provides in-flight

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<sup>49</sup> See Evan Bush, *Sea-Tac Airport's security challenge: 12,600 People Have Access to Aircraft*, Seattle Times, Aug. 13, 2018, <https://bit.ly/2PK4CJV>.

<sup>50</sup> *Id.*

<sup>51</sup> Office of Inspector General, Department of Homeland Security, *TSA's Security Screening Procedures*, at 31.

<sup>52</sup> Minutes of the San Francisco Airport Commission, Oct. 13, 2015, at 6, <https://bit.ly/2PBWyKc>.

<sup>53</sup> *Id.*

meals.<sup>54</sup> One leg of that investigation began when a pilot aboard an aircraft complained that the coffee tasted weak, and airplane staff discovered six kilograms of heroin stored in the coffee machine on the plane.<sup>55</sup> As demonstrated by the example discussed above of the Dallas worker who began smuggling cocaine and then agreed to smuggle plastic explosives, workers who are willing to smuggle any kind of illicit material may eventually be used to get weapons on board a plane.<sup>56</sup>

Because meal preparation often occurs off-site, it almost necessarily takes place in conditions that are less secure than the airport's premises. A report on safety in the airline catering industry found that 24 percent of catering workers said that an unauthorized person could enter their kitchen; the same proportion said that a foreign object could be added to a cart destined for an airplane.<sup>57</sup> The report included photographs of the conditions at a variety of off-site meal preparation locations, including those of Flying Food Group in San Francisco, LSG Sky Chefs in Miami, and Gate Gourmet in Dallas. The photographs show trucks at these facilities left unattended and ungated, parked along public roads or in unsecured parking lots. Fifty percent of the drivers surveyed reported that they had seen rushed or incomplete truck inspections because of the pressures of work.

In sum, catering workers thus represent a highly changing pool of workers in an insecure environment, with special access to material ultimately destined for airports and airplanes. There are a variety of ways they could cause or enable a threat to materialize at the Port Authority's Airports.

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<sup>54</sup> *Smuggling sting nabs 55 from airline, contractor*, CNN (Aug. 25, 1999), <https://cnn.it/2MRsSLq>.

<sup>55</sup> *Id.*

<sup>56</sup> Press Release, U.S. Dep't of Justice (Sept. 22, 2016), <https://bit.ly/2of8iXv>; U.S. House of Representatives, Homeland Security Committee Majority Staff Report, at 9.

<sup>57</sup> *Whistleblower Report: Security in Airline Catering*, UNITE HERE, at 2, <https://bit.ly/2NrShbL>. This report was produced by a union. The data reflected in the report is valuable and the security concerns reflected in the report are serious, as recognized by security professionals and as corroborated by real-world incidents.

#### 4. *Unprepared workers in emergencies*

Finally, in addition to helping detect and prevent threats, airport workers also influence how security emergencies develop – for better or worse. In an active shooter situation, for example, untrained workers may exacerbate the chaos, leading to a stampede of passengers. And delays or miscommunications in reporting threats to law enforcement can increase response times and lead to loss of life. By contrast, experienced and trained workers can identify threats and respond to directives from security personnel, helping guide travelers to safety and minimize the damage done in the event of an attack or natural disaster.

A recent example from JFK Airport illustrates how airport workers can inadvertently create and exacerbate security and safety incidents.<sup>58</sup> On August 14, 2016, patrons in a terminal coffee shop began loudly celebrating the Olympics victory of Jamaican track star Usain Bolt. When other travelers panicked because of the disturbance, airport workers failed to calm the situation – instead perpetuating further panic and security breaches.<sup>59</sup> Security personnel began running with some passengers out of the public area and through secured doors. This uncoordinated evacuation resulted in still more confusion – some travelers attempted to evacuate by running onto a Korean Air plane, where workers deployed emergency evacuation chutes that made a “popping” sound that may have been mistaken for gunfire.<sup>60</sup> Law enforcement officers drew their weapons, causing further panic. Some passengers self-evacuated onto the tarmac while the rest flooded public exits in a near-stampede. 9-1-1

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<sup>58</sup> See Letter from John F. Kennedy International Airport Multi-Agency Security Review Team to Governor Andrew Cuomo and Secretary of Homeland Security Jeh Johnson, at 4 (Nov. 16, 2016), <https://on.ny.gov/2odmPmr>. This was not an isolated incident. A similar scenario unfolded at LAX that same month. *Id.* at 1 n.1.

<sup>59</sup> *Id.* at 2.

<sup>60</sup> *Id.*

operators received more than 100 calls of an active shooter in the terminal.<sup>61</sup>

Fortunately, no passengers were seriously injured and this "false alarm" did not escalate into tragic harm.<sup>62</sup> But the incident illustrates how a similar false alarm, or a poor reaction to an actual security threat, could seriously jeopardize the well-being of travelers, workers, and airport property.

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In conclusion, airports face a range of security threats. In addition to outside intruders, airport employees can themselves become threats, and the "insider threat" faced by airports is vast. Off-site employees such as catering workers also pose a danger to airports by virtue of their access to equipment bound for airplanes and secure areas. And all employees have the potential to exacerbate security incidents or false alarms by panicking or failing to follow best practices in an emergency.

*D. Airports rely on all workers to detect and counteract threats*

As just described in Part II.C, there are at least four particular categories of threats facing airports: outsider threats, insider threats, off-site workers with special access, and workers who are unprepared to deal with emergencies. This part describes how a consensus has developed that each of these threats can be greatly reduced by having experienced, well-trained and motivated airport workers.

Consider the last three problems described in Part II.C – insider threats, off-site employees, and unprepared workers. Each of these threats comes from the airport workforce; it should be no surprise, then, that improving the performance of the airport workforce would reduce the likelihood of the threats. Employees who are trained, for instance, are less likely to be unprepared in the event of an emergency. Employees who are experienced are similarly going to have a better idea of how to respond to an emergency; they also are going to have

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 3.

a better sense of what is "normal" activity in the airport and will be better able to spot unusual behavior as a result. And employees who are motivated by their jobs are both more likely to invest time and energy in training and safety, and are less likely to be threats themselves.

For combatting each of those categories of threats, and for combatting the outsider threat as well, it is crucial for airport workers to develop situational awareness – the ability of an employee to use his or her experience to know when something is amiss. And situational awareness, in turn, requires experience, training, and motivation. Situational awareness requires employees to be experienced, so they have a developed sense of their environments and know what is normal and abnormal. It also requires employees to be trained, so they have context for their experience and can convert it into a useful awareness of what may or may not be a security threat. And finally, situational awareness requires employees to be motivated – they must be alert and engaged in active watching and reporting.

The importance of situational awareness is particularly apparent when it comes to dealing with the first threat described in Part II.C – the threat of outside intruders. As noted above, security screening cannot catch everything – in one test, TSA screeners "failed to detect weapons and other prohibited items 95 percent of the time."<sup>63</sup> Because security checkpoints can fail, detecting and responding to intruders is a task for all airport employees, not just for security professionals working at screening stations.

Situational awareness is also fundamental for combatting the other threats highlighted above – insider threats, off-site workers with catering access, and unprepared employees. If a worker is in a place where she isn't supposed to be, or a catering worker puts an unusual package in a food cart destined for an airplane, other colleagues need to know that something is amiss and need to know how to address it. This kind of knowledge requires experience and understanding.

Similarly, responding proactively and productively to an emergency requires situational awareness. An awareness of

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<sup>63</sup> Jada F. Smith, *Head of T.S.A. Out After Tests Reveal Flaws*.

one's environment, as well as the training and experience necessary to navigate that environment in a chaotic and unusual situation, is foundational for ensuring that unexpected events do not erupt into chaos. As the Chief Security Officer has said, "The airport is a busy and complicated environment, and it takes time to understand how it works. Employee experience and training is therefore an important layer of our security system."<sup>64</sup>

This key role for situational awareness bolstered by training and experience is reinforced by recent expert opinion outside the Port Authority as well. In 2016, prompted by recent atrocities in the public areas of airports in Brussels and Istanbul, the Transportation Security Administration and the Department of Homeland Security convened key government, industry, academic, and security experts.<sup>65</sup> The group began an extensive process of analyzing public-area vulnerabilities, and issued a report in 2017 entitled the *Public Area Security National Framework*.<sup>66</sup>

The *Framework* – a recent, state-of-the-art report from top experts – contains a short list of recommendations, several of which emphasize the need to strengthen the situational awareness of airport workers. The *Framework* highlighted the key role of situational awareness campaigns like "See Something Say Something," advising that increasing training for such programs "will further threat awareness by educating thousands of aviation workers on what is suspicious activity and what should be reported."<sup>67</sup>

The *Framework* also recommended education "for employees to enhance their ability to recognize and communicate potential threats to law enforcement."<sup>68</sup> Tellingly, that education should include exercises to "make participants familiar with

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<sup>64</sup> Letter from John Bilich, at 2.

<sup>65</sup> Public Area Security Summit, *Public Area Security National Framework* (May 2017), <https://bit.ly/2qXQRe7>.

<sup>66</sup> *Id.* at 6.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 10.

the layout of an airport," highlighting the need for workers to be experienced with their environments in the event of an emergency.<sup>69</sup>

The *Framework* specifically noted the importance of providing that training to "public area employees" who are not principally charged with security duties – such as airport and transportation vendors, cleaning companies, and cargo operators.<sup>70</sup> Similarly, the *Framework* underscored that background checks are particularly important because "[i]ndividuals and vendors working in the public area . . . play an important role in maintaining security and safety."<sup>71</sup> And the *Framework* emphasized the importance of sharing information, noting that "industry owners and employees" may not be security personnel, but are key sources of information, both for prevention and to assist responders in the event of an attack.<sup>72</sup>

Perhaps most tellingly, the experts concluded that it was not enough for law enforcement and first responders to engage in practice exercises and drills. Instead, these drills "should extend to include all community members – every individual or organization that would respond to an actual threat. All must work as one to resolve realistic attack scenarios in order to prepare for real-world events."<sup>73</sup> The *Framework* recommends, accordingly, that training emphasize a "shared lexicon with consistent and strong communications" to "strengthen training and response" for all "public area vendors and employees," "from top to bottom."<sup>74</sup>

The *Framework* thus represents an overwhelming contemporary consensus of experts that airports must focus on developing the situational awareness of their workforce, and

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 6.

<sup>71</sup> *Id.* at 9.

<sup>72</sup> *Id.* at 4.

<sup>73</sup> *Id.* at 10.

<sup>74</sup> *Id.* at 9-10.

that developing situational awareness requires worker experience, education, and training.

A similar conclusion was recently reached by the JFK Airport Multi-Agency Security Review Team, which reviewed the aftermath of the false alarm detailed above in Part II.C. That team, which included the Port Authority, the State of New York, the Transportation Security Agency, and the New York City Police Department, recommended "coordinated security and emergency preparedness training for all airport employees" and specifically cited the staff's lack of experience and high turnover rate as a cause of insufficient training and preparation for emergencies.<sup>75</sup>

These expert reports are consistent with the Port Authority's own experience. Recognizing the importance of situational awareness, the Port Authority "rel[ies] heavily on 'see something, say something' – the ability of employees at the airport to notice when something or someone is out of place, or doing something unusual, and communicate that rapidly to security personnel."<sup>76</sup> "Airport employees represent one of the most important backstops in this system, because they work throughout the airport – before and after security screenings, and in the airports' operations areas. They can best notice when something is not right."<sup>77</sup> One of the Port Authority's "highest priorities is making sure that if something goes wrong, and one of our layers of security does not catch something, it gets noted and reported as soon as possible."<sup>78</sup>

The Port Authority has a number of programs underscoring the importance of situational awareness, such as the Airport

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<sup>75</sup> See Letter from JFK Multi-Agency Security Review Team at 4 ("All airport employees should receive training on active violence and insider threats, and evacuation procedures that includes understanding the physical layout of the terminals and airport. Employees should be trained to assist in directing the traveling public to emergency exits or secure areas during an emergency.").

<sup>76</sup> Letter from John Bilich, at 1.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

Community Watch Program. That program provides monetary rewards to airport employees for detecting security breaches at the airport. Over the last ten years, this program has resulted in over 120 arrests of individuals who "have entered secure areas without authorization, possessed illicit or impermissible items like weapons, or otherwise violated the law or the airport's rules."<sup>79</sup>

This means that airport-employee vigilance, by itself, has led to an average of one arrest every few weeks – for a decade. The preventative value of such vigilance is hard to overstate: when it comes to our nation's airports, even a single individual can wreak enormous damage. But it is also important not to allow the success of these programs to result in complacency; as the incidents documented above demonstrate, even though a "see something say something" ethic is common and the need for worker vigilance is well-understood, the system still fails at detecting a variety of threats and bad actors.

If it was not clear before, it is clear now: aviation security professionals have formed a strong consensus that they must increasingly rely on the eyes and ears of *all* airport workers to address today's airport security challenges. Those workers, in turn, must be trained, experienced, and motivated for airports to be able to depend on them.

As detailed above in part II.C, modern airports face a variety of serious threats – intruders, insider threats, off-site workers with special access, and unprepared employees. The expert consensus described in this part reflects a natural conclusion: responding to these threats requires experienced, motivated, and well-trained employees, both when it comes to security personnel and for the civilian airport workforce more broadly.

### **III. Reducing workforce turnover is critical to maintaining adequate airport security**

The previous part described the many serious threats faced by the Port Authority's Airports. As Part II.A and II.B discussed, modern airports around the world face a continued risk of ground attacks, and the Port Authority's airports are

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<sup>79</sup> *Id.*

particularly high-profile targets. Part II.C described several particular risks: outside intruders, insider threats, off-site workers with special access, and underprepared employees. Part II.D then explained why combatting these threats requires a workforce full of experienced, well-trained, and motivated workers.

This Part will show that the Port Authority faces a dangerous, and escalating, problem when it comes to maintaining such a workforce.

The Port Authority sees alarming annual turnover among the employees who work at its Airports. These turnover rates are rising rapidly, and are already estimated to be over 30 percent – well above the point that other airports and private businesses would find troubling. The Transportation Security Administration, for instance, attracted congressional attention in 2016 when its turnover rate was just 7 to 8 percent for full-time officers.<sup>80</sup>

Facing the threats described in Part II thus requires the Port Authority to deal seriously with the issue of turnover. This Part begins in III.A by describing the alarming turnover trends at the Port Authority's Airports in recent years, and how workforce churn has become untenable. Part III.B then describes how this loss of turnover has significant implications for security at the Port Authority's Airports. Part III.C shows how reducing turnover will have a range of security benefits: producing a workforce that is more experienced, better trained, and more carefully vetted; reducing the risks of accidents; and increasing employees' preparedness for severe inclement weather, a problem that has been increasing in recent years as a result of climate change. Addressing turnover is necessary to maintain the experienced, trained, and motivated workforce that Airport security requires.

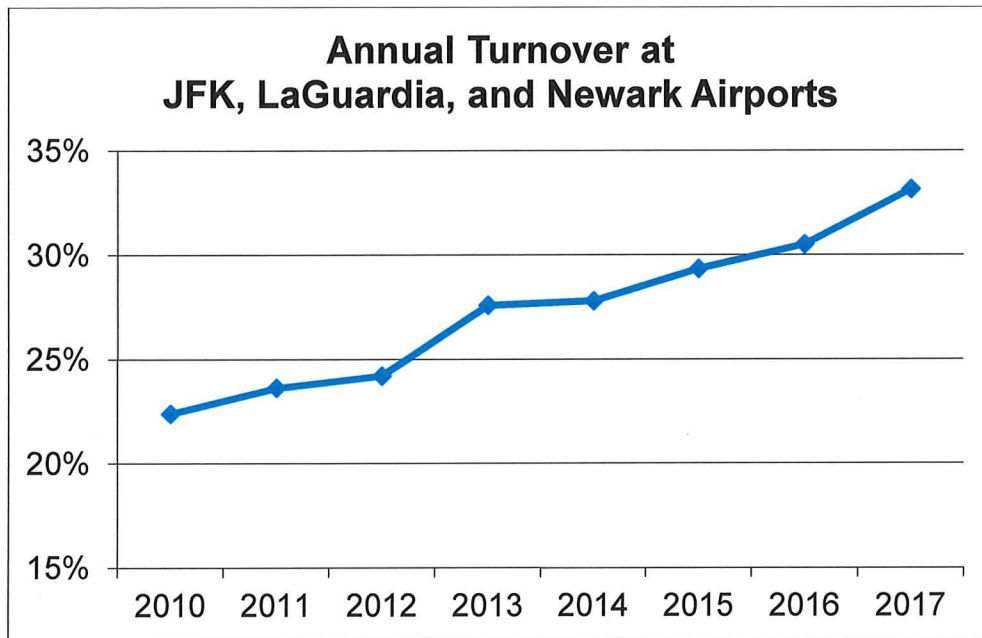
A. *Workforce turnover at Port Authority Airports is untenably high.*

Turnover among Port Authority Airport workers has increased rapidly in recent years, as wages have stagnated and

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<sup>80</sup> Melanie Zanona, *Low morale at TSA contributing to high turnover rates, long lines*, The Hill (May 26, 2016), <https://bit.ly/2LIRv8p>.

costs of living in the metropolitan area continue to rise. While airport employee turnover was an estimated 20 percent in 2010 – already precariously high – security data show a turnover rate that reached the untenable level of 33 percent in 2017 and is expected to continue to rise if no action is taken to counteract this trend. The following graph depicts the climbing rate of worker turnover at the Port Authority’s Airports, based on data collected from the Port Authority’s new-badge issuances:



This chart reflects the proportion of badged employees who are new across the Port Authority’s three Airports – a rough and conservative measure of the turnover rate that may actually understate the severity of the problem. As this chart shows, this proportion increased by a staggering 50 percent between 2010 and 2017, and has risen steadily every year.

Moreover, high overall numbers drawn from security data mask – and substantially understate – alarmingly higher rates of turnover for particular businesses and sectors at the Airports. A researcher working with one commenter – a union representing more than 8,000 workers across the Airports – performed a comprehensive analysis of turnover at all three Airports using its own internal data. This commenter reported

that its workers experience "a 12-month, across-the-board average turnover rate of 65.1%."<sup>81</sup> Individual employers at Port Authority Airports experience even higher turnover rates – as high as 90.4 percent and, in one case, 160 percent.<sup>82</sup> In their comments to the Port Authority, many workers across a range of occupations remarked on these high rates of turnover across the Airports.<sup>83</sup>

By contrast, an investigation for the United Kingdom's Civil Aviation Authority reported airport-wide turnover at London's Stansted Airport of just 6.15 percent (compared to an industry average of 12.7 percent).<sup>84</sup> In the U.S., turnover rates of 7 to 8 percent for full-time TSA screeners have been cited as a major cause for concern among members of Congress and security experts alike.<sup>85</sup> And the Port Authority turnover rate is now fully *four times* that rate.

While there is no universally agreed-upon standard for what turnover rate is healthy for ordinary businesses, the 33 percent turnover rate now experienced at the Port Authority's Airports is much too high. An oft-cited figure is that 10% is

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<sup>81</sup> SEIU Comment at 5.

<sup>82</sup> *Id.*

<sup>83</sup> See Comment ID 20180417011 ("There is a lot [of] worker turnover."); Comment ID 20180417003 ("I've seen a lot of turnover at Newark Airport"); Comment ID 20180417009 ("Over the years, some of [my colleagues] have quit because they were not earning enough money."); See Comment ID 20180418004 ("I have seen airport workers leaving their jobs because the pay is low and work hours are long").

<sup>84</sup> Incomes Data Services, *Benchmarking employment costs: a research report for the Civil Aviation Authority* (Jan. 2013), at 104, <https://bit.ly/2MEK9In>.

<sup>85</sup> Melanie Zanona, *Low morale at TSA contributing to high turnover rates, long lines*. Similarly, a report by the House Committee on Transportation and Infrastructure estimated that the turnover rate of screeners at the San Francisco airport was 8.5 percent. See Hugo Martin, *Treating TSA agents better might reduce airports' long lines*, Los Angeles Times, Aug. 15, 2018.

an acceptable turnover rate.<sup>86</sup> As one commenter, Professor Wayne Cascio of the University of Colorado Denver Business School, noted, companies like Costco pay an "efficiency wage" that is higher than competitors in order to retain employees.<sup>87</sup> Costco has a turnover rate of only six percent for its employees after their first year of employment.<sup>88</sup> Even given a less idealized benchmark, the Port Authority is far below where it should be. The Society for Human Resource Management estimates that the average turnover rate for all businesses in 2016 was nearly *half* of the Port Authority's turnover rate for the same year, as described in the chart above.<sup>89</sup> That same organization places a turnover rate of 24 percent in the 75<sup>th</sup> percentile, indicating that the Port Authority's rate of 33 percent is well into the top quartile of all kinds of businesses.<sup>90</sup>

These numbers understate the significance of the problem because the Port Authority's system of Airports is not a normal business. The Port Authority faces threats of terrorism as well as recurrent and increasing rates of massive disruptions like hurricanes and blizzards. Through it all, the Port Authority must provide secure and efficient services to more than 130 million people per year, acting as a linchpin in the regional and national economy. The Port Authority must maintain a high degree of coordination, and requires experienced workers throughout its system – not workers that turn over at many times the average rate.

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<sup>86</sup> One 2018 study found "a worldwide turnover rate of 10.9%," with the sector with the *highest* turnover rate experiencing annual turnover of 13.2%. Michael Booz, *These 3 Industries Have the Highest Talent Turnover Rates* (March 13, 2018).

<sup>87</sup> Comment of Wayne F. Cascio, ID 20180416012.

<sup>88</sup> *Id.*

<sup>89</sup> *2017 Human Capital Benchmarking Report*, Society for Human Resource Management (Dec. 2017), <https://bit.ly/2PjWej4>.

<sup>90</sup> *SHRM Customized Human Capital Benchmarking*, Society for Human Resource Management (2017) at 11, <https://bit.ly/2C0xZ7N>.

B. *High worker turnover is a loss for airport security*

The workforce churn described above significantly hinders the Port Authority's ability to maintain an experienced, trained, and motivated workforce. High rates of turnover mean that the Airports' workforce at any given moment has less experience. Exiting workers take their experience with them, and entering workers may not stay long enough to accumulate their own. If workers leave frequently, it is not worth as much to employers to spend time and energy training them, and employees may never develop skills that come over time with recurrent training.

Experts on airport security agree, citing high turnover rates as one of the obstacles to building high reliability among security operations.<sup>91</sup> For example, the Government Accountability Office cites "rapid turnover among screeners that leaves few experienced personnel at the checkpoints" as one of the "long-standing and long-recognized problems" that limits security screeners' effectiveness and harms airport security.<sup>92</sup> And a 2016 review of JFK's security protocols by the Transportation Security Administration and state and local security officials specifically recognized that the "high turnover rate among airport staff" contributed to a lack of coordinated security and emergency preparedness training at JFK.<sup>93</sup>

Indeed, a growing consensus has emerged that a strong causal relationship exists between decreased worker turnover and improved airport security.

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<sup>91</sup> H. George Frederickson & Todd R. LaPorte, *Airport Security, High Reliability, and the Problem of Rationality*, at 37, Public Administration Review (Sept. 2002).

<sup>92</sup> General Accounting Office, *Aviation Security: Long-Standing Problems Impair Airport Screeners' Performance*, at 23, <https://bit.ly/2PbzTnO>.

<sup>93</sup> Letter from JFK Multi-Agency Security Review Team, at 4.

In one key academic study, three researchers from U.C. Berkeley confirmed the impact of turnover rates on the detection of security breaches based on data gathered from across fifteen major U.S. airports.<sup>94</sup> To conduct the study, the researchers "carried out detailed surveys of airport employers and workers," "interviewed labor, management and airport officials" and "drew upon government documents and census datasets, the airport's own security badge data, and FAA data on security at major U.S. airports."<sup>95</sup> The results, which focused on pre-board screener turnover rates as well as the rates at which security breaches were detected at the airports, were remarkable: "For every percentage point increase in the turnover rate at an airport, the number of detected security breaches [falls] by 0.62 percent."<sup>96</sup> And the study also found that "the longer the airports are able to retain" certain workers, like pre-board screeners, "the more likely they are to detect security breaches."<sup>97</sup>

Other studies detail how high turnover rates contribute to poor security and public safety in specific airport occupations.<sup>98</sup> For instance, in 2000 the GAO examined the performance of airport screeners. It reported that the "[l]ong-standing problems with screeners' performance are attributable to a number of causes . . . [f]oremost among [which]

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<sup>94</sup> See Michael Reich, Peter Hall, & Ken Jacobs, *Living Wages and Economic Performance: The San Francisco Airport Model*, at 77 (Mar. 2003), <https://bit.ly/2PbHUcu>.

<sup>95</sup> *Id.* at 7.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 77.

<sup>98</sup> See Comment of Ken Jacobs (Comment ID 201805010); Comment of Economic Policy Institute (ID # 2018060108); Comment of SEIU Local 32BJ (ID # 2018060802).

is the rapid turnover of screeners."<sup>99</sup> As a result, "few experienced screeners staff the checkpoints."<sup>100</sup>

In 2007, the GAO issued another report on aviation runway and ramp safety procedures.<sup>101</sup> The focus was on "runway incursion," which was defined at the time as "any occurrence in the runway environment involving an aircraft, vehicle, person, or object on the ground that creates a collision hazard or results in a loss of required separation when an aircraft is taking off, intending to take off, landing, or intending to land."<sup>102</sup> In 1998, there were about 300 incursions.<sup>103</sup> By 2007, there were about 370.<sup>104</sup>

The GAO surveyed experts on the causes of and solutions to the problem, relying primarily on the assistance of the National Academy of Sciences.<sup>105</sup> They indicated that "high job turnover among ramp employees is . . . part of the problem"<sup>106</sup> and referenced an aviation industry report that cited turnover, particularly among aircraft fuelers, "as contributing factors in ramp accidents."<sup>107</sup>

Additional quantitative evidence of the relationship between turnover and security comes from the Port of Seattle's

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<sup>99</sup> United States General Accounting Office, *Report to Congressional Requesters: Aviation Security: Long-Standing Problems Impair Airport Screeners' Performance*, at 9 (June 2000), <https://bit.ly/2PbzTnO>.

<sup>100</sup> *Id.*

<sup>101</sup> U.S. General Accountability Office, *Aviation Runway and Ramp Safety: Sustained Efforts to Address Leadership, Technology, and Other Challenges Needed to Reduce Accidents and Incidents* (Nov. 2007), <https://bit.ly/2PJ5leb>.

<sup>102</sup> *Id.* at 8.

<sup>103</sup> *Id.* at 9 fig.2.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2.

<sup>106</sup> *Id.* at 55.

<sup>107</sup> *Id.* at 55-56.

study of whether to establish a minimum wage at Sea-Tac Airport.<sup>108</sup> That study identified substantial turnover across various airport employers in 2014 – almost all of it concentrated in entry-level positions. It found that “[n]ewer workers are almost twice as likely to be cited for security violations as more experienced workers.”<sup>109</sup> The internal data showed that “there were 12.7 security violations cited for every 1,000 new workers . . . compared to only 7.1 security citations per 1,000 experienced workers.”<sup>110</sup> Further, while “14% of the people working with [security] badges in a given year were hired that same year . . . 24% of the security citations were issued to workers hired during the calendar year of the violation.”<sup>111</sup> On the basis of this and other evidence, the Port of Seattle’s staff “conclude[d] that reduced turnover . . . will in turn lead to safer and more secure Airport operations.”<sup>112</sup>

The MWAA, which operates Washington, D.C.’s airports, arrived at a similar conclusion. The MWAA’s report detailed the considerable security challenge of a modern airport and described the need for a well-trained and motivated workforce that “understand[s] the unique nature and characteristics of the airport environment and the critical security challenges it faces, compl[ies] at all times with applicable security rules and procedures, and [is] capable of recognizing and responding to abnormal or questionable circumstances that may pose an imminent security threat or otherwise warrant alerting appropriate airport personnel.”<sup>113</sup> The committee explained that

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<sup>108</sup> See Memorandum from Mark Reis to Tay Yoshitani, Minimum Requirements for Aeronautical Workers with Safety and Security Responsibilities at Seattle-Tacoma International Airport (June 26, 2014) (“Reis Memorandum”).

<sup>109</sup> *Id.* at 9.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1.

<sup>113</sup> See Memorandum from Tony Griffin to Chairman and Members of the Airports Authority Board of Directors, Transmittal of Report of the Ad Hoc Committee on Labor Issues to the

reducing turnover "can be expected over time to deliver a more stable and experienced . . . workforce whose members, due to their longer tenure and enhanced on-Airport experience, will possess the[se] critical worker traits."<sup>114</sup>

In comments submitted during 2018 to the Port Authority, many commenters affirmed the existence of a robust relationship between turnover and security at the Airports. More than 290 workers commented that decreasing turnover would make the Port Authority's Airports "ready, safe, and strong" and "more stable and secure." All twenty-two local elected officials who participated in the comment process agreed.<sup>115</sup>

One comment was submitted by Ray White, the former Deputy Assistant Administrator for Security Operations with the Transportation Security Administration who is now a consultant

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Airports Authority Board of Directors, at 10–11 (Apr. 14, 2017), <https://bit.ly/2BU401m> ("Griffin Memorandum").

<sup>114</sup> *Id.*

<sup>115</sup> See Comment of William Colton, Assemblyman 47th District ("It will . . . increase the . . . security at our airports by creating a more stable, qualified and skilled workforce."); Comment of Marcos A. Crespo, Assemblyman 85th District ("The airports experience high turnover, leading to gaps in . . . security for customers."); Comment of 7 members of the New York State Senate, 6 members of the New York State Assembly, 2 members of the New York City Council, 4 members of the New Jersey State Senate, 9 members of the New Jersey State Assembly ("It will . . . increase the quality of . . . security at our airports by creating a more stable, qualified and skilled workforce."); Comment of Scott M. Stringer, New York City Comptroller ("Airport service workers play a crucial role in ensuring the safe and secure operation of our major transportation hubs. . . . New York has an interested in providing a higher minimum wage so New Yorkers and visitors alike feel safe while navigating our local airports; to safeguard the region from security threats."); Comment of Roxanne Persaud, Senator 19th District ("These measures will help improve the safety, security, and readiness of our airports, benefiting us all.").

with more than two decades of experience in aviation security.<sup>116</sup> White describes an annual analysis he performed for the Federal Aviation Administration before September 11, 2001, that connected airport security to turnover. White's study discovered "that approximately 75% of federal or airport regulatory security violations were caused by employees with between 90-180 days of tenure," which he notes is "directly attributable to high turnover rates and lack of familiarity and experience with airport security protocols."<sup>117</sup> White comments that his "first-hand experiences" in airport security over the past two decades "strongly support the evidence" that "higher attrition rates serve to undermine airport emergency procedures in the event of active shooters, air crashes, or airport evacuations for any reason."<sup>118</sup> "Employee and airport user familiarity and compliance with established security protocols," says White, "is paramount to creating a secure transportation operational environment."<sup>119</sup> He concludes that "[i]f there is one thing I could personally fix in aviation security today," it would be increasing wages "in an effort to reduce turnover, increase workforce stability and experience, all which serve to enhance aviation security."<sup>120</sup>

In addition, the Chief Operating Officer of Los Angeles International Airport reports that decreasing turnover at LAX improved the "stability of the workforce" and had "a positive measure for security. I have no doubt about that."<sup>121</sup>

Not all security judgments are quantifiable – some depend on human experience, which increases with time spent on the job. Many Airport workers who commented offered anecdotal examples that demonstrate the importance of being alert in the airport environment. For example, one wheelchair worker described observing a group of people go through a door that

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<sup>116</sup> Comment ID 20180810001.

<sup>117</sup> *Id.* at 2.

<sup>118</sup> *Id.* at 1.

<sup>119</sup> *Id.* at 2.

<sup>120</sup> *Id.*

<sup>121</sup> Conversation with Samson Mengistu, Chief Operating Officer, Los Angeles World Airports (July 25, 2018).

required an Airport ID without presenting one.<sup>122</sup> Another observed people attempting to go back through an exit-only door.<sup>123</sup> A security officer described being alert as they set up the lines in the customs area.<sup>124</sup> Another mentioned a man on the ramp in plain clothes, without visible ID.<sup>125</sup> A bag handler recounted standing by abandoned bags.<sup>126</sup> Another described a man walking around the terminal with a gas can.<sup>127</sup> These examples provide a sense of the security benefits that come when Port Authority workers have an experience-based awareness of what is and is not usual activity in the Airports as they go about their normal daily tasks.

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<sup>122</sup> See Comment ID 20180418002 ("Yesterday, when I went to the arrivals level, I scanned in with my card and the pin number and then showed the customs officer our id just like we show it every time. Right there, some passengers had exited and then tried to go through this door. Right away I called the officers so they could check and make sure everything is ok because people without IDs should not go through that door.").

<sup>123</sup> See Comment ID 20180418005 ("One time I saw a passenger try to go back through an exit only door from arrivals. They cannot go that way, but they didn't know that. I quickly alerted the customs officer on duty. This is one way I help keep the airports safe.").

<sup>124</sup> See Comment ID 20180417005.

<sup>125</sup> See Comment ID 20180417011 ("I am always vigilant; I pay attention to small and large details at my job. I saw a man out on the ramp in plain clothes and I ran out and asked him for his ID. It turned out this was a Port Authority Inspector.").

<sup>126</sup> See Comment ID 20180417010 ("I have had two scenarios where a passenger left their bag abandoned. I stood next to it, and asked whose bag it was. I called security and had them come and check it. I know I play an important security role at the airport.").

<sup>127</sup> See Comment ID 20180417001 ("Just last week there was a guy walking around Terminal A with a gas can. I told the airline agent and she called the police.").

C. *Reducing turnover will improve security at the Port Authority's Airports*

As the previous Part demonstrated, there is strong and persuasive evidence that less turnover, as a general matter, means more airport security. This Part now turns to the specifics. It lays out exactly how security at the Port Authority's Airports will be improved by reducing turnover.

1. **An experienced workforce improves security.** Lowering the turnover rate among Airport workers means that the workforce will be more experienced. Experienced workers, in turn, improve Airport security in several meaningful ways. First, they are able to draw on their experience to know when something is awry. As discussed in Part II, situational awareness is a key plank of Airport security. And it relies in large part on experience: The success of campaigns like "See Something Say Something" depends on whether workers are attuned enough to their environments to recognize when they have "seen something" that should be reported. Experience allows them to do this more effectively.

Second, more experience also means that Airport workers will be more effective at all aspects of their job that affect security. For example, in addition to being more aware of their environments, experienced workers have more knowledge of how to communicate and report potential threats and suspicious activity to law enforcement, thereby ensuring a proper response. They also better "understand[] the physical layout of the terminals and airport," which is crucial in times of chaos or emergency, when an evacuation plan must be executed by Airport employees and security personnel.<sup>128</sup>

Third, experienced workers are more likely to be competent and remain calm during an emergency or unexpected event because they have likely encountered these situations before. By virtue of their experience, they are able respond in a more appropriate way – not overreacting to false alarms, but not acting in an inappropriately casual manner when the emergency is real. The Usain Bolt incident in 2016, for instance, might

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<sup>128</sup> Letter from JFK Multi-Agency Security Review Team, at 4.

have been prevented had the workers been more experienced and reacted with more poise. Indeed, the JFK Airport Multi-Agency Security Review Team specifically cited the "high turnover rate among airport staff" as a contributing factor, along with inadequate training (which will be discussed in the next subsection).<sup>129</sup>

Finally, a more experienced workforce is more likely to be enthusiastic about their work and to regard it as their professional home – a long-term venture that they are connected to, rather than a temporary job to earn an income until a higher-paying job comes along. This increased enthusiasm extends especially to security: Situational awareness requires active attentiveness, which in turn requires mental energy and focus. Workers who feel invested in their jobs are more apt to have this energy and focus – and to be vigilant and proactive in security enforcement more broadly – given the increased pride and ownership they take over their jobs.

**2. Reduced turnover will improve training.** Reduced turnover will further improve security by making it possible to provide for better training of "badged" Airport workers. Before workers obtain a SIDA badge giving them access to non-public areas of the Airports,<sup>130</sup> they must be trained to ensure that they comply with Port Authority rules and policies, and to ensure that they know how to spot and respond to a potential security risk and what to do in the event of an emergency.

Just as experience can help workers be better prepared for unexpected or emergency situations, training can do the same. As the Port Authority's Chief Security Officer has explained to the Board in Executive Session: Well-trained workers strengthen overall Airport security, which is necessary to combat the most pressing Airport-security threats. The 2016 Usain Bolt incident at JFK "reinforce[d] the need for continuous awareness training and preparation."<sup>131</sup> In reviewing

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<sup>129</sup> *Id.*

<sup>130</sup> "SIDA" is short for Security Identification Display Area.

<sup>131</sup> Letter from JFK Multi-Agency Security Review Team, at 4.

that incident and probing its root causes, the Multi-Agency Security Review Team observed that "there are many airport employees who receive no training at all," and that even those who receive training are "not necessarily train[ed] for crises with law enforcement or other first responders."<sup>132</sup>

Reducing the turnover rate will allow the Port Authority to more effectively address these and other gaps in the training process. The reason for this is simple: When workers leave, their replacements often receive training that must explain each concept from the beginning (particularly when turnover occurs at the entry level, as is common at airports<sup>133</sup>). When workers stay, by contrast, they can receive more advanced training that builds off whatever training they have already received. These advanced programs are more effective because knowledge is accretive. Moreover, when there are fewer new employees to train, it frees up resources to expand and improve training for all employees – new and old alike. This additional training can be used not only to layer in new information, but to use repetition to inculcate employees with the most important security concepts and techniques.

Although the Port Authority has worked hard to revise its training programs in recent years, there is still room for improvement. Reduced turnover will allow the Port Authority to implement additional changes to make training more effective. Among other things, the Chief Security Officer has been directed to expand and improve training on a number of security-related subjects, including (1) threat-awareness education (such as "See Something Say Something"), (2) active violence and insider threats, (3) directing the public to emergency exits or secure areas during an emergency, and (4) interacting

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<sup>132</sup> *Id.*

<sup>133</sup> See Amanda Gallear, *The Impact of Wages and Turnover on Security and Safety in Airports: A Review of the Literature*, U.C. Berkeley Labor Center, at 5 (Oct. 18, 2017) (discussing Port of Seattle, *Memorandum: Minimum Requirements for Aeronautical Workers with Safety and Security Responsibilities at Seattle-Tacoma Airport* (2014)).

with law enforcement and other first responders in an emergency. As the *Framework* recommends, this training will be both "initial and recurrent."<sup>134</sup>

The Port Authority's Chief Security Officer has studied the issue and concluded that implementation of these enhanced training measures – which will become possible if turnover is substantially lower – will result in measurable improvement in Airport security.<sup>135</sup> Employees will become better versed in emergency procedures and better able to exert a calming influence during moments of confusion or crisis. They will also have a better idea of "what is suspicious activity and what should be reported," as training for the "See Something Say Something" campaign is enhanced, so they can identify and head off a potential threat.<sup>136</sup>

Finally, employees are more likely to approach training with diligence and zeal if they expect to be in the job for a long time. Rather than see training as a chore, they are likely to see it as part of their long-term professional success. This shift in attitude can improve the effectiveness of training programs, and hence improve Airport security. Before SFO implemented its wage increase in 2000, for instance, 13 percent of new hires failed training. But in 2001, that number plunged to 2 percent.<sup>137</sup> As one employer put it, the minimum wage increases "changed the way we do business. We are more proactive in getting good folks and keeping them trained . . . If we have someone who isn't performing, we have no hesitation about letting them go. We've weeded out non-performers, so the quality goes up considerably."<sup>138</sup>

**3. Reduced turnover will improve vetting.** Reduced turnover will also improve security in another respect: by allowing for an enhanced screening process for obtaining a SIDA badge, making it less likely that any given badged worker will pose

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<sup>134</sup> *Public Area Security National Framework*, at 9.

<sup>135</sup> Letter from John Bilich, at XX.

<sup>136</sup> *Public Area Security National Framework*, at 6.

<sup>137</sup> See Gallear, at 4.

<sup>138</sup> Reich, Hall, & Jacobs (2003), at 62.

a security risk. Many new workers are subjected to background security checks before they can begin their jobs – including a full criminal-history records check and fingerprinting – and it takes time to conduct a thorough check.<sup>139</sup> When turnover is high, it places added demands on the screening process by increasing the number of people in need of being screened. That is what is happening now, and the situation is becoming more serious each year – as noted above, turnover has soared by 50% at the Airports since 2010.<sup>140</sup>

With less turnover, there would be fewer job applicants needing vetting, and it would be possible to reinvest the time saved to provide a more comprehensive check of each applicant. Port Authority Airports comply with federal requirements for SIDA vetting. Reduced turnover would allow the Airports to go further, in terms of: (1) establishing tighter qualifying standards and (2) creating a more searching, interactive vetting process. The Chief Security Officer described such tighter standards in his March 2018 briefing to the Board during Executive Session.<sup>141</sup> And he is now developing a program for more interactive vetting, including potentially conducting more interviews and reference checks to better identify who might constitute a security threat. In the Chief Security Officer's judgment, these changes would improve Airport security and could be immediately undertaken if worker turnover were meaningfully reduced.<sup>142</sup>

In addition to increasing vetting of badged workers, reducing turnover would also make it possible for the Port Authority to increase vetting of public-area employees, as Logan Airport has done. Screening these employees would "allow the airport[s] to have better awareness of who is working

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<sup>139</sup> See, e.g., Office of the Chief Security Officer, Port Authority of New York and New Jersey, *Security Managers Bulletin #2015-03A: Recurrent Criminal History Records Checks for All Security ID Holders—Guidelines for Issuing Officers*, Jul. 21, 2015, <https://bit.ly/2C9yZXd>.

<sup>140</sup> See Part III.A, *supra*.

<sup>141</sup> Letter from John Bilich, at 2.

<sup>142</sup> *Id.* at 2-3.

within their domain, while reducing the number of employees that operate in the airport without vetting."<sup>143</sup> As the *Framework* detailed, that would "provide an effective mitigation strategy by providing real-time situational awareness, knowledge of the public area workforce, and a greater capability to identify employees with intent to harm."<sup>144</sup> Such measures would go beyond current requirements in the SIDA process. This is especially important because, as the recent attacks in the public areas of the Ataturk and Brussels airports show, the public areas at airports are increasingly vulnerable to an attack. The Chief Security Officer has been directed to formulate a vetting regime for public-area, non-SIDA employees that would be implemented as soon as possible, as turnover begins to fall, and to consider Logan's experience in creating a training regime for these employees.

**4. Reduced turnover will reduce the risk of accidents.** Reducing turnover also plays an important role in preventing worker injuries. All Airport workers routinely come into contact with equipment that, without proper training, can cause serious personal injury. And the inherent complexity of the airfield operating environment, including the complicated and constant movement of aircraft, personnel, and equipment, amplifies the risk of worker injury and equipment damage. Workers who remain on the job longer and gain meaningful experience perform better when it comes to the safe operation of equipment.

Robust empirical evidence makes this clear. For instance, a 2007 GAO report, which focused on the aviation industry, identified "high turnover for ramp and fuel workers" as a "major factor[] in ramp accidents."<sup>145</sup> One scholar recently made a similar point: "employees with years of experience may be less prone to mistakes and accidents, helping create safer

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<sup>143</sup> *Public Area Security National Framework*, at 9.

<sup>144</sup> *Id.*

<sup>145</sup> See Gallear, at 4 (discussing GAO, *Aviation Runway and Ramp Safety. Sustained Efforts to Address Leadership, Technology, and Other Challenges Needed to Reduce Accidents and Incidents*, GAO-08-29 (2007)).

working conditions." <sup>146</sup> Other researchers have likewise echoed the core point – high turnover makes it difficult to "maintain[] better-trained staff" and negatively impacts overall "job performance."<sup>147</sup>

Recent data from peer airports bears this out. One study at SFO found that lower turnover led to a dramatic improvement in equipment maintenance and a substantial reduction in equipment damage.<sup>148</sup> Overall, 29% of responding employers at SFO reported that employee handling of valuable airport equipment had gotten "better" or "much better." And 24% of responding employers reported that employees' ability to avoid damaging expensive equipment had likewise improved.<sup>149</sup> In short, reducing turnover will positively impact the safe and efficient use of airport equipment.

**5. Reduced turnover will improve employee preparedness for severe inclement weather.** Reduced turnover will also allow the Port Authority to better handle and address the difficult safety and security concerns posed by increasingly extreme inclement weather. Safely and securely operating an airport in the run-up to, and during, an extreme-weather event requires a dedicated and experienced workforce. Airports cannot entirely avoid disruption from extreme weather, but they can mitigate it. Given the Port Authority's geographic location, it faces an array of severe weather events all year round: blizzard conditions in the winter, thunderstorms in the summer, coastal flooding, and unpredictable wind conditions throughout. Global climate change will only increase these events, in both frequency and intensity.<sup>150</sup> These challenges require an experienced and committed workforce, both in terms of the Port Authority's own employees and the employees of its

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<sup>146</sup> *Id.* at 5-6.

<sup>147</sup> *Id.* at 6.

<sup>148</sup> See Michael Reich, Peter Hall, & Ken Jacobs, *Living Wage Policies at the San Francisco Airport: Impacts on Workers and Businesses*, 44 *Indus. Relations* 106, 127 (Jan. 2005).

<sup>149</sup> *Id.*

<sup>150</sup> See generally *Climate Change Impacts in the United States*, U.S. National Climate Assessment, U.S. Global Change Research Program (May 2014), available at <https://nca2014.globalchange.gov/>.

contractors. These varied groups must perform seamlessly – and safely – under often treacherous conditions. High turnover jeopardizes this goal.

The Port Authority's recent experience in the winter of 2018 illustrates the safety and security concerns posed by extreme weather. On January 4, 2018, Winter Storm Grayson – a "bomb-cyclone" Nor'easter – hit the eastern seaboard, and caused havoc at one of the Airports, JFK, including operational failures with respect to snow removal, baggage retrieval, and plane fueling. Port Authority leaders are closely familiar with the results of an exhaustive post-storm independent investigation, conducted by former Secretary of Transportation Ray LaHood.<sup>151</sup> The report that came out of the investigation makes clear that improved training is one of the key changes needed to improve JFK's response to severe inclement weather<sup>152</sup> – and the report underscores the necessity of building and retaining a committed, experienced, and well-trained workforce.

Although truly extreme weather is occurring with alarming frequency, it still happens only a handful of times a year. Workers who have been on the job for only a short period of time, therefore, are unlikely to have experienced many severe-weather events, which makes them less prepared than their more experienced counterparts. Further, bad weather makes it harder to staff the airport because many employees stay home. Thus, having workers who care – because they are invested in their work and the success of the enterprise, and because they have experienced and worked through difficult conditions before – plays a crucial role in helping to overcome the obstacles and problems that severe weather conditions create.

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<sup>151</sup> See generally Secretary Ray LaHood, *JFK Airport Operations During Winter Storm Grayson: Findings and Recommendations* (May 31, 2018).

<sup>152</sup> *Id.* at 35, 36, 37, 51, 53.

#### IV. Substantial evidence from peer airports and other industries demonstrates that increasing wages predictably decreases worker turnover

As Parts II and III showed, the Port Authority's alarmingly high turnover rate undermines Airport security.

Part II described the acute and evolving security threats faced by the Port Authority's Airports. It then described several specific threats of high concern: outside intruders, "insider" threats, certain off-site workers, and workers who are unprepared to handle safety or security emergencies. Finally, Part II detailed the expert consensus that reducing each of these sorts of threats requires experienced, motivated, and well-trained airport workers.

But as Part III has shown, the need for such workers is currently being undercut by the Port Authority's high – and growing – turnover rate. Part III began by describing the alarmingly rapid increase in turnover at the Port Authority over the last decade, reaching rates that are dramatically above those at other businesses and airports. Part III then demonstrated that this high turnover hurts security at the Port Authority's Airports – and showed that there are specific ways in which reducing turnover would improve security.

As these two Parts together demonstrate, if turnover numbers at the Port Authority's Airports are not dramatically reduced, that will present a severe and growing threat to the safety and security of the Airports and the region that they serve. It is clear that action to reduce employee turnover at the Port Authority's Airports is urgently needed. The question is: how to get there?

This Part addresses how to achieve a reduction in employee turnover. As Part IV.A shows, peer airports have answered this question through minimum wage increases. Part IV.B then describes the evidence from academic experts, commenters, and other industries, all of which demonstrates that the consensus approach of these peer airports – raising the minimum wage – is indeed the right approach to rapidly reducing turnover.

A. *Peer airports' experience shows that increasing the minimum wage reduces turnover*

In recent years, many major metropolitan areas and their affiliated airports have responded to concerns about security and turnover by adopting minimum wage policies for airport workers.

San Francisco International Airport (SFO) was the first major airport to address widespread worker-retention and security issues through a minimum wage policy. SFO's experience, in turn, provides an example of the policy's success. As part of SFO's Quality Standards Program, the airport's rules and regulations, which are integrated into the airport's contracts, were modified nearly twenty years ago to set a minimum wage floor that is higher than the municipal-wage rate that would otherwise be applicable.<sup>153</sup> SFO's rules and regulations also require employers to meet a minimum standard for health benefits.<sup>154</sup> Prior to this wage increase, San Francisco had experienced major problems with turnover and related security costs: the average tenure of its security screeners, who were airline contract employees prior to the creation of the Transportation Safety Administration, was six weeks.<sup>155</sup> In 2015, the airport's director reported that the program, which now covers over 12,000 employees, "has been an overwhelming success" as documented by an "extraordinarily high retention rate."<sup>156</sup> The official responsible for implementing the wage program at SFO has also observed that the higher wage "directly improves job performance."<sup>157</sup>

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<sup>153</sup> San Francisco International Airport, *Quality Standards Program: Safety and Security*, at 3 (Mar. 1, 2016), <https://bit.ly/2LxU1hw>.

<sup>154</sup> *Id.*

<sup>155</sup> *SFO Enhances Safety & Security With QSP Revision* (Oct. 13, 2015), <https://bit.ly/2wroVmf>.

<sup>156</sup> John L. Martin, *Re "Redefining the Minimum Wage"* (Nov. 19, 2013), <https://nyti.ms/2PJkaNE>.

<sup>157</sup> *Interview with Emylene Aspilla*, The Aspen Institute (Feb. 20, 2018), <https://bit.ly/2CBgfeo>.

The SFO director's impression that increased wages at the airport led to a substantial reduction in turnover is verified by empirical studies. One of the most useful studies is that of Ken Jacobs, the chair of the Center for Labor Research and Education (Labor Center) at the University of California Berkeley Institute for Research on Labor and Employment.<sup>158</sup> Jacobs co-authored a study of SFO's Quality Standards Program in the peer-reviewed journal *Industrial Relations*. His co-authors on the study were Michael Reich, now an emeritus professor in the Economics Department at the University of California, Berkeley, and Peter Hall, now a professor in and director of the Urban Studies Program at Simon Fraser University.<sup>159</sup>

As the study describes, SFO's success at reducing turnover was remarkable. SFO established an initial minimum wage of \$10.25 per hour at a time when the minimum wage required by California law was \$5.75 per hour,<sup>160</sup> and many employees at SFO were earning less than \$7 per hour.<sup>161</sup> The result was that, for firms that experienced an increase in wage costs of ten percent or more, turnover declined by a remarkable 60 percent – from almost 50 percent per year to 20 percent per year.<sup>162</sup>

The Reich, Hall, and Jacobs study also details dramatic improvements in turnover on a job-specific basis. For example, ramp workers saw a 25-percent decline in turnover; cabin cleaners saw a 44-percent decline in turnover; and screeners saw an 80-percent decline in turnover.<sup>163</sup>

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<sup>158</sup> See Comment ID 2018050101; Reich, Hall, & Jacobs (2005).

<sup>159</sup> See Reich, Hall, & Jacobs (2005).

<sup>160</sup> See Department of Industrial Relations, State of California, *History of California Minimum Wage*, <https://bit.ly/2oKoX5X>.

<sup>161</sup> See Reich, Hall, & Jacobs (2005), at 110 tbl.2.

<sup>162</sup> See *id.* at 125.

<sup>163</sup> This relationship is not as strong for customer-service agents, where the increase in the entry-level wages was 26 percent but the decline in turnover was just 5 percent. But

As one SFO official put it, because of SFO's new wage policy, "workers were not only staying in their jobs longer, but productivity and morale were also improving."<sup>164</sup> Because of this policy, "SFO was the first airport in the country to improve its worker retention rate" by increasing the minimum wage payable to airport workers.<sup>165</sup> In the years since the implementation of the minimum wage policy, SFO has expanded the policy to more and more workers, and continues to affirm that "the wage component" of the airport's Quality Standards Program "has decreased the turnover rate and increased effort and performance for covered employees."<sup>166</sup>

SFO is not the only peer airport to document a relationship between increasing the minimum wage and reducing airport worker turnover. Around the same time as SFO's new policy was implemented, wages for workers at LAX increased as well, as part of a policy change that increased wages for workers throughout Los Angeles. An academic study found that the increased wage significantly reduced turnover across affected businesses.<sup>167</sup> The Chief Operating Officer of Los Angeles International Airport reports that the airport has witnessed "a

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Reich, Hall and Jacobs note that "turnover was already low in these positions prior to [the minimum wage]. Unlike outsourced airline service jobs, these unionized positions with United Airlines had career advancement opportunities both within the job category and to other positions in the airline." *Id.* at 126.

<sup>164</sup> *Interview with Emylene Aspilla, The Aspen Institute* (Feb. 20, 2018).

<sup>165</sup> *Id.*

<sup>166</sup> *SFO Enhances Safety & Security With QSP Revision* (Oct. 13, 2015).

<sup>167</sup> See David Fairris, *The Impact of Living Wages on Employers: A Control Group Analysis of the Los Angeles Ordinance*, 44 *Industrial Relations* 84 (Jan. 2005).

decidedly lower rate of turnover across the board" since the minimum wage applicable to its workers was increased.<sup>168</sup>

Several years ago, Sea-Tac implemented a similar policy after conducting a thorough study. The study found that low wages was one of "the primary drivers of turnover" at the airport,<sup>169</sup> and noted that "[t]he safety and security of Airport operations relies significantly on the ability of companies . . . to retain a skilled workforce, since many of these employees have access to the airfield, aircraft, and other equipment that supports critical Airport operations."<sup>170</sup> The Port of Seattle subsequently implemented a policy setting a higher wage floor for contractors at the airport.<sup>171</sup>

More recently, the Metropolitan Washington Airports Authority, which operates Dulles International Airport and Reagan National Airport, also adopted a wage policy after conducting a thorough study.<sup>172</sup> The MWAA's study found that wage programs "have been shown to reduce employee turnover," producing a "more stable workforce" and improving the "quality of service delivered by employees."<sup>173</sup> Because lower turnover, in turn, results in "longer tenure and enhanced on-Airport experience," the MWAA found that increasing the minimum wage would promote "critical worker traits" to benefit airport security.<sup>174</sup> The MWAA's board voted shortly thereafter to adopt a wage policy representing a significant increase above the legally required minimum wages in the area.<sup>175</sup> The board's

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<sup>168</sup> Conversation between Samson Mengistu, Chief Operating Officers, Los Angeles World Airports, and Deepak Gupta, Gupta Wessler PLLC (July 25, 2018).

<sup>169</sup> Reis Memorandum at 7-8.

<sup>170</sup> *Id.* at 2.

<sup>171</sup> Port of Seattle, *Resolution No. 3694* (July 22, 2014), available at <https://bit.ly/2pxwyoa>.

<sup>172</sup> See Griffin Memorandum at 10.

<sup>173</sup> *Id.* at 9.

<sup>174</sup> *Id.* at 11.

<sup>175</sup> See Metropolitan Washington Airports Authority, *Resolution No. 17-8, Approving Amendment to Airports Authority*

resolution noted that the wage policy would "reduce the worker turnover rates experience[d] by many" airport businesses.<sup>176</sup>

The experiences of other airports is corroborated by employees at those airports. A comment submitted to the Port Authority by the Communications Workers of America, for example, suggests that the increased wage at Reagan National Airport in Washington, DC (DCA) similarly led to a decline in turnover.<sup>177</sup> That union, which represents workers at American Airlines' regional subsidiaries, noted that the proportion of one subsidiary's employees at DCA who had more than three years tenure went up by over 25 percent after the minimum wage was increased.<sup>178</sup> The union also reports that its members have a longer tenure at DCA and other airports with increased wages than at airports without such policies.<sup>179</sup>

After the dramatic success of SFO's increased wage program, virtually all of the major airports around the United States have raised wages to combat turnover. This key safety and security measure has become an industry standard among leading airports. In addition to San Francisco, Seattle, and Washington, DC, the airports serving Boston, Los Angeles, Minneapolis/St. Paul, Miami, and Chicago all have wages for their airport workers well above the federal minimum wage, whether by contract, ordinance, or other law.<sup>180</sup> Over the last twenty years, increasing the minimum wage has become a tried and tested tool for addressing turnover and its associated security problems.

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*Living Wage Program and Adopting an Airport Workers Wage Policy for Certain Businesses Operating on the Airports* (Apr. 19, 2017), <https://bit.ly/2wjlmPJ> ("Resolution No. 17-8").

<sup>176</sup> *Id.*

<sup>177</sup> *See* Comment ID 2018052801.

<sup>178</sup> *See id.*

<sup>179</sup> *See id.*

<sup>180</sup> *See* Griffin Memorandum, at 7.

B. *Evidence of the wage/turnover relationship from other industries*

The evidence that was just discussed, showing that increasing the minimum wage at airports decreases turnover, is unsurprising. That relationship – increasing wages leads to lower turnover – forms a general pattern across industries. This Part provides a brief overview of evidence establishing this general principle.

In 1986, John L. Cotton, now Professor of Management at Marquette University, and Jeffrey M. Tuttle conducted a meta-analysis of more than 130 turnover studies.<sup>181</sup> This extensive review confirmed that pay was a “stable, reliable correlate[] with turnover.”<sup>182</sup> The Cotton study found that all but three of the relevant datasets showed that increased wages were associated with decreased turnover.<sup>183</sup>

More recent studies provide additional supporting evidence. Candace Howes, a Professor of Economics at Connecticut College, has studied the impact of a doubling in the wage of In-Home Supportive Services workers in San Francisco between 1996 and 2002, from about \$5 per hour to \$10 per hour.<sup>184</sup> Before the increase, turnover was at 32 percent.<sup>185</sup> “Over the four-year period in which the wages and benefits increased,” Howes found that “the turnover rate fell by 31 percent for all providers and by 57 percent for new providers.”<sup>186</sup>

Three researchers – Michael Reich, Arindrajit Dube, and Suresh Naidu – studied the minimum wage in a different segment

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<sup>181</sup> See John L. Cotton & Jeffrey M. Tuttle, *Employee Turnover: A Meta-Analysis and Review with Implications for Research*, 11 Acad. Mgmt. Rev. 55 (Jan. 1986).

<sup>182</sup> *Id.* at 63.

<sup>183</sup> *Id.* at 60.

<sup>184</sup> See Candice Howes, *Living Wages and Retention of Homecare Workers in San Francisco*, 44 Indus. Rel. 139 (Jan. 2005).

<sup>185</sup> See *id.* at 143.

<sup>186</sup> *Id.* at 161.

of San Francisco workers, commissioning a panel survey of restaurants. In 2003, the city raised the minimum wage by 26 percent, from \$6.75 to \$8.50 per hour.<sup>187</sup> Together, Dube, Naidu, and Reich found that the policy was associated with an increase in the tenure of the typical worker by between roughly 20 and 40 percent.<sup>188</sup>

David Fairris, a Professor of Economics at the University of California, Riverside, has studied the implementation of Los Angeles' increased wage.<sup>189</sup> At a time when the state minimum wage was less than \$7,<sup>190</sup> a Los Angeles municipal ordinance required that covered firms pay \$9.25 per hour.<sup>191</sup> Fairris found that "[a]ll else constant," establishments covered by the relevant ordinance "possess[ed] turnover rates for their largest low-wage occupations that [were] . . . 35 percent . . . lower than nonliving wage establishments."<sup>192</sup>

Academic comments received by the Port Authority in connection with its consideration of the minimum wage buttress the above conclusions. Ken Jacobs included with his comment a

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<sup>187</sup> See Arindrajit Dube, Suresh Naidu, and Michael Reich, *The Economic Effects of a Citywide Minimum Wage*, 60 *Indus. & Lab. Rel. Rev.* 522, 522 (July 2007). Dube is a Professor of Economics at the University of Massachusetts, Amherst; Naidu is an Associate Professor of Economics and International and Public Affairs at Columbia University.

<sup>188</sup> *Id.* The authors found an increase of five to six months in the tenure of the typical worker, *id.* at 539, 541 tbl.14, and reported typical worker tenure to be 14 to 21 months, *id.* at 539, tbl.12.

<sup>189</sup> See Fairris, *The Impact of Living Wages on Employers*. The results from the same survey are also reported in David Fairris, David Runsten, Carolina Briones, & Jessica Goodheart, *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses* (2005), <https://bit.ly/2wgqJzw>.

<sup>190</sup> See California Dep't of Industrial Relations, *History of California Minimum Wage*, <https://bit.ly/2oKoX5X>.

<sup>191</sup> See Fairris, at 86, 88.

<sup>192</sup> See *id.* at 101.

literature review produced by Berkeley's Labor Center, detailing "an extensive body of research that establishes a correlation between higher wages and lower turnover across industries."<sup>193</sup> Similarly, a comment by the Economic Policy Institute described a "large body of research [that] has shown that raising wages generally, and setting high minimum wage standards specifically, leads to meaningful reductions in employee turnover or 'churn' among affected workers."<sup>194</sup> Finally, Paul Osterman, Professor of Human Resources and Management at MIT's Sloan School of Management, commented that "there is extensive and convincing evidence that in settings comparable to the New York airports when compensation is increased employers benefit in a variety of ways . . . includ[ing] lower turnover rates."<sup>195</sup>

*C. The comments affirm the strong connection between wage increases and decreased turnover*

The previous two parts discussed the evidence that increasing wages results in decreased turnover in airports (Part IV.A) and indeed across other industries as well (Part IV.B). There is every reason to expect that the Port Authority's Airports would follow this general trend. But there is no need to proceed by inference. Rather, there is *direct* evidence that an increase in wages at the Port Authority's Airports would reduce turnover. That evidence comes from information submitted to the Port Authority during the 60-day and 30-day public comment periods.

Workers across a variety of positions attributed the extraordinary turnover they have witnessed at the Airports to low wages:

- "During my 25 years on the job . . . I've seen a lot of turnover at Newark Airport because my colleagues and I have not been paid enough."<sup>196</sup>

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<sup>193</sup> See Gallear, at 2.

<sup>194</sup> See Comment ID 2018060108.

<sup>195</sup> See Comment ID 20180416028.

<sup>196</sup> See Comment ID 20180417003 (dispatcher).

- "The \$19 wage-an-hour increase will help reduce turnover for many of my colleagues since they'll be more incentivized to stay at a job that cares about us and the value we provide." <sup>197</sup>
- "Over the years, some of [my colleagues] have quit because they were not earning enough money." <sup>198</sup>
- "I have seen airport workers leaving their jobs because the pay is low and work hours are long. But with the \$19 wage increase, this would resolve the problem and more workers will stay in their jobs." <sup>199</sup>
- "Making more money would definitely make me and my colleagues happier and work harder. It would also help people stay on the job longer." <sup>200</sup>

Other Airport workers described a personal plan to stay at their jobs longer if the minimum wage were increased—including a cleaner,<sup>201</sup> a security officer,<sup>202</sup> and wheelchair escorts.<sup>203</sup> The comments of the wheelchair escorts are representative:

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<sup>197</sup> See Comment ID 20180417002 (cleaner).

<sup>198</sup> See Comment ID 20180417009 (multiple jobs).

<sup>199</sup> See Comment ID 20180418004 (baggage handler).

<sup>200</sup> See Comment ID 20180417007 (passenger escort).

<sup>201</sup> See Comment ID 20180418008 ("Though there are benefits to working at the airport, making a low salary has been very challenging. . . Our credit card bills are high because we usually rely on credit when we can't afford to pay our bills with our combined paychecks. But if I earn more at my job, I'd be able to stay there longer and not worry about rising debt.")

<sup>202</sup> See Comment ID 20180417011 ("I was already starting to look for a new job, but now that these raises are coming through, I am going to stay at the airport.")

<sup>203</sup> See Comment ID 20180418006; Comment ID 20180417004.

- "With these raises to \$19, my coworkers and I will stay longer in these jobs because the hard work will now be worth it."<sup>204</sup>
- "The \$19 will help people want to come to work. For me personally, it's a good motivator. It makes me want to do my job."<sup>205</sup>

More than 60 workers at JFK and 50 workers at Newark International Airport joined these workers, commenting that the wage "will help . . . provide longer term, stable jobs" and that it will "make our airport . . . more stable."<sup>206</sup>

These worker comments – coupled with numerous live testimonials at the Board's public meetings – demonstrate that increasing the minimum wage will reduce turnover at the Port Authority's airports and thereby enhance safety, security, and efficiency. As discussed in Parts IV.A and IV.B, this conclusion is corroborated by broad-based empirical studies across a variety of industries. Based on this overwhelming evidence, the Port Authority can be confident that implementing an increased minimum wage policy is likely to help reduce turnover among airport workers and thereby improve security and safety at the Port Authority's Airports.

**V. Increasing minimum wages will lead to improved efficiency, productivity, and customer service**

As detailed in the preceding parts of this Analysis and Justification, high worker turnover at the Airports is a serious concern from the perspective of security and safety, and turnover can be greatly reduced by raising wages.

But in addition to these security improvements, considerable evidence shows that increasing minimum wages is also necessary to ensure that the Port Authority remains at the forefront of global transportation in terms of the quality and competitiveness of the services that it offers to customers. Efficient, high-quality services are essential to the ongoing

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<sup>204</sup> See Comment ID 20180418006.

<sup>205</sup> See Comment ID 20180417004.

<sup>206</sup> See, e.g., Comment ID 2018050328; Comment ID 2018051019; Comment ID 20180426006; Comment ID 20180426031.

success and competitiveness of the Port Authority's Airports. Higher minimum wages help realize these benefits in two respects. First, they improve customer service and worker productivity, resulting in more efficient and higher quality Airports. Second, they make for a more integrated and uniform system of Airports, allowing the Port Authority to better fulfill its legal obligation, under its compact, to ensure "integration" of the "air terminals so far as practicable in a unified system."<sup>207</sup>

A. *Increasing minimum wages will improve workers' productivity and customers' experience*

Empirical evidence confirms that raising minimum wages improves workers' efficiency and productivity and leads to better customer service. After SFO implemented its minimum-wage policy, for instance, employers reported significant improvements in employee morale and customer service, substantial drops in employee grievances and disciplinary issues, and sharply reduced absenteeism.<sup>208</sup> Specifically, about half of all employers (45%) reported that customer service was "much better" or "better" than before the minimum-wage policy was put in place, while only 3% said that it was worse.<sup>209</sup>

Additionally, "[o]ne-third of all SFO employers, accounting for over half of all employees, reported improved overall job performance among workers covered by the [wage policy]," while "[t]he proportion of employers who reported improvements in employee morale was 47 percent."<sup>210</sup> There were similar "decreases in employee grievances (45 percent), decreases in employee disciplinary issues (44 percent), and decreases in absenteeism (29 percent)."<sup>211</sup> And "few employers reported any deterioration in performance."<sup>212</sup> In other words, the policy

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<sup>207</sup> N.Y. Uncon. Law §6631; N.J.S.A. 32:1-35.1.

<sup>208</sup> See Reich, Hall, & Jacobs (2005), at 106.

<sup>209</sup> *Id.* at 127.

<sup>210</sup> Reich, Hall, & Jacobs (2003), at 10; see also Reich, Hall, & Jacobs (2005), at 127.

<sup>211</sup> Reich, Hall, & Jacobs (2003), at 10.

<sup>212</sup> *Id.*

resulted in a better and more efficient workforce across the board. It also found that companies had made "dynamic adjustments" in response to the wage policy, generating cost savings and improving performance without job loss.<sup>213</sup> The study concluded that the wage policy had boosted the overall economic performance of SFO's entire system.<sup>214</sup>

Peer airports have reached the same conclusion. Relying on "the growing body of research that has empirically demonstrated" that "[l]iving wages have raised productivity" and "improved quality of service," the MWAA recently found that an increased minimum wage would "produce an overall improvement in worker job performance and the quality of service delivered by workers and, in the case of concession workers whose jobs involve direct interaction with Airport passengers, an increase in the level of Airport customer satisfaction."<sup>215</sup> Sea-Tac likewise found that raising wages would reduce turnover, thus improving efficiency, timeliness, and customer service.<sup>216</sup> For the Port Authority's Airports to remain competitive, they must keep pace.

More broadly, a literature review by Professor Justin Wolfers and Jan Zilinsky outlines the many ways in which increased wages for low-income workers lead to higher productivity.<sup>217</sup> They cite numerous studies showing that employees who receive higher wages and anticipate future raises work harder, perform better, and have higher morale. These workers are less likely to have disciplinary problems or to exhibit absenteeism, and they provide better customer service. Moreover, higher wages attract more capable and productive workers.

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<sup>213</sup> Reich, Hall, & Jacobs (2005), at 136.

<sup>214</sup> *Id.* at 107, 136.

<sup>215</sup> See Griffin Memorandum, at 9-11.

<sup>216</sup> See Reis Memorandum, at 9.

<sup>217</sup> See Justin Wolfers & Jan Zilinsky, "Higher Wages for Low-Income Workers Lead to High Productivity", *Raising Lower-Level Wages: When and Why it Makes Economic Sense*, Peterson Institute for International Economics (2015).

Empirical studies by Yale economist Truman Bewley show that setting wages too low endangers performance because it saps morale.<sup>218</sup> For similar reasons, researchers have found that a pay increase for lower-level employees boosts work quality and efficiency.<sup>219</sup>

These studies are directly relevant to the Port Authority context. In 2012, a study by researchers at New York University showed that more than half of the contracted service employees at Port Authority airports reported difficulty paying their monthly bills or expenses.<sup>220</sup> About 20% relied on government-sponsored food subsidies or food stamps. One recent study calculated that more than 20% of Airport workers who would be covered by the Proposed Rules now live below a regionally adjusted poverty line.<sup>221</sup>

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<sup>218</sup> See Truman F. Bewley, "Fairness, Reciprocity, and Wage Rigidity", *Behavioral Economics and its Applications* 157 (Peter Diamond & Hannu Vartiainen eds. 2012); Truman F. Bewley, *Why Wages Don't Fall in a Recession* (1999); see generally, e.g., Eric Verhoogen, et al., *Fairness and Freight-Handlers: Local Labor Market Conditions and Wage-Fairness Perceptions in a Trucking Firm*, 60 *Indus. & Lab. Rel. Rev.* 477 (2007); Fehr Ernst & Klaus Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 *Q. J. Econ.* 817 (1999).

<sup>219</sup> Douglas M. Cowherd & David I. Levine, *Product Quality and Pay Equity between Lower-Level Employees and Top Management*, 37 *Adm. Sci. Q.* 302 (1992); cf. Anuj K. Shah et al., *Some Consequences of Having Too Little*, 338 *Science* 682 (2012) (showing that the psychological stress of living near the poverty line creates a "cognitive load" that hampers awareness and good decision-making).

<sup>220</sup> C. Nicole Mason, *Above Board: Raising the Standards for Passenger Service Workers at the Nation's Busiest Airports*, at 14-15 (2012).

<sup>221</sup> See Economic Roundtable, *Restoring Altitude: Economic Impacts of the Port Authority of New York and New Jersey Minimum Wage Proposal*, at 23 (June 2018). In addition to productivity concerns, financial instability may be relevant to security concerns. Port Authority workers with low pay may be more vulnerable targets. For instance, the Orlando airport

B. *The Proposed Rules will produce a more uniform and integrated Port Authority*

In vesting the Port Authority with the obligation to operate the Airports, the legislatures of New York and New Jersey expected the Port Authority to operate an "intergrat[ed]" and "unified" air travel system.<sup>222</sup>

But there are currently substantial gaps between minimum-wage laws in New York and New Jersey. If these gaps are not eventually closed, it will become harder and harder for the Airports to function as they are supposed to—as integrated pieces of a unified whole. Higher skilled and more motivated workers will systematically choose higher-wage airports. As a result, customer service, operational effectiveness, and ultimately safety will decline at lower-wage airports, creating the potential for a different degree of quality and service at each Port Authority Airport. This would be unacceptable. Bringing Airport wages into parity with each other can help to ensure that it never happens. Moreover, when workers are part of a highly interrelated airport system like the Port Authority's, a coordinated approach is beneficial because performance in one sub-sector affects efficiencies throughout the system.<sup>223</sup>

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worker discussed above in Part II, who bypassed security and smuggled drugs onto a flight, explained that he was motivated by his "difficult financial situation." Office of Inspector General, Department of Homeland Security, *TSA's Security Screening Procedures for Employees at Orlando International Airport and the Feasibility of 100 Percent Employee Screening*, at 12 (Oct. 2008), <https://bit.ly/2BNicUQ>. And the airport worker at Sea-Tac who recently stole a plane, see Part II, told air traffic control over the radio: "Minimum wage, we'll chalk it up to that. Maybe that will grease some gears a little bit with the higher-ups." Susannah Frame, *Horizon worker who stole plane mentioned minimum wage from cockpit*, K5 News, Aug. 12, 2018, <https://kng5.tv/2MQdb81>.

<sup>222</sup> N.Y. Uncon. Law §6631; N.J.S.A. 32:1-35.1.

<sup>223</sup> See, e.g., Paul Freathy & Frank O'Connell, *Planning for Profit: The Commercialization of European Airports*, 32

## VI. The benefits of an increased minimum wage are unlikely to be offset by increased unemployment

There has been some limited criticism of the Proposed Rules by commenters focused on the possibility that wage increases would result in job losses at the Airports. The Port Authority takes these concerns seriously. If a wage increase were to cause an increase in unemployment, it would reduce the aggregate experience of the workforce and undermine, to some degree, the justifications for adopting the Proposed Rules.

But the available evidence does not support this critique. "The employment effect of the minimum wage is one of the most studied topics in all of economics."<sup>224</sup> Studies of the impact on increases to minimum wages find that affected businesses develop "channels of adjustment" to maintain stable levels of employment.<sup>225</sup> For instance, a recent study that focused on New York's minimum wage increase found that an increase in the minimum wage is not meaningfully offset by adverse employment effects.<sup>226</sup> Instead, any "costs of the minimum wage" tend to be mitigated by "turnover reductions" and "productivity increases."<sup>227</sup> Indeed, a study released earlier this month examines the effects of "a new wave" of minimum-

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Long Range Planning 587 (1999) (discussing how the successful transition to deregulated airport operations and concessions in Europe required a coordinated and comprehensive strategy by airport management).

<sup>224</sup> John Schmitt, *Explaining the Small Employment Effects of the Minimum Wage in the United States*, *Industrial Relations*, at 547 (Oct. 2015).

<sup>225</sup> See, e.g., Barry T. Hirsch, et al., *Minimum Wage Channels of Adjustment*, 54 *Indus. Rel.* 199 (Mar. 12, 2015).

<sup>226</sup> Michael Reich, et al., *The Effects of a \$15 Minimum Wage In New York State*, Policy Brief, Center on Wage and Employment Dynamics, U.C. Berkeley (Mar. 2016).

<sup>227</sup> *Id.*; see also, e.g., David I. Levine, *Can Wage Increases Pay for Themselves? Tests with a Productive Function*, 102 *Econ J.* 1102 (Sept. 1992); David I. Levine, *What Do Wages Buy?*, 38 *Admin. Sci. Q.* 462 (Sept. 1993).

wage policies in the food services industry and "do[es] not detect significant negative employment effects."<sup>228</sup>

The Port Authority's own experience reinforces this conclusion. After the Port Authority increased the minimum wage in 2014, by 15% at JFK and LaGuardia and by 20% at Newark, no reduction in employment occurred.<sup>229</sup> In fact, the independent report commissioned by the Port Authority found that afterwards, "employment among the Port Authority's classifications of covered services rose by 25 percent . . . increasing in every category."<sup>230</sup>

And, even if a wage increase were somehow to result in a small unexpected decline in employment, that would not outweigh the overall gains in the aggregate workforce experience. The Port Authority's primary goal with the Proposed Rules is to reduce turnover and boost safety and security. A wage increase will help guarantee that the Airports' workforce is sufficiently skilled, stable, and motivated to secure the high-quality, efficient operations that the public expects. These benefits will complement the critical safety and security benefits identified above. Any marginal decrease in employment, even if it unexpectedly occurs, would not meaningfully undermine these benefits.

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<sup>228</sup> Sylvia Allegretto, Anna Godoey, Carl Nadler & Michael Reich, *The New Wave of Local Minimum Wage Policies: Evidence from Six Cities*, Center on Wage and Employment Dynamics, at 1-2 (Sept. 2018), <https://bit.ly/2CIMTQD>.

<sup>229</sup> Effective February 1, 2015, PANYNJ established a minimum wage of \$10.10 per hour. At the time, New York's minimum wage was \$8.75, see <https://on.ny.gov/2Mxiadw>, and New Jersey's minimum wage was \$8.38, see <https://bit.ly/2BNs0TL>.

<sup>230</sup> InterVISTAS, *Summary Report: Potential Impacts of Increases in Wages and Benefits on the Port Authority of New York and New Jersey*, at 11 (July 21, 2016); see also *id.* at 11 tbl.3.

## VII. The Port Authority's legal authority

This Part describes the legal authority for the Proposed Rules.

When it acts as the proprietor, as it proposes to do here, the Port Authority can do what a private entity could do in generally analogous circumstances. Thus, for example, as a proprietor the Port Authority can establish rules for the use of its property - which property includes the Airports. And as a proprietor, the Port Authority can enter into legally binding agreements that require counterparties to follow certain rules - like the agreements the Port Authority has made with relevant Airport employers.

In turn, a proprietor can plainly set rules with respect to wages - and at its Airports, the Port Authority has set wage rules since 2014, and has done so without objection. Port Authority rules can be established in any number of ways - by the Port Authority's Board of Commissioners, of course, and also through amendments to the Airport Rules and Regulations, as issued by Port Authority staff. And when the Port Authority acts as a proprietor, various federal and state preemption doctrines are inapplicable.

Part VII.A describes the Port Authority's proprietary authority as operator of the Airports. Part VII.B explains that all covered employees under the Proposed Rules work for contractors that are already contractually bound to follow the Port Authority's Rules and Regulations, including rules with respect to minimum wages. Part VII.C explains that this contractual authority has been confirmed each year by covered contractors' certifications, acknowledging their ongoing obligations under the currently-binding 2014 Minimum Wage Rules. Finally, Parts VII.D and VII.E explain why neither federal nor state preemption analysis is applicable.

A. *The Port Authority has the authority to adopt the Proposed Rules as proprietor of the airports.*

The Port Authority contemplates adopting the Proposed Rules solely in its proprietary capacity – that is, in its capacity as the proprietor and operator of the Airports.<sup>231</sup>

The Port Authority has both *governmental* authority to regulate and *proprietary* authority to act in a manner akin to a private business.<sup>232</sup> In general, "a governmental entity's conduct may fall along a continuum," "deriving from its governmental and proprietary functions."<sup>233</sup> On one end are public lawmaking actions – regulatory actions having the force and effect of law – based on a sovereign's "general police powers." On the other are "proprietary" actions, based on the power to exert control over property and operations that "essentially substitute for or supplement traditionally private enterprises."<sup>234</sup>

As the proprietor of its Airports, the Port Authority is empowered to enter into contracts with users of Airport facilities, to place conditions on the use of its property, and to issue rules governing the safe and efficient operation of its Airports. The Port Authority's Compact – passed by the New York and New Jersey legislatures and approved by Congress in 1921 – gives the Port Authority the "full power and authority" to "lease and/or operate any terminal or transportation facility" within the Port District, "and to make charges for the use thereof: and for any of such purposes to own, hold, lease

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<sup>231</sup> When entities act in a propriety capacity, their actions are said not to have the force of law. Thus, for example, in adopting its airport minimum wage policy, the MWAA made clear that the adopted rules did not constitute a "law, regulation, rule, requirement or other provision having the force and effect of law." The same is true here.

<sup>232</sup> See, e.g., *State v. Daquino*, 56 N.J. Super. 230 (N.J. Super. Ct. App. Div. 1959).

<sup>233</sup> *Sebastian v. State*, 93 N.Y.2d 790, 793 (N.Y. Ct. App. 1999) (internal quotation marks omitted).

<sup>234</sup> *Id.* at 790 (internal citations and quotation marks omitted).

and/or operate real or personal property."<sup>235</sup> This broad language has been held to confer upon the Port Authority full proprietary authority to oversee the operations of its facilities.<sup>236</sup> In addition, "all details" regarding "the operation of air terminals owned or controlled by the Port Authority shall be within its sole discretion," and the Port Authority's "decision in connection with any and all matters concerning such air terminals shall be controlling and conclusive."<sup>237</sup>

It is not unusual for government-operated airports acting in their proprietary capacities – like "many private parties" in a variety of industries – to enter into contracts "requiring certain standards for labor safety, training, and wages."<sup>238</sup> Just as with any other business, such standards make airports

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<sup>235</sup> N.Y. Uncon. Law § 6407; N.J. Stat. Ann. § 32:1-7.

<sup>236</sup> See *State v. Cohen*, 73 N.J. 331, 338-39 n.3 (1977); *Bush Terminal Co. v. City of New York*, 282 N.Y. 306, 316 (1940).

<sup>237</sup> N.Y. Uncon. Law § 6640; N.J.S.A. § 32:1-10. In 1947, New York and New Jersey passed legislation providing that the "maintenance and operation of air terminals by the Port Authority is and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions." N.Y. Uncon. Law § 6634; N.J.S.A. § 32:1-35.4. Thus, while the Proposed Rules are amply grounded in the Port Authority's specific business imperative to ensure the secure and efficient operation of its Airports, the Port Authority would not be unjustified in taking into account broader commercial benefits of these rules.

<sup>238</sup> *Allied Constr. Indus. v. Cincinnati*, 879 F.3d 215, 222 (6th Cir. 2018). When entities act in a propriety capacity, their actions are said not to have the force of law. Thus, for example, in adopting its airport minimum wage policy, the MWAA made clear that the adopted rules did not constitute a "law, regulation, rule, requirement or other provision having the force and effect of law." The same is true here.

"less likely to experience significant employee turnover, improving [their] stability and overall quality."<sup>239</sup> These critical concerns of "safety, quality," and efficiency are not abstract regulatory goals, but instead arise out of a "proprietary interest" in secure and effective operations shared by public and private actors alike.<sup>240</sup>

The 2014 Minimum Wage Rules were explicitly grounded in the "authority vested in the Port Authority as proprietor of the airports it operates, in order to promote safety and security in the airport working environment as well as enhance quality of service for the traveling public."<sup>241</sup> None of the contractors subject to these Rules by virtue of their contracts, privilege permits, or terminal leases has objected to or challenged these Rules. To the contrary, and as explained more fully below, Port Authority contractors have universally complied with the 2014 Rules since they were implemented and have signed written statements "acknowledg[ing]" their obligations under the Rules – recognizing that the wage rules are "applicable" to them, confirming that minimum wages are "required" to apply to contractors and subcontractors, and agreeing each year to "abide[]" by the compensation levels set by the Port Authority and incorporated into all existing contracts.

*B. The Port Authority has the authority to adopt the Proposed Rules under its existing contractual relationships*

The Proposed Rules "apply to lessees, permittees, and contractors, as well as the subcontractors and sublessees of those entities" that provide a number of covered services. All of the Port Authority's contracts, privilege permits, and leases for the use of its Airport facilities bind precisely

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> See Memorandum to All Commissioners of the Port Authority from Patrick J. Foye, Executive Director, regarding Comments Received on the Proposed Rules for Implementation of the Minimum Wage Policy, dated July 18, 2014.

these entities to a set of proprietary standards that the Port Authority publicizes as its airport "Rules and Regulations."<sup>242</sup>

Representative provisions illustrate the basic contours of this contractual requirement. A lease agreement with Virgin America, for example, provides:

The use by the Lessee and its officers, employees, passengers, guests, invitees and those doing business with it, of the Public Aircraft Facilities and any and all other portions of the Airport which it may be entitled to use under this Lease (other than space leased to the Lessee for its exclusive use) shall be subject to the Rules and Regulations of the Port Authority in effect as of the execution of this Agreement, and such reasonable future rules and regulations (including amendments and supplements to existing Rules and Regulations) as the Port Authority may from time to time promulgate in the public interest and in the interest of health, safety, sanitation, good order and the economic and efficient operation of the Airport.<sup>243</sup>

A privilege permit with Flying Food, an airline catering company, likewise contains the following contractual language to which the company has expressly consented:

The Permittee shall observe and obey (and compel its officers, employees, guests, invitees, and those doing business with it, to observe and obey) the rules and regulations and procedures of the

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<sup>242</sup> Some of the requirements contained in the Rules and Regulations are relatively simple, low-impact house rules — like a prohibition on open containers of alcohol in public areas. Rules and Regulations, at 9. Others, by contrast, provide detailed guidelines on fundamental aspects of these counterparties' air-terminal operations. For instance, the Rules and Regulations include over 80 pages of detailed directions on permissible vehicle use. *Id.*, Appendix B-1.

<sup>243</sup> See Common Use Agreement Between the Port Authority of New York and New Jersey and Virgin America, Inc., Lease No. ANC-4364 § 35 (Dec. 1., 2013).

Port Authority now in effect, and such further reasonable rules and regulations and procedures which may from time to time during the effective period of this Permit, be promulgated by the Port Authority for reasons of safety, health, preservation of property or maintenance of a good and orderly appearance of the Airport or for the safe and efficient operation of the Airport.<sup>244</sup>

Identical or near-identical provisions are found throughout the Port Authority's contracts, privilege permits, and leases with Airport contractors. In short, *Airport counterparties have explicitly agreed in formal and binding legal documents to be bound by the Port Authority's Airport Rules and Regulations – including future amendments to those Rules.*<sup>245</sup>

The Proposed Rules, if adopted, would constitute an amendment to the Port Authority's Rules and Regulations. The

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<sup>244</sup> See JFK In-Flight Catering Privilege Permit for Flying Food Group, LLC, Permit No. AYD-731, § 17 (Dec. 31, 2015).

<sup>245</sup> In the time since the 2014 Rules were implemented, a number of contractors have renewed their contracts with the Port Authority. Reflecting the incorporation of the 2014 Rules into the contractual relationship, contracts entered into or restated after 2015 generally contain an even more explicit provision requiring contractors to comply with the Port Authority's minimum-wage requirements as they are amended over time. For instance, the relevant provision in a Delta agreement provides that the Port Authority "has adopted a minimum wage [] for workers performing under non-trade labor services contracts as all Port Authority facilities" and informs them that the Port Authority "reserves the right to amend the aforesaid policy and rule from time to time." See Common Use Agreement Between the Port Authority of New York and New Jersey and Delta Air Lines, Inc., AGB-113 § 62 (Sept. 13, 2017). The agreement then states that Delta "agrees to comply with the Minimum Wage Policy and implementing rule, as the same may be amended." And, it further makes clear that Delta is required, in any subcontracts, to include a clause that the subcontractor also agrees to comply with the Port Authority's minimum wage policy and requirements, including any amendments thereto.

"Airport Rules and Regulations" explicitly authorize the Port Authority "to amend" the Rules and Regulations "as necessary" through bulletins issued by the Port Authority manager.<sup>246</sup> The Proposed Rules would be issued via just such a manager's bulletin. This means that they would become binding under the Port Authority's contracts, permits, and leases because these agreements, by their terms, uniformly require compliance with "reasonable future rules and regulations" that "may from time to time . . . be promulgated by the Port Authority."

For several reasons, the contemplated amendments are "reasonable."

*First*, for all the reasons given in the preceding sections of this Analysis and Justification, they are reasonably and proportionally tailored to ensure the "safe and efficient" operation of the Airports.

*Second*, parallel minimum wage rules have been adopted by peer airports throughout the country, including airports who have established such rules in their proprietary capacity. Minimum wage rules have become the industry standard for major U.S. airports.<sup>247</sup>

*Third*, contractors are frequently bound by rules analogous to the minimum wage rules – amendments to existing "house rules," "terms and conditions," or "policies," that govern conduct in circumstances that require coordination across large organizations or properties involving shared space. For example, unit-owners or lessees living in condominiums, cooperatives, or housing developments frequently agree to abide by such rules and regulations as may be promulgated by a governing residential association. These parties voluntarily cede property rights because "arrangements such as these [] require

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<sup>246</sup> See Rules and Regulations, at 4 ("Airport bulletins may be issued by the Managers as necessary to amend these Rules & Regulations.").

<sup>247</sup> See, e.g., Resolution No. 17-8.

cooperation among the property owners for the good of the complex."<sup>248</sup>

*Fourth*, the Port Authority's Airport counterparties are generally sophisticated businesses – and it has been explicit since at least 2014 that by being bound to the Port Authority's Rules and Regulations, they are bound to minimum wage rules.

*Fifth*, the formal Airport Rules and Regulations impose an extensive set of obligations – addressing everything from ID badges to use of baggage carts – that are all animated by a focus on safety and efficiency. The minimum wage rules, born from a similar desire to ensure increased airport security and efficiency, are of a piece with the range of concerns and topics generally encompassed by the existing Airport Regulations and Rules.

In short, the Proposed Minimum Wage Rules fall squarely within the scope of, and are expressly contemplated by, current Port Authority agreements. These agreements explicitly recognize and require compliance with both the Port Authority's existing Rules and Regulations and any future amendments to those Rules. And that is what the Proposed Minimum Wage Rules are.

*C. Contractors have annually certified that they acknowledge their ongoing minimum wage obligations under the 2014 Rules*

In addition to the above, the 2014 Minimum Wage Rules – which have been incorporated into relevant Airport contracts, permits, and leases since 2014 – specifically contemplate, and likewise require compliance with, *future* amendments involving wages. The 2014 Minimum Wage Rules explicitly state that the Port Authority has "the right to amend these rules from time to time."<sup>249</sup> That is just what the 2018 Proposed Rules are –

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<sup>248</sup> *Renauto v. Bd. of Dirs. of Valimar Homeowners Ass'n, Inc.*, 780 N.Y.S.2d 483, 490–91 (N.Y. Sup. Ct. 2004), *aff'd*, 23 A.D.3d 564 (N.Y. Sup. Ct. App. Div. 2005).

<sup>249</sup> Rules for Implementation of Minimum Wage Policy, at 3 (Mar. 18, 2015).

amendments to the 2014 Rules. And the 2014 Rules have been complied with, across the board, for years.

As alluded to above, as part of its implementation of the 2014 Wage Rules, the Port Authority has required that relevant contractors, lessees, and permittees submit an annual "Certification Form."<sup>250</sup> On this form, employers with employees providing Covered Services must sign and notarize a form stating:

Employer acknowledges and abides by the compensation levels set forth within the "Rules for Implementation of Minimum Wage Policy for Non-Trade Labor Service Contracts—La Guardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport" as applicable to all entities doing business at the Airports."<sup>251</sup>

Port Authority records indicate that there has been widespread compliance, and certification of that compliance, by contractors throughout the Port Authority's three Airports. For example, during 2018 – precisely as the Board has been publicly considering changes to the Airports' minimum wage rules – the Port Authority has received *hundreds* of Certification Forms, 349 as of July 16, 2018.

Nonetheless, the Port Authority has received comments from two commenters – a trade group and a business – arguing that the Port Authority does not have the legal authority to implement the policy.<sup>252</sup> But these comments did not discuss or even allude to any of the legal considerations described above: the Port Authority's broad authority under its Compact as proprietor of the Airports; the contractual obligation undertaken by Airport employers to adhere to the Port Authority's Rules

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<sup>250</sup> A sample form is available at <https://bit.ly/2mZ4jO6>.

<sup>251</sup> *Id.*

<sup>252</sup> See Comments of Airlines for America (ID #s 2018060703, 20180727001); Comments of Flying Food Group (ID #s 2018061102, 20170721001). A third commenter, a law firm, argued that the Port Authority does have such authority. Comment of McCracken, Stemerman & Holsberry (ID # 20180815008).

and Regulations; the Port Authority's explicit power to amend both those Rules and the 2014 Rules; and contractors' widespread and consistent annual certifications and acknowledgments of their obligations under the existing 2014 wage rules. These omissions undermine the force of the commenters' arguments.

*D. Federal preemption analysis is inapplicable*

The same two commenters noted above also raised a federal preemption objection to the Proposed Rules.<sup>253</sup> This objection is misplaced.

Because the Port Authority is acting in a proprietary capacity analogous to a private business, neither the existing 2014 Rules nor the Proposed Rules are subject to preemption under the Airline Deregulation Act (ADA). The ADA states explicitly that a bi-state compact entity like the Port Authority is not subject to preemption to the extent that it is "carrying out its proprietary powers and rights."<sup>254</sup> In addition to falling under this statutory exception, the Rules also are not subject to preemption because they fall into the well-established market-participant exception. The Supreme Court has held that "pre-emption doctrines apply only to state regulation," not to a public entity's "interact[ions] with private participants in the marketplace."<sup>255</sup> A public entity is therefore free to adopt contractual requirements "tailored to protect its proprietary interest" without being subject to federal preemption.<sup>256</sup>

Here, the Proposed Rules explicitly would not have the force or effect of law and would be enforced solely through

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<sup>253</sup> See Comments of Airlines for America (ID #s 2018060703, 20180727001); Comments of Flying Food Group (ID #s 2018061102, 20170721001).

<sup>254</sup> 49 U.S.C. § 41713(b)(3).

<sup>255</sup> *Building and Const. Trades Council of Metro. Dist. v. Assoc. Builders & Contractors of Mass./Rhode Island, Inc.*, 507 U.S. 218, 227 (1993) (emphasis in original).

<sup>256</sup> *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 217 (3d Cir. 2004).

remedies available to any private party under contract law. Moreover, the Proposed Rules are tailored to make the Port Authority's Airports "less likely to experience significant employee turnover" by "improving [their] stability and overall quality" – and thereby safeguarding the Airports' passengers and the region from terrorism and other serious threats.<sup>257</sup> Accordingly, the Proposed Rules unmistakably serve a valid proprietary interest sufficient to categorically exempt the rules from federal preemption.<sup>258</sup>

In any event, even assuming counterfactually that the Rules were public regulations with the force and effect of law, rather than an exercise of the Port Authority's proprietary authority, they would be fully consistent with the ADA.<sup>259</sup> The Supreme Court has held that state and local regulations are preempted only if they directly control air carrier prices, routes, or services or indirectly have a "significant impact" on such prices, routes, or services.<sup>260</sup> The Rules offend neither limitation. On their face, they do not compel carriers to offer, or prohibit them from offering, any particular price, route, or service to their customers.<sup>261</sup> Nor do they directly regulate the manner in which air carrier prices, routes, or services are displayed, implemented, designed, advertised, or conveyed to customers. Finally, the Rules apply generally to all entities and contractors at the Port Authority's airports, the vast majority of whom are not themselves air carriers.

In addition, the Proposed Rules do not have a forbidden "significant impact" on air carrier prices, routes, or services. This conclusion is supported by two decisions

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<sup>257</sup> *Allied Constr. Indus.*, 879 F.3d at 222; see also *Airline Serv. Providers Ass'n v. Los Angeles World Airports*, 873 F.3d 1074, 1080 (9th Cir. 2017).

<sup>258</sup> *Id.*

<sup>259</sup> See 49 U.S.C. § 41713(b)(1) (preemption clause).

<sup>260</sup> *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370-71 (2008); see also *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

<sup>261</sup> *Contra Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218 (2d Cir. 2008).

evaluating and upholding analogous minimum wage policies.<sup>262</sup> It is further supported by decisions upholding generally applicable wage, anti-discrimination, and land-use requirements under the ADA.<sup>263</sup> And it draws still more support from cases holding that regulations with a "tenuous, remote, or peripheral" effect on air carrier prices, routes, or services are not preempted.<sup>264</sup> Requiring Airport contractors to comply with wage standards would not distort the competitive landscape for air carrier services. Instead, like many other policies upheld by state and federal courts, changes to extant minimum wage rules will have only a marginal effect – if any at all – on air carrier prices, routes, or services.

*E. State preemption analysis is inapplicable*

The Rules are not subject to preemption under state or local law either. First, just as a private business can, via contract, set wages of its contractors or subcontractors higher than a local minimum wage, so too can the Port Authority. And second, the case law regarding local minimum wage law cited in the comments of Airlines for America and Flying Food Group does not apply to the Port Authority. The Port Authority is a bi-state compact entity whose power stems from legislation enacted by both States and approved by Congress – it is not

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<sup>262</sup> See *Amerijet Int'l, Inc. v. Miami-Dade Cnty.*, 7 F. Supp. 3d 1231, 1238 (S.D. Fla. 2014), *aff'd* 627 F. App'x 744 (11th Cir. 2015); *Filo Foods, LLC v. City of SeaTac*, 183 Wash. 2d 770, 805-08 (2015) (en banc).

<sup>263</sup> See, e.g., *S.C. Johnson & Son, Inc., v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 547 (7th Cir. 2012); *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206 (2d Cir. 2011); *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998).

<sup>264</sup> See, e.g., *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013); *Gary v. Air Grp., Inc.*, 397 F.3d 183, 186-89 (3d Cir. 2005); *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 191 (3d Cir. 1998); *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77 (2d Cir. 1997).

analogous in this respect to a local municipality subject to state law.<sup>265</sup>

#### VIII. Responses on the four issues identified for supplemental comment

During the initial, 60-day comment period, commenters identified four discrete issues that were not self-evident on the face of the Proposed Rules themselves. The issues related to tipped workers, benefits offsets, street pricing, and small employers. Because the issues were raised in the first instance by public commenters, the professional staff of the Port Authority recommended that the Board solicit additional public comments so that everyone would have an opportunity to consider and comment on these "potentially significant and plainly complex" issues.<sup>266</sup> After carefully considering all comments, including the 62 comments submitted in a supplemental round, the Port Authority reaches the following conclusions.

##### A. *Tipped workers*

###### 1. *Background*

In general, wherever there is a minimum wage policy, the question arises as to how to treat workers' tips. Many jurisdictions with minimum wages approach this question via a "tip credit" system. A "tip credit" refers to a credit given to employers toward their minimum wage obligations based on the tips collected by their employees. If an employee earns enough in tips, a tip credit means that the employer does not need to pay that employee the full minimum wage, because the employee's tips suffice.<sup>267</sup>

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<sup>265</sup> See, e.g., *Agesen v. Catherwood*, 26 N.Y.2d 521 (Ct. App. 1970); *Goodman v. Port Auth. of N.Y. & N.J.*, 2013 WL 5313427, at \*9 (S.D.N.Y. Sept. 20, 2013).

<sup>266</sup> See Memorandum from Huntley Lawrence, Director of Aviation, to Board of Commissioners (June 26, 2018).

<sup>267</sup> See, e.g., U.S. Department of Labor, *Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act*.

The availability of tip credits does not mean that employees are not supposed to receive the full minimum wage when their tipped income is low. This is because if an employee does not receive enough in tips to reach a level equal to the minimum wage, the employer is generally responsible for "topping off" the employee's salary – that is, the employer must make up the difference between what the employee actually received and the minimum wage he or she is owed.<sup>268</sup>

Additionally, even where tip credits are permitted, employers generally must pay a base hourly wage to their employees, regardless of the amount of tips they receive. That base hourly wage is typically set at a level that is substantially below the otherwise applicable minimum wage.<sup>269</sup> Take, for example, federal minimum wage law. The current federal minimum wage is \$7.25 per hour. Federal minimum wage law allows employers to take a tip credit – but if they do so, employers must nonetheless pay a base hourly wage of \$2.13 to workers who qualify as tipped employees.<sup>270</sup> Employers may therefore receive a tip credit of up to \$5.12 per hour for an employee, so long as the employee in question is earning at least that much per hour in tips.<sup>271</sup>

## 2. *Tipped Workers at the Port Authority's Airports*

The Port Authority's currently-binding rules allow an Airport employer to take a tip credit against the Port Authority minimum wage with respect to workers who "customarily and regularly" receive tips. These rules stipulate that the burden is on the employer to demonstrate that, including tips, Airport employees as to whom the tip credit is said to apply are receiving total "compensation (including tips) in amounts

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<sup>268</sup> See, e.g., *id.* at 3.

<sup>269</sup> See, e.g., *id.* at 1.

<sup>270</sup> *Id.* at 3.

<sup>271</sup> New York has a generally similar minimum wage regime, as does New Jersey – though each state sets a different minimum wage than does the federal government, and also sets a different base hourly wage. See 12 NYCRR 142-2.5(b); New York Dep't of Labor, *Wage Order Summary*, <https://on.ny.gov/2NreHt1>; N.J.S.A. 34:11-56a1(d); New Jersey Dep't of Labor & Workforce Dev., *Wage and Hour Compliance FAQs*, <https://bit.ly/2PbW3qU>.

equal to the minimum wage levels" required by the Port Authority rules.

With respect to tipped workers, the Port Authority's current minimum wage rules read as follows:

A Contractor seeking to demonstrate compliance for employees, who receive tips, shall have the burden of proving that the employee received compensation (including tips) in amounts equal to the minimum wage levels set forth in these rules.

The federal government and certain states allow an employer to count all or part of an employee's tips towards its minimum wage obligations and some states set a maximum "tip credit" toward the minimum wage. For purposes of these rules, only if a Contractor/Employer takes advantage of the applicable "tip credit" for federal, state or local minimum wage compliance, will the Covered Service worker's receipt of tips be considered in determining whether the Contractor/employer is compliant with the Port Authority Minimum Wage Policy.

Contractors/Employers who seek to take advantage of the payment of "tips" or a "tip credit" towards compliance with the Minimum Wage Policy and these Rules, will be required to certify that they are in compliance with the applicable (federal, state or local) minimum wage requirements governing the receipt of a credit for tips for their Covered Service workers.

"Tipped Employees" are those who engage in occupations in which tips are customarily and regularly received from patrons.

Under the Port Authority's current minimum wage rules, as quoted above, an Airport employer who seeks to take a "tip credit" with respect to the Port Authority's minimum wage standards must first certify that it is in compliance with applicable federal, state, and local laws that concern minimum wages for tipped workers. These minimum wage laws impose a broad range of obligations, all of which the Airport employer in question must certify it is following. These minimum wage laws, for example, determine when employee tips may and may not be pooled by an employer. In addition, these laws require employers to pay tipped employees a base hourly wage — the

minimum hourly payment, fixed by law, that must *always* be made, regardless of the tips that an employee does or does not earn on a given shift. And finally, these laws establish the precise manner in which employers must "top off" the wages of their tipped employees – in the event that the tips the employees receive, plus their base hourly wage, do not measure up to the broader, generally-applicable minimum wage.

In practice, under the Port Authority's current minimum wage rules, the precise manner in which tips are accounted for varies from Airport workplace to Airport workplace. For example, in some Airport workplaces, tips provided to employees can be automatically recorded in real time, by an electronic point of sale ("POS") system – and logs created by the POS system can be used to calculate wages. In other workplaces, employees apparently hand over the tips they have received to their employer – and the employer keeps track of tip amounts, for the purpose of calculating wages. And in still other workplaces, employees apparently retain the tips they have received – and the employee keeps track of tip amounts, and then reports that information to the employer, so the employer can calculate the employee's wages.<sup>272</sup>

### 3. *Comments*

The comments received by the Port Authority focused on four key points: a tip-credit system will be under-enforced; tipped workers will have inconsistent and varying income; tipped workers' income will be too low; and specific categories of tipped workers will be hurt by the Proposed Rules as they currently stand.

#### i. Noncompliance and limited enforcement

One of the primary concerns commenters raised is the prospect that if the Proposed Rules include a tip credit, tipped

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<sup>272</sup> Employee reports of this kind will often be provided to employers on a simple form, analogous to the Internal Revenue Service Form 470, "Employee's Report of Tips to Employer."

workers will not receive the wages they are due. As one commenter put it, "[b]ecause the rules are so complicated, employers and employees are often confused."<sup>273</sup>

This confusion can exist on multiple levels. First, both employers and employees may be unaware of employers' obligation to increase the wages paid to tipped employees when the employees' earnings fall below the full minimum wage.<sup>274</sup> Second, employers and employees have difficulty accurately keeping track of tips.

ii. Inconsistent income

Several commenters pointed out that where workers' income depends on tips, their take-home pay may be inconsistent and depend on the number of customers in a given shift, those customers' willingness to tip, and customers' familiarity with tipping norms.<sup>275</sup> As one wheelchair agent said in a comment, "I cannot depend on the tips, because there are often no tips."<sup>276</sup>

Some of this inconsistency is inherent to the nature of tipped work, but some is exacerbated in the context of working at the Port Authority, where many patrons are not from the United States. Because tipping is a matter of social custom, many travelers are not acquainted with the expectation that certain workers will be compensated in part by individual tips. The result is that, as one commenter noted, "[p]assengers that come from international flights often don't know to tip, and therefore don't tip."<sup>277</sup>

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<sup>273</sup> Comment of National Employment Law Project (ID # 20180806001).

<sup>274</sup> *Id.*

<sup>275</sup> *See, e.g.,* (ID #s 20180417004; 20180418002; 2018051116).

<sup>276</sup> (ID # 20180418005).

<sup>277</sup> (ID # 20180418002); *see also* SEIU Comment at 16; Comment of National Employment Law Project (ID # 2018060106), at 3.

### iii. Insufficient income

Many comments invoked a concern that tipped workers are not paid enough. To some extent, these comments reflect the concern noted above – that it is difficult to enforce a minimum wage for tipped workers. But some comments arguably reflect a slightly different stance: that the Proposed Rules should not include a tip credit because eliminating the tip credit would increase tipped workers' take-home pay. One commenter pointed out that living wage policies at other airports do not allow for a tip credit, and discussed how existing policies at the Port Authority "have simply not been enough to bring workers out of poverty."<sup>278</sup>

### iv. Skycaps and wheelchair attendants

Several comments raised their concerns about the Proposed Rules with reference to two particular categories of employees: skycaps and employees engaged in wheelchair assistance. According to some commenters, skycaps have received fewer tips in recent years because airlines' bag fees have decreased the number of bags passengers bring and the willingness of those passengers to tip.<sup>279</sup> And at least one commenter raised a concern that workers providing wheelchair assistance are particularly vulnerable to uneven tip income.<sup>280</sup> Due to the nature of wheelchair assistance, workers are sometimes required to spend long periods of time with a single passenger, and so their incomes depend more on the willingness of a smaller number of individuals to tip.<sup>281</sup>

## 4. Conclusions

The Port Authority has carefully reviewed this issue. Two main considerations guide the response outlined in this Analysis and Justification.

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<sup>278</sup> SEIU Comment at 13.

<sup>279</sup> SEIU Comment at 14; (ID # 2018051114) ("[M]y colleagues and I used to get better tips. But we don't really get many tips now.").

<sup>280</sup> SEIU Comment at 15-16.

<sup>281</sup> *Id.*

*First*, as the above summary illustrates, most issues noted by commenters are essentially problems of enforcement. The current minimum wage rules clearly require that tipped employees must receive the cash minimum wage through a combination of employer-paid wages and tips. Full enforcement of the Proposed Rules should fully address the problems set out above.

This is the primary consideration guiding the response outlined here, which would focus on enforcement.

*Second*, the Port Authority's Proposed Rules are not a comprehensive wage regulation. The Port Authority, acting as a proprietor, cannot police the enforcement of the Proposed Rules as a state Department of Labor might; it cannot issue administrative subpoenas, criminally prosecute offenders, or impose punitive fines for non-compliance. The Port Authority is limited, instead, to contractual remedies – which, as noted below, can themselves be rigorous and strong.

Guided by these considerations, this Analysis and Justification proposes to retain the currently-binding minimum wage rules – but to add various provisions to them, to ensure that tipped Airport workers promptly receive the wages to which they are entitled.

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To that end, the Proposed Rules reflect the following:

■ Employers of Airport tipped workers who seek to benefit from a tip credit will be required to maintain detailed, contemporaneous records that establish for each employee: (a) how many hours the employee worked in a given pay period, and what the employee was paid; (b) the tips the employee received during the pay period; and (c) supporting documentation to substantiate (a) and (b).

■ With respect to (b), tips received, supporting documentation may come in a variety of forms. As to Airport workplaces that rely upon real-time logging of tips through an electronic POS system, supporting documentation may be in the form of the records generated by the POS system. As to all other Airport workplaces, such supporting documentation must include copies of written reports provided by an employee to his or her employer

("Employee Tip Report"). An Employee Tip Report must describe the tips the employee has received during a given shift, and should be prepared as the shift ends or as soon thereafter as is reasonably practicable.

■ In addition to any other record-keeping requirements imposed by federal, state, or local law, records described in the preceding two paragraphs must be retained for two years by Airport employers.

■ Records related to an employee must be *immediately* made available to that employee upon the employee's request.

The record-keeping requirements set out above should help to ensure that tipped Airport employees are paid based on the tips they have in fact received – not based on an employer's assumption or extrapolation or "rule-of-thumb."

If properly-kept records reflect that it is necessary to upwardly adjust a tipped employee's wages (to "top off" those wages), then it is essential that workers are not left waiting for an indeterminate period before they receive the supplemental compensation to which they are entitled.

Accordingly, the Proposed Rules reflect the following:

■ Should an employer determine that an employee's pay for a given pay period must be "topped off," because the employee has not received sufficient tips during a particular pay period, the required supplemental payment must be made to the employee as promptly as is reasonably practicable. The supplemental payment should be made on the day the employee is paid for the pay period in question. If that is not reasonably practicable, the supplemental payment should be made no later than the employee's next regularly-scheduled pay day.

To be sure, there may be instances – even under the rigorous record-keeping regime set out above – when disputes develop as to whether records are in fact correct. Therefore, the Proposed Rules state:

■ Should an employer disagree with an Employee Tip Report, the employer must inform that employee in writing of the reasons for the disagreement within 48

hours of the Report being received by the employer. If the employer does not do so, the Employee Tip Report will be treated as valid.

This provision will help to ensure that disputes are rapidly addressed, before memories fade and evidence disappears; that employers bear the burden of bringing disputes to employees' attention; and that disputes are not frivolously undertaken, that they are initiated by employers based on a written statement of reasons.

Dispute resolution in this context is a matter for relevant state authorities or for the courts. The Port Authority cannot adjudicate individual cases or disputes. But the Port Authority has a strong, overarching interest in the safe and efficient operation of the Airports, and that interest requires that Airport workers - including tipped workers - receive the wages to which they are entitled. This is part of why the Airports' minimum wage rules have long required each relevant employer to certify to the Port Authority that it is in compliance with the minimum wage rules - and why the Port Authority has reserved the right to audit each employer's compliance.

In light of the above, the Proposed Rules reflect the following:

■ Employers will be required to fully and promptly cooperate with all Port Authority audits to determine whether employers' certifications of compliance have been properly given regarding wage payments to Airport workers. Cooperation will include complying with all reasonable requests for documents or interviews. In the context of such audits, employers will be required to produce clear and convincing evidence that they have retained all required records and that they have in place effective systems for ensuring that all of their tipped employees are receiving the wages to which they are entitled. If this burden is not met, the Port Authority shall prepare an audit report, to be provided to the employer in question; any impacted employees; relevant state Department of Labor officials; and the Port Authority's Director of Aviation, who shall determine what Port Authority remedies may be appropriate. These remedies may include a breach of contract lawsuit or, in the case of especially serious or persistent violations, denial of

permission for the employer to continue operating at the Airports.

Finally, Airport workers who are aware of their rights are better able to protect them. Therefore, the Proposed Rules reflect the following:

■ Employers will be required to inform all tipped workers in writing of how the tip credit works – including an explicit statement that if tips are insufficient, an employee's wages must be "topped off" by his or her employer.

■ Employers will be required to retain for at least two years a record documenting that the above communication was made.

■ To affirmatively facilitate information gathering about Airport conditions, the Port Authority will create a hotline through which employees may anonymously report violations of the Proposed Rules, including with respect to tipped workers.

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As issues related to tipped workers can be especially complex, the Port Authority will remain open to potential revision or reexamination of the Proposed Rules based on comments as to how those Rules are working in practice with respect to tipped employees. Such comments should be supplied to the Port Authority's Director of Aviation by March 1, 2019, at which point the Director will evaluate them. Comments can be emailed to [TippedWorkers@panynj.gov](mailto:TippedWorkers@panynj.gov).

#### *B. Benefits offsets*

During the 60-day initial comment period, two entities submitted identical comments suggesting that employers should receive an offset under the Proposed Rules for certain benefits – such as health-care or retirement benefits—that they have contractually agreed to pay their employees. These commenters suggested that, when determining the minimum wage, "the total

value of an employee's compensation, including the value of benefits, should be considered."<sup>282</sup>

In light of the prior comments, the Board invited supplemental comment on the issue of benefits offsets.<sup>283</sup> The supplemental comments received by the Port Authority opposed implementing any benefits offset.

The Board's request for supplemental comment proposed a hypothetical to illustrate how a benefits offset might work in practice: Consider, for example, an employee who is paid \$16 per hour in wages and receives health-care benefits worth \$3 per hour. Under a benefits-offset regime, the employer could argue that it need not pay \$19 per hour in cash to satisfy a mandated \$19 minimum wage—because the "total value" of the compensation the employer is providing (\$16 in cash plus \$3 in benefits) equals the minimum wage rate of \$19 per hour.

In the view of the two original commenters that supported such a benefits offset, the absence of an offset might disincentivize employers from providing an adequate level of health-care and retirement benefits to their employees.<sup>284</sup> Commenters also expressed concern that companies might counteract any wage increases generated by the Proposed Rules by reducing other benefits.<sup>285</sup>

But a far greater number of comments — including all of the supplemental comments — strongly opposed the use of any benefits-offset requirement. The president of the United Food & Commercial Workers Local 2013, which represents some 15,000 workers in the New York area, raised the concern that a benefits offset would "undermine the concept of a minimum wage" by introducing "unpredictability and inequity into the wage calculation."<sup>286</sup> This is because implementing a benefits offset

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<sup>282</sup> Comment of Day Pitney (No ID).

<sup>283</sup> *See generally* Huntley Lawrence Memorandum.

<sup>284</sup> Comment of Day Pitney (No ID).

<sup>285</sup> *Id.*

<sup>286</sup> Comment of Louis Mark Carotenuto, President, United Food & Commercial Workers Local 2013 (ID No. 20180718001).

would require complex judgments to determine the dollar value of various benefits. And numerous other commenters, including a New York State Senator, also expressed their strong opposition to "unfairly" including benefits offsets in the Proposed Rules.<sup>287</sup> Some 26 individual airport workers, echoing these concerns, "urge[d]" the Port Authority to adopt the Proposed Rules "without any benefit offset."<sup>288</sup>

The Port Authority has considered this issue carefully and concludes that no benefits offset should be adopted. Allowing for a benefits offset is flatly inconsistent with the setting of a simple, across-the-board cash minimum wage for the Airports – a minimum wage of a kind that would help to ensure that the Airports are operated in an appropriately safe and efficient manner. This is a fundamental point, and it is also supported by a set of additional considerations:

*First*, benefits offsets are not a feature of either New York or New Jersey minimum wage law.<sup>289</sup> So, too, for federal minimum wage law.<sup>290</sup> No commenters during the supplemental comment period identified any reason to deviate from this background law.

*Second*, the Port Authority's own existing minimum wage Rules likewise have not allowed for benefits offsets. See Rules for Implementation of Minimum Wage Policy for Non-Trade Labor

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<sup>287</sup> See, e.g., Comment of New York State Senator Marisol Alcantara (ID No. 20180717001).

<sup>288</sup> See Comments of United Airlines Catering Operations employees. (ID Nos. 20180802001, 20180802002, 20180802003, 20180802004, 20180802005, 20180802006, 20180802007, 20180802008, 20180802009, 20180802010, 20180804001, 20180806002, 20180807001, 20180807002, 20180807003, 20180807004, 20180807005, 20180807006, 20180807007, 20180808001, 20180808002, 20180808003, 20180809001, 20180809002, 20180809003, 20180813002).

<sup>289</sup> See N.Y. Lab. Law § 652 (McKinney); N.J. Const. art. I, ¶ 23.

<sup>290</sup> See Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

Service Contracts—LaGuardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport (Mar. 18, 2015). No comments suggested that, in the absence of a benefits offset, the existing 2014 Rules failed to function in an appropriate or effective manner.

*Third*, while no commenter addressed the relevant policies of other peer airports, the Port Authority's own review reveals that, of the U.S. airport authorities nationally that set their own minimum wage, only one — San Francisco's — had included any kind of benefit-offset requirement.<sup>291</sup>

*Fourth*, imposing a benefits-offset regime would be administratively complex. Either the Port Authority or individual employers would need to determine the cash value of every benefit to be offset. Without the guidance of any applicable background law in New York or New Jersey, the Port Authority is not in a position to make difficult judgments about the relative value of benefits and any attempt to do so would impose significant administration costs. The administrative complexity of attempting to value benefits offsets is reinforced by the practical experience of governmental agencies in one area where states do calculate offsets — prevailing wage law. Those calculations often involve a large administrative apparatus drawing on state departments of labor with specialized expertise and very large professional staffs. The Port Authority does not have an equivalent administrative apparatus, nor does it have equivalent fact-finding capabilities, such as the power to subpoena.

Although it may well be true, as one commenter noted, that "employees consider more than wages when valuing a job," and that "'benefits' offer significant financial value to a job,"<sup>292</sup> the question of precisely how much "financial value" is offered by a particular benefits package is a matter better resolved at the bargaining table. Employers and employees can bargain for benefits packages and options with no involvement from a third-party such as the Port Authority.

*Finally*, a benefits offset might also unnecessarily implicate the policies of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001, et. seq. Recently,

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<sup>291</sup> See Griffin Memorandum, at 7.

<sup>292</sup> See Comment of Day Pitney (No ID).

the U.S. Supreme Court has suggested that ERISA imposes substantial limitations on the ability of states and local governments to adopt policies that interfere with ERISA's uniform system of benefit-plan administration — including reporting, disclosure, and recordkeeping requirements.<sup>293</sup>

Because the Port Authority's Proposed Rules do not carry the force of law and involves the exercise of the Port Authority's proprietary powers, there are no federal preemption concerns. Nevertheless, determining what benefits might be offset against a minimum wage and how such a regime could be implemented and enforced consistent with ERISA's interest in the uniform administration of benefits could invite additional complexity and generate additional administrative burdens. As one commenter has explained, the benefits provisions of New York's prevailing wage law were the subject of more than decade of litigation and required multiple modifications before they were ultimately held to have complied with ERISA.<sup>294</sup>

### C. *Street pricing*

During the first open comment period, some commenters raised concerns about burdens that the Proposed Rules may impose on businesses subject to the existing Port Authority Aviation Department Street Pricing Policy ("Street Pricing Policy") and the Board encouraged commenters to submit additional comments on this point.<sup>295</sup>

Under the Street Pricing Policy, the prices that Airport businesses may charge for certain items are capped based on those items' "street prices," which are the prices charged for

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<sup>293</sup> See *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016).

<sup>294</sup> See Comment of National Employment Law Project (NELP) (ID #2018086001) (citing *A.L. Blades & Sons, Inc. v. Roberts*, 136 A.D.2d 926, 927, 524 N.Y.S.2d 912 (4th Dep't 1988); *Gen. Elec. Co. v. N.Y. State Dep't of Labor*, 891 F.2d 25, 29 (2d Cir. 1989); *Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor*, 107 F.3d 1000, 1007-08 (2d Cir. 1997); *HMI Mech. Sys., Inc. v. McGowan*, 266 F.3d 142 (2d Cir. 2001)).

<sup>295</sup> See generally June 28 Board Resolution, at 8-10.

equivalent items in the New York/New Jersey metropolitan area.<sup>296</sup> The Proposed Rules may increase the labor costs faced by some of the airport businesses covered by the Street Pricing Policy. But because the Street Pricing Policy restricts certain Airport businesses' ability to raise the price of their products beyond a certain level, these businesses will be limited in their ability to use increased prices to defray their increased labor costs.

The Port Authority has considered this issue carefully. The Street Pricing Policy is an important way to make sure that travelers can purchase goods on similar terms they would find generally at businesses in the New York/New Jersey metropolitan area. But if businesses were unable to remain profitable, travelers and airport employees would be negatively affected.

Accordingly, the Street Pricing Policy should be modified to provide additional pricing flexibility to businesses that are impacted by the Proposed Rules. This modification would occur in two phases.

In the short term, businesses covered by both the Proposed Rules and Street Pricing Policy would be permitted to set their retail prices at all airports up to the level of "street prices" for equivalent items sold in Manhattan. This lifting of the applicable price ceiling reflects the fact that, in the short term, the Proposed Rules will raise the wages of covered employees to a level that is roughly comparable with the minimum wage in New York.<sup>297</sup> Manhattan business and Airport businesses will have generally comparable expense levels with respect to labor costs. Manhattan prices are therefore a reasonable proxy for the prices charged by businesses that must pay wages at a similar rate to the minimum wage required by the Proposed Rules. This change to the Street Pricing Policy will become effective on November 1, and will last approximately 18 months.

Meanwhile, the Port Authority will act immediately to commission a study designed to inform further long-term changes to the Street Pricing Policy. The Proposed Rules will

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<sup>296</sup> See Huntley Lawrence Memorandum, Exh. P.

<sup>297</sup> See, e.g., New York Dep't of Labor, *Wage Order Summary*, <https://on.ny.gov/2NreHt1>.

continue to increase minimum wages at covered businesses over several years, and will surpass the current New York State minimum wage in September 2020. The Port Authority's study will examine the costs faced by businesses at the Airports to determine the extent of any burden imposed by the Proposed Rules going forward. For some businesses, labor costs may be a high share of their total costs, and the Proposed Rules could represent more of a burden; for other businesses, labor costs may be a lower share of total costs, or they may already pay their employees at or above the level required by the Proposed Rules. The study will help the Port Authority identify whether and to what extent further changes should be made to the Street Pricing Policy. Moreover, nearly all of the 20 largest airports in the United States allow on-airport businesses to charge "street prices" plus up to an additional 10%. The study will examine the possibility of such a pricing regime at the Airports.<sup>298</sup>

This two-step plan for addressing commenters' concerns has several advantages. It will allow businesses to adjust in the short term to the Proposed Rules' minimum wage by enabling them to set prices at up to the level set by other businesses – Manhattan businesses – that face a similar minimum wage. In the meantime, it will allow the Port Authority to gather more detailed information than the commenters provided regarding the extent to which the Proposed Rules will impact airport businesses' bottom lines. And in the long term, it will allow the Port Authority to address commenters' concerns with a well-informed policy that balances the needs of airport businesses with the goals of improving safety, security, and operations while keeping prices reasonable.

#### *D. Small employers*

During the 60-day comment period, a pair of commenters raised concerns about the impact of the Proposed Rules on their businesses.<sup>299</sup> As a result, the Port Authority solicited supplemental comments about the possibility of creating a small-business exception to the minimum wage. The Port Authority

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<sup>298</sup> See Huntley Lawrence Memorandum, Exh. R.

<sup>299</sup> See Comment of EWR operator (ID # 2018052462); Comment of Airport Concession Disadvantaged Business Enterprise (ID # 2018053001).

asked for comment on five specific questions on this especially complicated issue, including the definition of small employer, the nature of any exception, the experiences of jurisdictions with exceptions, the margins and labor costs of small versus large employers, and the ability of small versus large employers to accomplish the goal of advancing operational effectiveness and security. No commenter answered. The Port Authority has therefore undertaken its own analysis, and concluded that no small-business exception is necessary.

Two commenters in the initial period raised the possibility that their businesses would struggle under the Proposed Rules. One expressed concern that the proposed rate of increase of the minimum wage, particularly for Newark International Airport, coupled with the street pricing policy, may result in "little operators (subcontractors, independent concessionaires, third party providers)" being "forced to close their doors and lay off the very people this is supposed to help."<sup>300</sup> After the receipt of this comment, the Port Authority separately concluded that the Street Pricing Policy should be modified to provide additional pricing flexibility to businesses that are highly impacted by the Proposed Rules.

Another commenter pointed to the particularly small margins and high labor costs of his food concession business, noting that "the raise in minimum wage has the possibility to put a lot of us out of business or cripple the ability for us to compete with the bigger players."<sup>301</sup>

To be sure, if an increase in Airport wages were to force small business to shutter or lay off workers, that would potentially diminish to a certain extent the ability of the Proposed Rules to promote a stable workforce. But, as noted above in Part VI, the balance of academic analysis in this

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<sup>300</sup> Comment of EWR operator (ID # 2018052462).

<sup>301</sup> Comment of Airport Concession Disadvantaged Business Enterprise (ID # 2018053001). It bears noting that this commenter nonetheless supported the Port Authority's minimum wage proposal. See *id.* ("I understand the reasonings and will support the initiatives passed by the PANYNJ.").

area does not establish that raising minimum wages causes substantial job loss.<sup>302</sup> To be sure, it is possible that minimum wage increases have an especially acute impact on small businesses, and cause them to suffer job losses, perhaps because small businesses are less efficient than larger businesses. But the evidence does not generally support this hypothesis. Indeed, a study from the Fiscal Policy Institute found that small businesses grew more quickly along several dimensions in states with higher minimum wages.<sup>303</sup> Moreover, the Port Authority's own experience confirms that increasing wages has not reduced employment. Since the Port Authority established its 2015 Rules, employment has increased in every covered services classification.<sup>304</sup> Overall, employment among the Port Authority's classifications of covered services rose by 25 percent over the period studied. The Port Authority is not aware of any evidence that small businesses have not been part of this trend. And no one has submitted a comment suggesting any.

Beyond the economics literature, the Port Authority also considered the employment laws of New York, New Jersey, and other populous states as well as the policies of peer airports. New Jersey does not have a small-business exception for its wage; and New York has a temporary small-business exception that expires on December 30, 2019.<sup>305</sup> As a result, within 18

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<sup>302</sup> See Part VI; see generally, e.g., Michael Reich, Sylvia Allegretto, & Anna Godoe, *Seattle's Minimum Wage Experience 2015-16* (June 2017), <https://bit.ly/2sipRp0>; David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 *American Economic Review* 772 (1994), <https://bit.ly/PorXRe>.

<sup>303</sup> See Fiscal Policy Institute, *State Minimum Wages and Employment in Small Businesses* (Apr. 20, 2004), <https://bit.ly/2wua6zp>.

<sup>304</sup> See InterVISTAS, *Summary Report: Potential Impacts of Increases in Wages and Benefits on the Port Authority of New York and New Jersey* 11 (July 21, 2016).

<sup>305</sup> Compare *id.* at § 652(1)(a) (setting the wage for large New York City employers at "\$15.00 per hour on and after December 31, 2018"), with *id.* at § 652(1)(b) (setting the wage

months, both New York and New Jersey will maintain a baseline minimum wage that does not consider employer size. Similarly, seven of the ten most populous states do not have a small-business exception to their state minimum wages.<sup>306</sup>

Among airports that have instituted minimum wage policies, none provides a small-business exception. This includes San Francisco International Airport,<sup>307</sup> Seattle-Tacoma International Airport,<sup>308</sup> and the three airports in the metropolitan

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for small employers at "\$15.00 per hour on and after December 31, 2019").

<sup>306</sup> Texas, Florida, Illinois, Pennsylvania, North Carolina, and Michigan do not have a small-business exception. See Tex. Labor Code Ann. § 62.051 (making the Texas state minimum wage equal to the federal minimum wage); Fla. Stat. Ann. § 448.110(3) (allowing no exception for employer size to the minimum wage); 820 Ill. Comp. Stat. Ann. 105/4 (same); Pa. Stat. Ann. tit. 43, § 333.104(a) (same); N.C. Gen. Stat. Ann. § 95-25.14 (same); Mich. Comp. Laws Ann. § 408.414 (same). California does have a small-business exception. See Cal. Lab. Code Ann. § 1182.12(b)(1) (minimum wage for any employer who employs 26 or more employees); Cal. Lab. Code Ann. § 1182.12(b)(2) (minimum wage for any employer who employs 25 or fewer employees). Ohio does not have a small-business exception per se, but it only raises the state minimum wage above the federal floor for employers who bring in \$205,000 or less in annual gross receipts. See Ohio Const. art. II, Section 34a. New York is one of the ten most populous states and currently has a temporary exception, as explained above.

<sup>307</sup> San Francisco mandates that any employer who is a contractor with the City and County pay its workers a minimum wage. See S.F., Cal., Admin. Code Ch. 12P (2000); see also *Minimum Compensation Ordinance*, Office of Labor Standards Enforcement, <https://bit.ly/2Lxljoy>. On top of that, San Francisco International Airport requires that the minimum wage for airport workers be 50 cents above the municipal minimum wage. See San Francisco International Airport, *Quality Standards Program: Safety and Security* (Mar. 1, 2016), <https://bit.ly/2LxU1hw>.

<sup>308</sup> Seattle-Tacoma International Airport allows for a waiver of its minimum wage policy in a bona fide collective

Washington area.<sup>309</sup> Several other airports, such as Los Angeles International Airport and Denver International Airport, are covered by state or local minimum wage laws that also do not grant an exception to small businesses. Federal law, which governs the minimum wage at many other airports, also does not distinguish between businesses based on number of employees.<sup>310</sup> And the Port Authority's current policy also does not distinguish between employers based on size. All covered employers are subject to a single minimum wage. This policy of uniformity reflects a consensus among both peer airports and the most populous states.

The proprietary goals of the airport also support setting a uniform minimum wage. As discussed at length above, improving the security and safety of the Airports requires a stable workforce, at small and large businesses alike. The Port Authority is aware of no evidence – and none has been submitted – suggesting that workers at small businesses are exempt from the trends showing increased retention and productivity at higher wage levels. Nor is the Port Authority aware of evidence suggesting that workers at small businesses already perform higher than the baseline with respect to vigilance, productivity, or retention. All of the goals underlying the Proposed Rules apply just as strongly to small businesses and large ones.

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bargaining agreement, but does not differentiate between large and small employers. See SeaTac Municipal Code Section 7.45.050.

<sup>309</sup> The Metropolitan Washington Airports Authority also does not differentiate between large and small employers. See Resolution No. 17-8.

<sup>310</sup> See Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

**Amended Rules for Implementation of Minimum Wage Policy for Non-Trade Labor Service Contracts - LaGuardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport**

**Summary:**

The Port Authority of New York and New Jersey has adopted a Minimum Wage Policy ("Policy"). By these Rules for Implementation of Minimum Wage Policy for Non-Trade Labor Service Contracts-LaGuardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport ("Rules"), the Policy is being implemented with respect to LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport (collectively, "Airports"), to enhance safety, security, and quality of service at the Airports. As set forth below, the Policy will apply to employees who perform either "Covered Services" or "Port District Covered Services."

**Compensation:**

The minimum wage for workers performing Covered Services or Port District Covered Services is increased to \$19.00, to be implemented according to the following schedule:

Airport	11/18	9/19	9/20	9/21	9/22	9/23
JFK/LGA	\$13.60	\$15.60	\$16.20	\$17.00	\$18.00	\$19.00
EWR	\$12.45	\$15.60	\$16.20	\$17.00	\$18.00	\$19.00

Workers who perform "Covered Services" are workers who perform the "Covered Services" listed in the Addendum to these Rules, within the geographical boundaries of one of the Airports.

Workers who perform "Port District Covered Services" are workers who perform the "Port District Covered Services" listed in the Addendum to these Rules, within the geographical boundaries of the Port District.

**Applicability:**

These Rules shall apply only to lessees, permittees, and contractors, as well as the subcontractors and sublessees of those entities (collectively, "Contractors") who provide Covered Services or Port District Covered Services.

In all events, Covered Services shall include services provided by non-trade employees whose work requires that they obtain access to the Airfield Operations Area (AOA) whether such AOA access is obtained by the issuance of a badge or an escort.

These Rules are issued by the Port Authority solely in its proprietary capacity, under the power granted by its governing Compact to operate transportation facilities and own and control real property. Acting in their governmental or regulatory capacities, agencies may have various powers – to initiate prosecutions, for example, or to gather evidence using criminal or administrative subpoenas. The Port Authority is not exercising any such powers with respect to enforcement of its minimum wage rules. Rather, the Port Authority is acting in a purely proprietary capacity. Accordingly, while the Port Authority will enforce its minimum wage rules very aggressively, it will do so only using the means that would be available to a similarly-situated private party. These means include initiating a breach of contract law suit, based on the theory that a given Airport employer's non-compliance with the minimum wage rules is a material breach of the employer's binding legal agreement or agreements with the Port Authority.

**Exclusions:**

The Policy implemented by these Rules will not apply in instances where other applicable laws or regulations provide higher minimum rates for employees falling within the Policy and Rules, as demonstrated by the employer.

**Tipped Employees:**

A Contractor seeking to demonstrate compliance for employees, who receive tips, shall have the burden of proving that the employee received compensation (including tips) in amounts equal to the minimum wage levels set forth in these rules.

The federal government and certain states allow an employer to count all or part of an employee's tips towards its minimum wage obligations and some states set a maximum "tip credit" toward the minimum wage. For purposes of these rules, only if a Contractor/Employer takes advantage of the applicable "tip credit" for federal, state or local minimum wage compliance, will the Covered Service worker's receipt of tips be considered in determining whether the Contractor/employer is compliant with the Port Authority Minimum Wage Policy.

Contractors/Employers who seek to take advantage of the payment of "tips" or a "tip credit" towards compliance with the Minimum Wage Policy and these Rules, will be required to certify that they are in compliance with the applicable (federal, state or local) minimum wage requirements governing the receipt of a credit for tips for their Covered Service workers.

"Tipped Employees" are those who engage in occupations in which tips are customarily and regularly received from patrons.

Contractors who employ Airport tipped workers and seek to benefit from a tip credit must maintain detailed, contemporaneous records that establish for each employee: (a) how many hours the employee worked in a given pay period, and what the employee was paid; (b) the tips the employee received during the pay period; and (c) supporting documentation to substantiate (a) and (b). With respect to (b), supporting documentation may come in a variety of forms. As to Airport workplaces that rely upon real-time logging of tips through an electronic POS system, supporting documentation may be in the form of the records generated by the POS system. As to all other Airport workplaces, such supporting documentation must include copies of written reports provided by an employee to his or her employer ("Employee Tip Report"). An Employee Tip Report must describe the tips the employee has received during a given shift, and should be prepared and submitted to the Contractor as the shift ends or as soon thereafter as is reasonably practicable.

In addition to any other record-keeping requirements imposed by federal, state, or local law, records described in the preceding paragraph must be retained by the Contractor for two years. Records related to an employee must be immediately

made available by the Contractor to that employee upon the employee's request.

Should a Contractor disagree with an Employee Tip Report, the Contractor must inform that employee in writing of the reasons for the disagreement within 48 hours of the Report being received by the employer. If the Contractor does not do so, the Employee Tip Report will be treated as valid.

If a Contractor determines that it must "top off" an employee's pay for a given pay period because the employee has not received sufficient tips, the Contractor must make the required supplemental payment as promptly as is reasonably practicable. The supplemental payment should be made on the day the employee is paid for the pay period in question. If that is not reasonably practicable, the supplemental payment should be made no later than the employee's next regularly-scheduled pay day.

Contractors who elect to take a tip credit must inform all tipped employees in writing of how the tip credit works, including an explicit statement that if the tips an employee receives are insufficient, the Contractor is obligated to "top off" the employee's wages until the employee's pay equals the minimum wage required by these Rules. Contractors must retain a record documenting that this communication was made. In addition to any record-keeping requirements imposed by federal or state law, these records must be retained by the Contractor for two years.

Contractors must fully and promptly cooperate with all Port Authority audits as to wage payments to Airport workers, including by complying with all reasonable requests for documents or interviews. In the context of such audits, employers must produce clear and convincing evidence that they have retained all required records and that they have in place effective systems for ensuring that all of their tipped employees are receiving the wages to which they are entitled. If this burden is not met, the Port Authority shall prepare an audit report, to be provided to the employer in question; any impacted employees; relevant state Department of Labor officials; and the Port Authority's Director of Aviation, who shall determine what Port Authority remedies may be appropriate. These remedies may include a breach of contract lawsuit or, in

the case of especially serious or persistent violations, denial of permission for the employer to continue operating at the Airports.

**Martin Luther King, Jr. Day:**

All Contractors subject to the Policy and these Rules shall provide its workers performing Covered Services or Port District Covered Services a paid holiday for Martin Luther King, Jr. Day.

**Implementation:**

These Rules are applicable to all current and future employees of Contractors providing Covered Services or Port District Covered Services. In addition, the Port Authority will take further appropriate steps, including, but not limited to, the inclusion of appropriate provisions in new or amended agreements, permits, contracts, and consents, as a condition for such Contractors doing business at the Airports. In the future, all agreements entered into between the Port Authority and those Contractors, including leases, permits, contracts, and consents, shall contain a clause which states that the Contractor has reviewed the Policy and Rules and that it will comply with the Policy and Rules, as amended by the Port Authority from time to time. Additionally, Contractors shall be required to include such a clause in their subleases and subcontracts.

The effective date for all minimum wage increases is November 1, 2018.

Beginning on January 1, 2019, employers at John F. Kennedy International Airport and LaGuardia Airport ("New York Airports"), will generally be required to institute thoroughgoing changes to their payrolls, because of changes to take effect on January 1 with respect to New York State minimum wage law. For some New York Airports employers, altering their payrolls on November 1, 2018 (to accommodate the Port Authority's new minimum wage rules) and then again on January 1, 2019 (to accommodate New York State's new minimum wage rules) would be a large administrative burden and expense. Accordingly, Contractors at the New York Airports may elect to defer their obliged payments under these Rules to employees at the New York Airports until January 1, 2019. Contractors who choose

this option must continue to pay their New York Airports employees at their currently scheduled rates until January 1, 2019. Thereafter, the employers must retroactively pay their employees the difference between (a) the employees' currently-scheduled pay rates, and (b) \$13.60 per hour, for each hour worked between November 1, 2018, and January 1, 2019. That retroactive payment must be made on the first regular payday after January 1, 2019. Any Contractor who wishes to elect this deferred-payment option must inform the Port Authority of this decision by October 29, 2018.

The Port Authority acknowledges that there may be circumstances which warrant an exception to the Rules, which exception may be granted by the Port Authority, for good cause, at its sole and absolute discretion.

**Certification:**

By November 1, 2018, and, at least, on an annual basis thereafter, a responsible officer of each Contractor providing Covered Services or Port District Covered Services shall deliver to the Port Authority a statement certifying, in a form to be approved by the Port Authority, that it is in compliance with the Policy and Rules. The Port Authority reserves the right to audit such compliance at any time.

**Severability:**

Should a court of competent jurisdiction determine that any part of the Policy and/or these Rules is invalid, illegal, or unenforceable, such determination shall in no way affect or impair the validity, legality, and enforceability of the remaining parts of the Policy and/or these Rules.

**Amendments to Rules:**

The Port Authority reserves the right to amend these Rules, from time to time.

## **ADDENDUM - COVERED SERVICES**

### **Passenger Related Security Services**

- Escorts
- Catering Security
- Passenger Aircraft Security
- Fireguards
- Terminal Security
- Traffic Security

### **Cargo Related and Ramp Services**

- Cargo Screening (including Guards) and Warehouse Security
- Baggage and Cargo Handling
- Load Control and Ramp Communication
- Aircraft Mechanics and Fueling of Aircraft
- Provision of water, cooling/heating, power
- Equipment and toilet services to Aircraft
- Passenger Aircraft Servicing
- Cabin Equipment Maintenance
- Guiding Aircraft in and out of Gates
- Gateside Aircraft Maintenance
- Ramp area cleaning

### **In-Terminal and Passenger Handling Services**

- Baggage handling
- Skycap
- Wheelchair attendant
- Ticketing agent
- Customer Service Representatives
- Queue Managers
- ID Checkers
- Porter Service for Baggage
- Passenger and Employee Shuttle Drivers

### **Cleaning Services**

- Building Cleaning
- Aircraft and Cabin cleaning
- Plane washers

### **Concession Services**

- Food Service (including, food and beverage service, wait service, busing, cashiers)
- Retail Service (including news/gifts and duty-free)
- Cleaning for concession services
- Security for concession services
- Airport Lounge Services (Food, Retail, Cleaning and Security Services)

### **Airport Catering Workers**

With respect to food or beverages prepared and packaged for the specific purpose of in-flight consumption by Airport aircraft crew or Airport passengers in aircraft departing from the Airports ("In-Flight Meals"):

- Preparing and packaging In-Flight Meals
- Inspecting In-Flight Meals, to ensure food safety and to detect contraband
- Cleaning dishes, utensils, and glassware used for In-Flight Meals
- Cleaning and operating kitchens or other nearby facilities (such as warehouses) used for the preparation, packaging, and storage of In-Flight Meals
- Direct delivery of In-Flight Meals to Airport locations where they are needed, from kitchens where they are prepared or from nearby facilities (such as warehouses) where they are stored

## ADDENDUM - PORT DISTRICT COVERED SERVICES

### Airport Catering Workers

With respect to food or beverages prepared and packaged for the specific purpose of in-flight consumption by Airport aircraft crew or Airport passengers in aircraft departing from the Airports ("In-Flight Meals"):

- Preparing and packaging In-Flight Meals
- Inspecting In-Flight Meals, to ensure food safety and to detect contraband
- Cleaning dishes, utensils, and glassware used for In-Flight Meals
- Cleaning and operating kitchens or other nearby facilities (such as warehouses) used for the preparation, packaging, and storage of In-Flight Meals
- Direct delivery of In-Flight Meals to Airport locations where they are needed, from kitchens where they are prepared or from nearby facilities (such as warehouses) where they are stored

# **EXHIBIT 1**

To: All Commissioners  
 From: Port Authority Staff  
 Date: September 24, 2018  
 Re: **Summary Report on Supplemental Comments on the Port Authority's Proposed Wages at the Three Major Airports**

Copy to: R. Cotton, J. Allen, A. Barsky, M. Farbiarz, L. Handel, H. Lawrence, L. McCarthy, P. Simon

After the Port Authority's initial comment on the proposed "Rules for Implementation of Minimum Wage Policy for Non-Trade Labor Service Contracts — Laguardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport" ("Rules"), the Port Authority announced a supplemental comment period of 30 days to receive additional comments on particular issues.

An earlier memorandum, dated June 22, 2018, provided a summary of the comments received during the initial comment period. The purpose of this memo is to provide you with a summary of the comments received during the supplemental comment period.

**Summary**

The supplemental comment period began on July 17, and ended on August 15, 2018. In addition to the comments received during this 30-day period, the Port Authority received a number of comments after the close of the initial comment period but before the start of the supplemental period; the Port Authority decided to regard those comments as supplemental comments, and so this summary includes a discussion of those comments as well. In total, 68 comments were received after the initial comment period closed. Of these, over 95% voiced general support. Common themes in this category included: (1) bolstering aviation safety and security; (2) boosting workforce stability; (3) improving worker productivity; and (4) providing a wage that keeps up with regional costs. Three comments, all from airport employers, voiced concern or opposition. All comments are further detailed below.

The Table below summarizes the comments received:

Affiliation	General Support	Concern	Opposition	Grand Total	Percent
Airport Worker	49	-	-	49	73.1%
No Reported Affiliation	1	-	-	1	1.5%
Non-Profit / Government	6	-	-	6	9%
Union	6	-	-	6	9%
Academic	-	-	-	-	-
Airport Employer	-	1	2	3	4.5%
Other	2	-	-	2	3%
Grand Total	64	1	2	67 <sup>1</sup>	100%
Percent	95.5%	1.5%	3%	100%	

<sup>1</sup> This total and the percentages in this table do not include one comment, ID # 20180803001, which appeared to be a misplaced request for information rather than a comment for the Board's consideration.

## Comments in Support

As noted in the table above, 64 comments were received in support of the proposed Rules. The vast majority of those comments (76.6%) came directly from airport workers, many of whom spoke of how they would be impacted by the proposed Rules and the positive changes the Rules would have for the Port Authority's Airports.

The comments in support of the proposed Rules cite a variety of benefits that are consistent with those that have been considered by the Board to date. The comments point to expected positive impacts in terms of the Airports' safety and productivity, achieved through a variety of means. Comments point to the expected decrease in turnover associated with a wage increase, stating that lower turnover will result in a more trained and experienced workforce, which will result in improvements to security. The comments also cite expected improvements in worker performance, as higher wages and lower turnover leads to increased job satisfaction. Some comments substantiated these expectations with citations to academic studies of other airports and other industries. There were also many personal statements by employees about their own experiences or plans consistent with the positive benefits they would expect if the proposed Rules were enacted.

In addition, some comments reflected professional expertise with issues associated with the proposed Rules. Attorney Kimberley C. Weber with the law firm McCracken, Stemerman & Holsberry, LLP, for instance, submitted a memorandum discussing why the Port Authority has legal authority under its proprietary powers to implement the proposed Rules, and why the proposed Rules are not preempted under various federal statutes.

One comment was submitted by Ray White, the former Deputy Assistant Administrator for Security Operations with the Transportation Security Administration. Mr. White, who has over two decades of experience in aviation security, wrote that "[e]mployee and airport user familiarity and compliance with established security protocols is paramount to creating a secure transportation operational environment. High attrition rates undermine that familiarity and compliance resulting security incidents that should and could be avoided through having a stable workforce." And, he noted, "individuals experiencing economic deprivation due to low wages become prime targets for manipulation and bribery. Associated with the insider-threat are widely reported incidents of criminal activity such as theft, smuggling of weapons, drugs and other prohibited items." For that reason, White concludes, "[i]f there is one thing I could personally fix in aviation security today, it would be to increase low wages to a livable wage level in an effort to reduce turnover, increase workforce stability and experience, all which serve to enhance aviation security."

Five government officials also included comments in support of the proposed Rules:

- New York State Senator Roxanne Persaud wrote to say that "These measures will help improve the safety, security, and readiness of our airports, benefiting us all."
- New York State Senator Marisol Alcántara wrote that "As the cost of living continues to increase, airport service workers are sadly being left behind."
- New York State Senator James Sanders Jr. wrote that "In order for New York to remain internationally competitive, we require a workforce that will be compensated fairly and continue to dedicate their services to this great State."

- New York Assembly Member Peter J. Abbate, Jr. wrote that “Many of these workers who receive low wages and few benefits often need to rely on taxpayer-funded social service programs to survive.”
- New York City Public Advocate Letitia James wrote that the increased wage will “ensure that our local airports continue to have a supply of experienced and dedicated employees who do not have to split their time between multiple jobs to make ends meet.”

### **Areas of Concern and Opposition**

Three comments voiced concern or opposition to the proposed Rules.

One was a comment by “a small operator in Newark Liberty International Airport” who voiced concern that they “would be forced to economize through layoffs and/or hour reductions to insure we could stay afloat” given increased labor costs. The comment noted that “there’s no guarantee of increased sales or price increase to off-set this additional expense.”

In addition to this comment, comments opposing the proposed Rules were received from Flying Food Group and Airlines for America. These two comments generally reiterated and developed the concerns that they had previously made, and that were described in the memorandum of June 22, 2018, summarizing the first round of comments. Flying Food Group and Airlines for America asserted that the proposed Rules are unlawful because they are beyond the Port Authority’s legal authority and/or are preempted by federal and state laws. The comments also indicated skepticism that the proposed Rules would enhance airport safety and security.

### **Responses to Specific Issues**

In addition to voicing general support or opposition to the proposed Rules, some comments weighed in at least briefly on the specific issues the Board requested comment on in its resolution of June 28, 2018: tipped workers, benefits offsets, street pricing, and small employers.

*Benefits offsets:* The policy issue that received the most comments was the question whether the minimum wage suggested by the proposed Rules should include an offset for non-wage benefits provided by employers. Many commenters, including dozens of airport workers, wrote to encourage the Board to adopt the proposed Rules with no offset for employer-provided benefits. A repeated theme was that a benefits offset would reduce the amount of money that workers take home, reducing the effectiveness of the wage increase. Several commenters also noted that benefits offsets are not standard in minimum wage laws generally. And commenters noted the potential for administrative difficulty when it comes to calculating the value of benefits, as well as potential unfairness if the calculations mean that different workers would be paid differently for the same work. As Louis Mark Carotenuto, President of the United Food & Commercial Workers Local 2013, put it, “Depending on the employer’s subjective calculation of the ‘value’ of any benefits included in the benefits offset, a worker could be paid a different wage for the same or similar work performed by her colleague.” One commenter, “a small operator in Newark Liberty International Airport,” supported the use of a benefits offset to help “better manage the economics of our business.”

*Tipped workers:* Several commenters favored implementing the proposed Rules without a “tip credit,” which would mean that tipped workers would be entitled to certain hourly wages regardless of how much they make in tips. Commenters indicated that the minimum wage is particularly hard to enforce for tipped workers, and emphasized the possibility that a lack of enforcement of the wage requirements would lead to underpayment of tipped workers. Commenters also noted that tips are often low and inconsistent. The National Employment Law Project (NELP), for instance, pointed to a study finding that tipped workers are disproportionately likely to report wages that fall under the federal minimum wage. NELP stated that the “two-tier system, tipped vs. regular minimum wage, creates an unnecessarily complex system, puts workers at a higher risk of wage theft, puts even well intentioned businesses at risk for unknowingly violating the law and puts pressure on very limited public enforcement resources.” The Communications Workers of America, a union, echoed in its comment that “tipped workers are not consistently tipped and often face wage theft.” And New York State Senator Roxanne Persaud said that “[i]n the interest of creating a uniform standard, all workers should receive the full wage, in which employers should not be permitted to take tip credits.” No commenter submitted a comment in favor of the tip credit.

*Street pricing:* Only one comment, jointly submitted by several unions, addressed the street pricing policy in any depth. It noted that the Port Authority’s Airports rank highly in Airport Revenue News’ 2017 sales rankings, and suggested that the Port Authority’s street pricing policy could remain unchanged even given the higher minimum wage. The comment also said that a “street-pricing plus” policy could be appropriate to provide more leeway to concessionaires, and cited a report indicating that most airports have a “street-pricing plus” policy. In addition to this comment, one comment by “a small operator in Newark Liberty International Airport” noted that part of its concerns with the wage increase was the lack of a “guarantee of increased sales or price increase to off-set this additional” payroll expense.

*Small business exception:* No comments were received regarding a possible small business exception.

### **Additional suggestions**

A small number of commenters suggested a change to the proposed Rules to make clear that the rules are not applicable where relevant laws set a wage requirement that is higher than the wage requirement under the proposed Rules.

### **Recommendations**

Recommendations regarding these comments and comments made during the initial comment period will be included in an Analysis and Justification prepared by the Port Authority and sent to the Board in advance of its September 27 meeting.

# **EXHIBIT 2**

**THE PORT AUTHORITY OF NY & NJ**

John Bilich  
*Chief Security Officer*

September 21, 2018

Dear Board of Commissioners:

I write as the person charged with the responsibility for security of the Port Authority's airports to explain why the Board's proposed wage policy is, in my judgment, a necessary enhancement to airport security. Other airport authorities and large municipalities with peer airports in Los Angeles, Chicago, San Francisco, Seattle, Boston, Washington, D.C., and Philadelphia have already adopted similar policies, in large part because of the emerging national consensus that high turnover among low-wage airport workers is a pressing security concern. Against this backdrop, the wage policy is necessary for the Port Authority to maintain its position at the forefront of our nation's travel infrastructure when it comes to safety and security.

As you know, the Port Authority has invested heavily in improving airport security, including with new technology, increased screenings, additional police staffing, and physical hardening of airport infrastructure. But, fundamentally, the human factor is as important as any other aspect of airport security. We rely on many different security measures, from screening of passengers to baggage inspection to patrolling and monitoring the airport grounds. Our security system is built with redundancies, because no single measure will ever be perfect. One of our highest priorities is making sure that if something goes wrong, and one of our layers of security does not catch something, it gets noted and reported as soon as possible.

To achieve this goal, we rely heavily on "see something, say something"—the ability of employees at the airport to notice when something or someone is out of place, or doing something unusual, and communicate that rapidly to security personnel. Airport employees represent one of the most important backstops in this system, because they work throughout the airport—before and after security checkpoints, and in the airports' operations areas. They can best notice when something is not right. That is why our airport badging program compels airport workers to challenge unbadged individuals and why we operate the Airport Community Watch Program, which provides monetary rewards to airport employees for detecting security violations at the airport. Since 2008, employee reporting recognized by that program has resulted in over 120 arrests of individuals who have entered secure areas without authorization, possessed illicit or impermissible items like weapons, or otherwise violated the law or the airport's rules.

It is my considered judgment that employee vigilance is a foundational part of maintaining airport security. And the more acclimated an employee is, the more attuned they will be to noticing what

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is different. The airport is a busy and complicated environment, and it takes time to understand how it works. Employee experience and training is therefore an important layer of our security system. High turnover rates undermine that key security layer. A wage policy that sets a floor high enough to incentivize employees to stay would be a strong step forward for airport security.

Additionally, an airport is only as safe as its weakest link, which may be an easily compromised employee. One of the most significant threats we must guard against is the possibility that a person looking to breach airport security would be aided by someone on the inside. There are over 70,000 people who work at the airports and have security badges providing unfettered access to the airfield. It is essential to do everything we can to minimize the risk associated with so many individuals having airport access. We have taken many steps to minimize that risk; but in my judgment, low pay and the resulting financial vulnerability experienced by some airport workers creates an unnecessary elevated risk. We have seen clear examples of individuals at airports who are compromised by possible monetary gain. Employing a workforce where large numbers of people struggle with basic living expenses may increase individuals' willingness to take risks for money, or it may increase the odds that they find themselves in a desperate financial condition that others can take advantage of.

High turnover rates also strain the Port Authority's resources for conducting vetting and background checks, limiting the Port Authority's ability to implement background screening that goes above and beyond the requirements of federal law. As I detailed in my March 2018 briefing to the Board during Executive Session, my staff and I already have developed a number of improved steps for more thorough vetting, including tighter qualifying standards for prospective workers and continuous monitoring of the active workforce for the commission of disqualifying crimes. Additionally, my staff is working to formulate an appropriately tailored vetting regime and training program for public-area, non-SIDA employees, who are highly important to safety and security in the pre-screening areas.

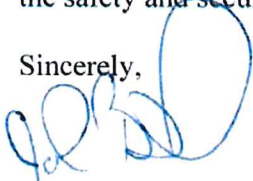
Finally, it is essential to have well-trained employees who are able to respond effectively in emergency situations. We have seen scenarios where employees of airport businesses add to the confusion or chaos that naturally develops in an ongoing emergency. That is not inevitable; with proper training and preparation, the airport's workers can help mitigate the consequences of an emergency and provide the direction and reassurance our customers expect in a time of crisis.

To that end, airport worker training has been improved and expanded in several areas, including threat-awareness education, active violence and insider threats, directing the public to emergency exits or secure areas during an emergency, and interacting with law enforcement and other first responders in an emergency. This training, in keeping with expert recommendations, should

happen when an employee first begins working at a Port Authority airport and should recur over time. But that takes a significant investment of time and resources. And when turnover is high, it thwarts that investment in two ways. First, this kind of training builds on itself over time, and high turnover rates mean that many employees do not stay on long enough to develop the kind of expertise that results from recurrent training. And second, when employees leave they walk out the door with all of the time and money that has been invested in training them. High turnover thus hurts our ability to train employees to respond to emergencies when they occur, exacerbating the harm that could be caused by a natural disaster or terrorist attack.

These changes outlined in this letter will substantially improve security and could be implemented immediately if turnover rates were meaningfully reduced. Thank you for your efforts to improve the safety and security of the Port Authority's airports.

Sincerely,



John Bilich  
Chief Security Officer  
The Port Authority of New York & New Jersey

**PORT JERSEY-PORT AUTHORITY MARINE TERMINAL – ACCEM WAREHOUSE, INC. – NEW LEASE LPJ-017**

It was recommended that the Board authorize the Executive Director to enter into: (1) a lease agreement with Accem Warehouse, Inc. (Accem) for the letting of Building 150 and the associated open area at the Port Jersey-Port Authority Marine Terminal (Port Jersey) for the storage and distribution of general cargo, including food and non-food products; and (2) a related brokerage agreement with M and M Realty Services LLC d/b/a Greiner Maltz of New Jersey (Greiner).

As authorized by the Board at its meeting of December 18, 2007, the Port Authority acquired, through eminent domain, Building 150, located at 150 Pulaski Street in Bayonne, New Jersey, in January 2014 for marine terminal purposes. The premises were incorporated into Port Jersey. Accem is seeking to expand its warehousing operation to Building 150.

The lease agreement would commence on or about November 1, 2018 and run for a five-year and three-month term. Under the lease agreement, Accem would be eligible to receive an estimated amount of up to \$400,000 in rent credits for upgrades to Building 150, subject to Port Authority approval. The eligible improvements would include upgrades to the lighting and heating systems, and replacement of the dock doors, and would have to be completed within the first two years of the agreement for Accem to receive a rent credit upon completion of the improvements. Accem would pay an aggregate net rental of approximately \$8.4 million over the term of the agreement. Accem would assume responsibility for the maintenance and repair of the premises.

Accem engaged Greiner as the procuring broker for this transaction. The Port Authority would pay to Greiner a brokerage commission in the amount of approximately \$420,000 pursuant to a brokerage agreement.

Pursuant to the foregoing report, the following resolution was adopted, with Commissioners Bagger, Eve, Horwitz, LaBarbera, Lynford, McCabe, McDonald, O'Toole, Pocino and Rosado voting in favor. General Counsel confirmed that sufficient affirmative votes were cast for the action to be taken, a quorum of the Board being present.

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to enter into: (1) a five-year and three-month lease agreement with Accem Warehouse, Inc. for the letting of Building 150 and the associated open area at the Port Jersey-Port Authority Marine Terminal for the storage and distribution of general cargo, including food and non-food products; and (2) a related brokerage agreement with M and M Realty Services LLC d/b/a Greiner Maltz of New Jersey; each substantially in accordance with the terms outlined to the Board; and it is further

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to enter into any other contracts or agreements necessary or appropriate in connection with the foregoing; and it is further

**RESOLVED**, that the form of all contracts, agreements and other documents in connection with the foregoing shall be subject to the approval of General Counsel or his authorized representative, and the terms of such contracts, agreements and other documents shall be subject to review by General Counsel or his authorized representative.

**PORT JERSEY-PORT AUTHORITY MARINE TERMINAL – ACQUISITION, DECLARATION AS SURPLUS AND DISPOSITION OF REAL PROPERTY INTERESTS IN CONNECTION WITH AN EXCHANGE OF PROPERTIES WITH LEG-BP INVESTORS, LLC**

It was recommended that the Board: (1) declare an approximately 9.78-acre land parcel (PA Parcel) located on a 131-acre site owned by the Port Authority at the Port Jersey-Port Authority Marine Terminal (Port Jersey) as surplus property; and (2) authorize the Executive Director to: (a) enter into an exchange agreement with LEG-BP Investors, LLC (LEG-BP) for the conveyance to LEG-BP of the PA Parcel in return for the conveyance to the Port Authority from LEG-BP of an approximately 9.78-acre land parcel (together with 7.51 acres of associated riparian rights) located adjacent to Port Jersey; and (b) enter into any other related agreements and/or contracts necessary to effectuate the foregoing transactions, including agreements with developers of adjacent property to modify undertakings previously made by the Port Authority and confirm satisfaction of the modified undertakings, and to incur expenses in conducting any required due diligence, including environmental review, engaging appraisers, surveyors and title companies, and entering into roadway/utility easements and maintenance agreements, consistent with existing deed restrictions.

The former Military Ocean Terminal Bayonne (MOTBY) site in Bayonne, New Jersey encompasses 652 acres of upland and related riparian rights. At its meeting of June 22, 2010, the Committee on Operations, acting for and on behalf of the Board pursuant to delegated authority, authorized the acquisition by the Port Authority, for marine terminal purposes, of a 131-acre portion of the former MOTBY site, and the associated riparian rights, from the Bayonne Local Redevelopment Authority. The acquired property was incorporated into Port Jersey, and current tenants include Royal Caribbean Cruise Line, Ltd., which operates the newly redeveloped Cape Liberty Cruise Terminal, and Bayonne Dry Dock and Repair Corp.

LEG-BP recently purchased a 90-acre parcel in a portion of the former MOTBY site known as the Maritime District, for the development of up to 1.6 million square feet of modern industrial warehouse space to serve the growing supply chain and logistics needs of regional companies. The LEG-BP property is located adjacent to the 131-acre parcel owned by the Port Authority at Port Jersey.

LEG-BP and the Port Authority propose to enter into a land-swap transaction, which would eliminate existing cross-encumbrances between the LEG-BP and Port Authority properties. In support of its own redevelopment plans, LEG-BP would agree to construct two roads (Roads) to serve the Maritime District and Port Authority-owned property, the longer of which would include an adjacent berm for noise suppression. Construction of the roadways would be performed by LEG-BP and cost-shared between the Port Authority and LEG-BP. Both parties also would grant respective easements providing for mutual access to the Roads.

Pursuant to the terms of a pre-existing settlement agreement reached with various owners of real property in the vicinity of its 131-acre parcel at the former MOTBY site (Settlement Agreement), the Port Authority agreed to certain use restrictions and other obligations arising from the Port Authority's use of the parcel. As a condition precedent to the land swap transaction with LEG-BP, the Port Authority must obtain agreements from the parties to the Settlement Agreement

that the Roads satisfy the Port Authority's obligation to construct a road and associated sound walls/barriers pursuant to the Settlement Agreement.

The waterfront parcel to be acquired by the Port Authority includes riparian, berth, and upland area capable of supporting future development and expansion of cruise terminal and/or other maritime uses at Port Jersey that the Port Authority could not realize from the parcel to be conveyed to LEG-BP. It is expected that, when completed, LEG BP's development of its property would result in approximately 1.6 million square feet of new industrial warehouse space adjacent to Port Jersey.

Pursuant to the foregoing report, the following resolution was adopted, with Commissioners Bagger, Eve, Horwitz, LaBarbera, Lynford, McCabe, McDonald, O'Toole, Pocino and Rosado voting in favor. General Counsel confirmed that sufficient affirmative votes were cast for the action to be taken, a quorum of the Board being present.

**RESOLVED**, that the Board hereby finds and declares an approximately 9.78-acre land parcel (PA Parcel) located on a 131-acre site owned by the Port Authority at the Port Jersey-Port Authority Marine Terminal (Port Jersey) as surplus property; and it is further

**RESOLVED**, that the Chief Engineer of the Port Authority be and he hereby is authorized and directed, for and on behalf of the Port Authority, to execute a certificate to be annexed to the appropriate Port Authority Map stating that the PA Parcel is no longer required for the purpose for which it was acquired, such map to be filed with the Office of the Secretary of the Port Authority; and it is further

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to: (1) enter into a contract of exchange agreement with LEG-BP Investors, LLC (LEG-BP) for the conveyance to LEG-BP of the PA Parcel in consideration of the conveyance to the Port Authority from LEG-BP of an approximately 9.78-acre land parcel and 7.51 acres of riparian rights located adjacent to the Port Authority's property at Port Jersey; and (2) enter into any other related agreements and/or contracts necessary to effectuate the foregoing transactions, including agreements with developers of the former Military Ocean Terminal Bayonne property that modify existing restrictions and obligations of the Port Authority and confirm satisfaction with such modified obligations, and to incur expenses in conducting any required due diligence, including environmental review, engaging appraisers, surveyors and title companies, and entering into roadway/utility easements and maintenance agreements, consistent with existing deed restrictions; all substantially in accordance with the terms outlined to the Board; and it is further

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to enter into any other contracts and agreements necessary or appropriate in connection with the foregoing; and it is further

**RESOLVED**, that the form of all contracts, agreements and other documents in connection with the foregoing shall be subject to the approval of General Counsel or his authorized representative, and the terms of such contracts, agreements and other documents shall be subject to review by General Counsel or his authorized representative.

**JOHN F. KENNEDY INTERNATIONAL AIRPORT – RUNWAY 13L-31R AND ASSOCIATED TAXIWAYS PROJECT – INCREASE IN PROJECT SCOPE TO PROVIDE FOR RECONSTRUCTION AND WIDENING OF RUNWAY – PROJECT REAUTHORIZATION AND AWARD OF CONTRACT**

It was recommended that the Board: (1) reauthorize a project for the reconstruction and widening of Runway 13L-31R and associated taxiways and infrastructure, inclusive of electrical and drainage improvements, the upgrade of crossing taxiway fillets, realignment of portions of certain taxiways, and construction of a new high-speed taxiway to increase operational efficiencies and reduce delays at John F. Kennedy International Airport (JFK), at an estimated total project cost of \$355 million; and (2) authorize the Executive Director to award a contract to perform construction work associated with the foregoing project, at an estimated total construction cost of \$247 million, inclusive of net cost work and extra work, to the lowest-priced responsive bidder, pursuant to a publicly advertised procurement process. Remaining authorized funds would be used for materials purchased directly by the Port Authority and project soft costs.

Runway 13L-31R, last rehabilitated in 2004, is nearing the end of its useful life. The runway is 10,000 feet long and 150 feet wide, and serves primarily as a landing runway at JFK. Runway 13L-31R accommodates approximately 47 percent of all arrivals at JFK and handles approximately 75,000 aircraft operations annually.

At its meeting of September 28, 2017, the Board authorized: (1) a project for the rehabilitation of Runway 13L-31R and associated taxiways and infrastructure, at an estimated total project cost of \$215 million; and (2) the Executive Director to award Contract JFK-164.020 for the performance of construction work associated with the project, at an estimated total construction cost of \$137 million.

The original project scope included an asphalt mill-and-pave rehabilitation of the runway. However, following the results of another asphalt-paved runway project at JFK, it was determined to modify the authorized project to reconstruct Runway 13L-31R with concrete. Reconstruction of Runway 13L-31R with concrete would require a full runway closure beginning in or around April 2019, with an expected reopening to occur in or around November 2019 (a reduction in closure time from the project as originally planned). The concrete reconstruction of the runway would yield an estimated 40-year asset life, roughly four times the estimated life of an asphalt mill-and-pave rehabilitation.

To maintain a state of good repair, full reconstruction of Runway 13L-31R and associated taxiways and infrastructure, including electrical and drainage infrastructure, is required. The proposed project would provide for a range of improvements. One such improvement is the widening of the Runway from 150 feet to 200 feet, allowing the largest aircraft (such as Airbus A380) to land on both Runway approaches. A second improvement is the upgrade of crossing taxiway fillets to meet current Federal Aviation Administration standards. In addition, Taxiway U would be realigned, permitting larger aircraft to operate on that taxiway, which would allow for more efficient airport operation, and Taxiway YA also would be constructed in anticipation of a future delay-reduction project for that taxiway. Constructing this section now would minimize the need for future closures of Runway 13L-31R. Finally, the project includes construction of a new high-speed taxiway to increase operational efficiencies and reduce delays at JFK by reducing the amount of time required for arriving aircraft to clear the runway.

Pursuant to the foregoing report, the following resolution was adopted, with Commissioners Bagger, Eve, Horwitz, LaBarbera, Lynford, McCabe, McDonald, O'Toole, Pocino and Rosado voting in favor. General Counsel confirmed that sufficient affirmative votes were cast for the action to be taken, a quorum of the Board being present.

**RESOLVED**, that a project for the reconstruction of Runway 13L-31R at John F. Kennedy International Airport and associated taxiways and infrastructure, inclusive of electrical and drainage improvements, the upgrade of crossing taxiway fillets, realignment of portions of one taxiway, and construction of a new high-speed taxiway to increase operational efficiencies and reduce delays, at an estimated total project cost of \$355 million, be and it hereby is reauthorized; and it is further

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to award a contract for the performance of construction work associated with the foregoing project, at an estimated total construction cost of \$247 million, inclusive of net cost work and extra work, to the lowest-priced responsive bidder, pursuant to a publicly advertised procurement process; and it is further

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to take action with respect to other construction contracts, contracts for professional and advisory services and such other contracts and agreements as may be necessary to effectuate the foregoing project, pursuant to authority granted in the By-Laws or other resolution adopted by the Board; and it is further

**RESOLVED**, that the form of all contracts, agreements and other documents in connection with the foregoing project shall be subject to the approval of General Counsel or his authorized representative, and the terms of such contracts, agreements and other documents shall be subject to review by General Counsel or his authorized representative.

**NEWARK LIBERTY INTERNATIONAL AIRPORT – REPLACEMENT OF CENTRAL HEATING AND REFRIGERATION PLANT NORTH ELECTRICAL SUBSTATION AND CHILLER UPGRADES – PROJECT REAUTHORIZATION**

It was recommended that the Board: (1) reauthorize a project for the replacement of the Central Heating and Refrigeration Plant (CHRP) at Newark Liberty International Airport (EWR), at an estimated total project cost of \$33.4 million (an increase of \$8.3 million from the previously authorized amount of \$25.1 million); and (2) authorize the Executive Director to award a construction contract for the replacement of the north electrical substation and generator serving the CHRP, at a total estimated amount of \$16 million, inclusive of net cost and extra work, to the lowest-priced responsive bidder, pursuant to a publicly advertised procurement process.

The CHRP supplies hot and chilled water to heat and cool Terminals A, B and C at EWR, through a centralized distribution system. When constructed in 1968, the CHRP was powered by the north electrical substation. The north substation is now 50 years old, and requires replacement in order to maintain a state of good repair. In addition, two of the chillers require replacement and upgrading, in order to better accommodate current terminal requirements. During the major expansion of EWR in the 1980s, the south electrical substation was added.

On November 15, 2012, the Board authorized a project for the replacement of the CHRP's north electrical substation, cross-connection of the north and south electrical substations, and replacement of two chillers and associated hot and chilled water equipment, at an estimated total project cost of \$25.1 million.

Following that project authorization, the project was split into two phases, in order to prioritize the most critical elements of the project that required urgent replacement – the motor control centers, six chilled water pumps and modifications to the electrical distribution system at the CHRP. This work – constituting Phase 1 of the project – has substantially been completed, at a cost of \$9.1 million, leaving \$16 million available for Phase 2.

Phase 2 of the project encompasses the replacement of the north electrical substation, two existing chillers and an emergency generator, as well as the remaining electrical work to enable a tie-in between the CHRP's two electrical substations. This phase includes the primary construction contract under this project (the electrical substation replacement). As a result of splitting the project into two phases and performing Phase 2 work approximately five years later than originally anticipated, overall project costs have increased, necessitating this project reauthorization and budget increase of \$8.3 million. Total budget for Phase 2 of \$24.3 million would be used for construction, as described above, at an estimated cost of \$16 million, and for planning and engineering, project supervision and soft costs.

The replacement of the north electrical substation would provide electrical redundancy for partial CHRP operations, and allow for independent operation of the cooling systems by either of the two substations at EWR in the event the Public Service Electric and Gas Company (PSE&G) power grid serving either substation is disrupted. The CHRP north substation replacement would assure temperature control at Terminals A, B and C in the event of PSE&G power disruptions at either the north or south substation.

Pursuant to the foregoing report, the following resolution was adopted, with Commissioners Bagger, Eve, Horwitz, LaBarbera, Lynford, McCabe, McDonald, O'Toole, Pocino and Rosado voting in favor. General Counsel confirmed that sufficient affirmative votes were cast for the action to be taken, a quorum of the Board being present.

**RESOLVED**, that a project for the replacement of the Central Heating and Refrigeration Plant (CHRP) at Newark Liberty International Airport, at an estimated total project cost of \$33.4 million, an increase of approximately \$8.3 million from the previously authorized amount of \$25.1 million, be and it hereby is reauthorized; and it is further

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to award a construction contract for the replacement of the north electrical substation and generator serving the CHRP, at a total estimated amount of \$16 million, inclusive of net cost and extra work, to the lowest-priced responsive bidder, pursuant to a publicly advertised procurement process; and it is further

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to take action with respect to other construction contracts, contracts for professional and advisory services and such other contracts and agreements as may be necessary to effectuate the foregoing project, pursuant to authority granted in the By-Laws or other resolution adopted by the Board; and it is further

**RESOLVED**, that the form of all contracts, agreements and other documents in connection with the foregoing project shall be subject to the approval of General Counsel or his authorized representative, and the terms of such contracts, agreements and other documents shall be subject to review by General Counsel or his authorized representative.

**GEORGE WASHINGTON BRIDGE – TRANS-MANHATTAN EXPRESSWAY MEDIAN BARRIERS PROJECT – MODIFICATION OF PROJECT SCOPE TO INCLUDE WATER SYSTEM REHABILITATION – PROJECT REAUTHORIZATION AND AWARD OF CONTRACT**

It was recommended that the Board: (1) re-authorize and expand a project to replace the concrete median barriers, rehabilitate concrete-encased steel columns contained within those barriers, and perform certain related traffic safety enhancements on the Trans-Manhattan Expressway (TME) approaches to the George Washington Bridge (GWB), in connection with the Restoring the George program, at an estimated total project cost of \$70.3 million (including: (i) incremental tasks and increased expenses, at a total cost of approximately \$23.75 million over the previously authorized amount of \$28.4 million; and (ii) inclusion of an additional subproject, at a total cost of approximately \$18.15 million for the rehabilitation of the existing water distribution system on the TME, which is currently authorized in the 2017-2026 Capital Plan as part of a separate project); and (2) authorize the Executive Director to award Contract GWB-244.049 to El Sol Contracting/ES II Ent. JV for construction work in connection with the foregoing project, at an estimated amount of \$42.5 million (composed of construction costs and reserves for extra work and net cost work, as necessary).

The TME, located east of the GWB, is the main thoroughfare for vehicles entering and exiting the GWB from the eastern side of the bridge. Three median barriers divide the TME into four roadways. Along the median barriers are columns providing structural support for the GWB Bus Station and certain private property located above the TME.

The project, as originally authorized, would address deterioration of existing concrete median barriers on the TME, which were installed as part of the GWB Lower Level expansion project in the 1960s. These barriers, which extend from Cabrini Boulevard to Amsterdam Avenue, separate traffic flow between the eastbound and westbound upper and lower expressways. A design development study and in-depth inspections conducted after June 2015 concluded that 65 percent to 80 percent of each barrier was deteriorated beyond repair and not in compliance with current American Association of State Highway and Transportation Officials (AASHTO) codes.

In addition, the original project also anticipated rehabilitation of certain columns that are contained within the existing median barriers. Approximately 50 percent of the columns to be rehabilitated as part of the project are owned and maintained by a third party. The Port Authority would pursue reimbursement from such third party for the cost of the design and construction work for the rehabilitation of the columns owned by it, which cost is approximately \$7 million and included in the total estimated project cost.

At its June 24, 2015 meeting, the Board authorized a project to replace the concrete median barriers, rehabilitate columns contained within these barriers, and perform the traffic safety enhancements, at an estimated total project cost of \$28.4 million. Such project has been in Stage III design since 2015.

Three developments drive the need for the additional \$23.75 million for this project: (1) AASHTO raised minimum height requirements for the concrete median barriers, from 42 inches to 54 inches; (2) the scheduled construction duration has increased because activities of other Restoring the George projects have reduced the availability of days during which lane closures required for this project can occur; and (3) the project scope now includes additional repairs to the concrete of the columns supporting the GWB Bus Station and certain private property above the TME, which repairs are necessary to address deterioration that has occurred since 2015.

Staff has determined that it would be efficient and cost-effective to include, as a subproject in the TME project, repairs and upgrades to the existing water distribution system at the TME, which supplies water to meet the TME's fire safety needs. Except for various emergency repairs and select upgrades, most of the water distribution system has not been replaced since its original construction. The subproject includes rehabilitation of the system because of extensive leaks and crushed pipelines.

The related traffic safety enhancements to be performed as part of this project include the placement of new pavement markings and installation of new static guide signs.

Pursuant to the foregoing report, the following resolution was adopted, with Commissioners Bagger, Eve, Horwitz, LaBarbera, Lynford, McCabe, McDonald, O'Toole, Pocino and Rosado voting in favor. General Counsel confirmed that sufficient affirmative votes were cast for the action to be taken, a quorum of the Board being present.

**RESOLVED**, that a project to replace the concrete median barriers, rehabilitate columns contained within these barriers, and perform certain related traffic safety enhancements on the Trans-Manhattan Expressway (TME) approach to the George Washington Bridge (GWB), at an estimated total project cost of \$52.15 million, an increase of \$23.75 million from the previously authorized amount, be and it hereby is re-authorized; and it is further

**RESOLVED**, that a project to rehabilitate the existing water distribution system on the TME approach to the GWB, at an estimated total project cost of \$18.15 million, be and it hereby is authorized; and it is further

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to award Contract GWB-244.049 to El Sol Contracting/ES II Ent. JV of Maspeth, NY for construction work in connection with the foregoing projects, at an estimated amount of \$42.5 million (composed of construction costs and reserves for extra work and net cost work, as necessary); and it is further

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to take action with respect to other construction contracts, contracts for professional and advisory services and such other contracts and agreements as may be necessary to effectuate the foregoing projects, pursuant to authority granted in the By-Laws or other resolution adopted by the Board; and it is further

**RESOLVED**, that the form of all contracts, agreements and other documents in connection with the foregoing projects shall be subject to the approval of General Counsel or his authorized representative, and the terms of such contracts, agreements and other documents shall be subject to review by General Counsel or his authorized representative.

**WORLD TRADE CENTER SITE FLOOD MITIGATION AND RESILIENCY IMPROVEMENTS PROGRAM – BELOW-GRADE WATER INTRUSION PROTECTION SYSTEMS AT THE SOUTH BASEMENT LEVELS – AWARD OF CONTRACT WTC-964.958A**

It was recommended that the Board authorize the Executive Director to enter into a construction contract with Paul J. Scariano, Inc. for the fabrication and installation of below-grade Water Intrusion Protection Systems (WIPS) at the south basement levels of the World Trade Center (WTC) site (also known as the South Bathtub), including the WTC Vehicular Security facilities (WTC Vehicular Security Center and Tour Bus Parking Facility and WTC Vehicle Roadway Network and Eastside Tour Bus Parking Facility), at an estimated total cost of \$5,050,040, inclusive of clause work and an eight-percent allowance for extra work.

As Superstorm Sandy and its associated storm surge demonstrated, business and transportation assets in low-lying areas of Lower Manhattan are at great risk for storm surge flooding. The high value and critical nature of the Port Authority facilities, particularly the Port Authority Trans-Hudson (PATH) rail system and other transportation facilities at the WTC site, require a comprehensive flood protection plan, including multiple levels of protection to minimize the impact of future storms.

In the fall of 2013, a site-wide comprehensive flood hazard mitigation plan was developed for the WTC site. This plan includes evaluations of site-wide and project-specific flooding vulnerabilities, flood mitigation strategies and improvement alternatives. The WTC's flood mitigation plan recommended three "rings of protection" to protect the WTC site effectively against coastal flooding levels comparable in magnitude to Superstorm Sandy's storm surge. The first ring is a perimeter bollard protection system at the western portion of the WTC site. The second and third rings, known as WIPS at-grade and WIPS below-grade, respectively, include various flood barriers, roll-down doors, louvers, hatches, structural hardening, waterproofing, and similar measures.

In April 2017, the Board authorized a project for WTC site Below-Grade Flood Mitigation and Resiliency Improvements, at an estimated total project cost of \$37.1 million. The proposed contract would be the final planned construction contract to be awarded in connection with that project.

In August 2017, the Port Authority and the Federal Transit Administration executed a grant agreement for WTC below-grade flood mitigation and resiliency projects that provides for federal reimbursement of 90 percent of eligible project expenditures, up to a maximum of approximately \$33.4 million.

The protection of these areas was previously bid as Contract WTC-964.958, with award authorized by the Board at its October 26, 2017 meeting to Paul J. Scariano, Inc., the lowest-priced technically qualified bidder, at an estimated total cost of \$5,659,160. Subsequent to authorization, an alternate flood mitigation solution was identified as a result of improved pumping strategies being implemented in the below-grade areas of the WTC site. The bids for Contract WTC-964.958 were rejected, and the contract was re-bid based on the revised design.

The proposed contract provides for the fabrication and installation of WIPS equipment at the south basement levels of the WTC site, particularly at interior ramps, roadways, stairwells and shafts in the WTC Vehicular Security Facilities. All construction activities in this contract would be coordinated with WTC site operating facilities, to minimize public impacts.

Pursuant to the foregoing report, the following resolution was adopted, with Commissioners Bagger, Eve, Horwitz, LaBarbera, Lynford, McCabe, McDonald, O'Toole, Pocino and Rosado voting in favor. General Counsel confirmed that sufficient affirmative votes were cast for the action to be taken, a quorum of the Board being present.

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to enter into a construction contract (WTC-964.958A) with Paul J. Scariano, Inc. for the fabrication and installation of below-grade Water Intrusion Protection Systems at the south basement levels of the World Trade Center (WTC) site (also known as the South Bathtub), including the WTC Vehicular Security Center and Tour Bus Parking Facility and the WTC Vehicle Roadway Network and Eastside Tour Bus Parking Facility, at an estimated total cost of \$5,050,040, inclusive of clause work and an eight-percent allowance for extra work; and it is further

**RESOLVED**, that the form of the foregoing agreement shall be subject to the approval of General Counsel or his authorized representative, and the terms of such agreement shall be subject to review by General Counsel or his authorized representative.

**WORLD TRADE CENTER – AUTHORIZATION OF FUNDS FOR THE CONSTRUCTION OF A MEMORIAL TO 9/11 RESCUE AND RECOVERY WORKERS**

It was recommended that the Board authorize the Executive Director to enter into an agreement or agreements with The National September 11 Memorial Museum (Memorial & Museum) and any other appropriate entities pursuant to which the Port Authority would provide an amount not to exceed \$500,000 toward the construction of a permanent memorial at the World Trade Center (WTC) site honoring all those who assisted in rescue and recovery efforts at the WTC site following the terrorist attacks of September 11, 2001.

Immediately following the attacks of September 11, 2001 through May 30, 2002, thousands of men and women took part in the extensive rescue and recovery from the destruction of the WTC. Disregarding risks to their own safety, they undertook work that was arduous and dangerous, but vital to the region and the entire nation. Among these thousands of rescue and recovery workers were many employees of the Port Authority.

The Memorial & Museum, working together with governmental and private entities, has developed plans to build a memorial at the WTC site to recognize the courage, sacrifice and selflessness of all those who participated in the rescue and recovery efforts. It is expected that this memorial will be located on the Memorial Glade, in the southwest portion of the WTC site. The funds to be provided by the Port Authority would come from the agency's New York Regional Transportation Program.

Pursuant to the foregoing report, the following resolution was adopted, with Commissioners Eve, Horwitz, LaBarbera, Lynford, McCabe, McDonald, O'Toole, Pocino and Rosado voting in favor. Commissioner Bagger, recused and did not participate in the consideration of, or vote on, this item. General Counsel confirmed that sufficient affirmative votes were cast for the action to be taken, a quorum of the Board being present.

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to enter into an agreement or agreements with The National September 11 Memorial Museum and any other appropriate entities pursuant to which the Port Authority will provide an amount not to exceed \$500,000 toward the construction of a permanent memorial at the World Trade Center (WTC) site honoring all those who assisted in rescue and recovery efforts at the WTC site following the events of September 11, 2001; and it is further

**RESOLVED**, that the form of the foregoing agreement(s) shall be subject to the approval of General Counsel or his authorized representative, and the terms of such agreement(s) shall be subject to review by General Counsel and his authorized representative.

**CONFIDENTIAL ITEM**

The Board took action in executive session on a matter that shall remain confidential until such time as its publication is determined not to endanger the public interest.

Whereupon, the meeting was adjourned.

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Secretary