Supreme Court Copy

Case No. S162647

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN JOSE,

Plaintiff/Appellant,

v.

OPERATING ENGINEERS LOCAL UNION NO. 3, et al.

Defendants/Respondents.

NO. S162647

Sixth Appellate District Case No. H030272

(Santa Clara County Superior Court Case No.: 1-06-CV064707)

SUPREME COURT
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Deputy

REPLY BRIEF ON THE MERITS

FILED WITH PERMISSION

After a Decision by the Court of Appeal
Sixth Appellate District
[Case No. H030272]

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I. INTRODUCTION

In its Opening Brief on the Merits, Appellant City of San Jose ("City") pointed out that under the Sixth District Court of Appeal's "flawed analysis, virtually every matter in which a strike or labor dispute is somehow involved, [the Public Employment Relations Board] would be deemed to have exclusive initial jurisdiction, regardless of whether the [Meyers-Milias-Brown Act] is implicated." (Opening Brief on the Merits ["Opening Brief"] at 2.)

In its Answer Brief on the Merits ("Ans. Brief"), Operating Engineers Local Union No. 3 ("OE3") does not dispute the City's take on the effect of the Sixth District's reasoning. Rather, just like the Sixth District, OE3 attempts to expand the scope of the Public Employment Relations Board's ("PERB's") jurisdiction to any "strike injunction or strike damage action," a proposition that is contained nowhere in the language of the MMBA, or in any of the cases cited by OE3. The yardstick for invoking PERB's jurisdiction remains whether the matter implicates provisions of the MMBA – not simply whether labor issues are somehow involved.

For the first time in this litigation, however, OE3 has finally committed to a provision in the MMBA that it contends is inevitably implicated in any case in which a public employer seeks to enjoin safety-critical employees from engaging in a work stoppage: Government Code Section 3505,[1] which requires public employers and their employee unions to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment." In making this argument, OE3 relies

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[1] Oddly, OE3 never cites Section 3505 in its brief, but generally relies on the general prohibition against "bad faith bargaining." (Ans. Brief at pp. 2 and 19.) Because Section 3505 sets forth the MMBA's good faith meet and confer requirements, the City is presuming that this is the provision on which OE3 is relying.

heavily on *San Diego Teachers Ass'n v. Superior Court* (1979) 24 Cal.3d 1, which found PERB to have initial jurisdiction over a claim seeking to enjoin a teachers' strike that was arguably considered illegal at the time.

In placing so much reliance on the *San Diego Teachers* case, OE3 overlooks other, more applicable, cases in which courts, including this Court, have refused to find administrative preemption where the controversy presented to the state court is different than the controversy that would invoke jurisdiction under the governing labor statute. In such situations, courts have found that the MMBA is not implicated as there is no real danger of inconsistent rulings.

Moreover, the "local concern" principle overrides any arguable application of the preemption standard in this case such that jurisdiction should remain with the Superior Court. Protecting the public from potential health and safety breaches is the epitome of a local concern. A rule taking the ability of a municipality to seek immediate relief from the state courts and handing it to an administrative body with no expertise in gauging community health risks would be inefficient, bad policy, and contrary to the law.

Because the controversy in this case is neither arguably protected nor arguably prohibited by the MMBA, and because the local concern principle overrides any sort of administrative preemption argument, the Sixth District's decision finding that PERB had exclusive initial jurisdiction in this matter should respectfully be reversed.

II. REPLY ARGUMENT

A. PERB JURISDICTION CANNOT BE INVOKED MERELY BECAUSE THE UNDERLYING DISPUTE HAS SOME RELATIONSHIP TO A LABOR DISPUTE OR A STRIKE

OE3 asserts that "thirty years of precedent" supports the Sixth District's decision in this case, and yet cannot cite to a single precedent in that thirty year period in which a court or statute mandates the result OE3 advocates in its Answer Brief. Under OE3's theory, the proper analysis of the issue raised in this case begins and ends on the question of whether an actual or potential labor strike is somehow involved in the underlying action, regardless of the nature of the action, and regardless of whether it is the MMBA or some other source that is implicated. Such a broad-brush approach to the issue of PERB's jurisdictional reach has not been adopted in any of the precedents cited by OE3.

1. PERB's Jurisdiction Over Labor Disputes Is Limited to Labor Claims that Implicate the MMBA

Were this Court to adopt a literal interpretation of Government Code Section 3509, there can be little doubt that the Superior Court would be found to have jurisdiction in this case. *See* Cal. Gov't Code §3509(b) (PERB's jurisdiction extends only to complaints "alleging any violation of this chapter or any rules and regulations adopted by a public agency"). (Opening Brief at pp. 2 and 9-10.)

However, the courts, in determining the jurisdictional reach of PERB, have adopted the federal standard for determining the scope of the National Labor Relations Board's jurisdiction over labor disputes as first articulated in *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon* (1959) 359 U.S. 236. Under this "*Garmon*" standard, the administrative board is deemed to have jurisdiction over activities "arguably

protected or prohibited" by the governing labor statute. *See El Rancho Unified School District v. National Education Ass'n* (1983) 33 Cal.3d 946, 953.

In every instance where PERB is found to have exclusive jurisdiction, courts have relied on the potential violation of specific provisions of the governing statute, such as the Educational Employment Relations Act ("EERA") or the MMBA. Where no specific provision is implicated, then no PERB jurisdiction is found, regardless of whether the underlying conduct involves labor disputes.

As discussed in great detail in the City's Opening Brief, the authority for a claim seeking to enjoin safety-critical public employees from striking stems, not from the MMBA, but rather from the common law rule set forth in *County Sanitation District Number 2 v. Los Angeles County Employees Ass'n* (1985) 38 Cal.3d 564. (See Opening Brief at pp. 12-21.) In an effort to sidestep this reality, OE3 has conjured up an argument that no case has ever endorsed: that whenever a common law claim is made in conjunction with a labor strike, there is an argument that the strike could be deemed "bad faith bargaining" prohibited by the MMBA, thus invoking PERB's jurisdiction. This contention has no legal support and should be rejected.

OE3 relies heavily on the *San Diego Teachers* case to support its novel proposition. (See Ans. Brief at pp. 7-18.) However, *San Diego Teachers* cannot be read so expansively.

In *San Diego Teachers*, a teachers association and its president sought a writ deeming a strike injunction against them to be invalid because the school district obtained the injunction directly from the Superior Court, rather than first exhausting its remedies under EERA. In its complaint with the Superior Court, the school district "alleged not only that the strike

would be illegal and cause the district and pupils irreparable injury but also that under the EERA the parties had duties to meet and negotiate and had not declared an impasse." *San Diego Teachers* 24 Cal.3d at 4.

In light of these factual allegations, the Court held that PERB had exclusive initial jurisdiction. The Court's holding was based, not on the general principle that all labor disputes should blindly be sent to PERB, but rather on the school district's allegations which the Court linked to specific prohibitions set forth in the MMBA. In particular, the Court related the school district's allegations to EERA's "requirement that a union must bargain in good faith, as set forth in Government Code §3543.6(c)." (Ans. Brief at 9.)

Based on this reasoning by the *San Diego Teachers* Court, OE3 contends basically that all common law violations alleged in "strike injunction or strike damage actions" could somehow amount to a failure to bargain in good faith, thus invoking PERB's jurisdiction. This is a dramatic leap in logic that has no legal support. In fact, cases that have analyzed common law claims in labor disputes have often determined Superior Courts to have initial jurisdiction over such matters. *See, e.g., Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal. App. 4th 1807, 1814 (fraudulent inducement of contract claim could proceed in Superior Court, not the NLRB, even though the alleged conduct touched upon the labor rights of the company's employees in potential violation of the NLRA); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters* (1978) 436 U.S. 180, 197 (employer may go forward with trespass claim against union's picketing activity in Superior Court as opposed to NLRB).

In order for OE3's argument to have any merit whatsoever, this Court must first decide that all threatened work stoppages by employees

alleged to be safety-critical could amount to bad faith bargaining, and that they are therefore arguably prohibited by the MMBA. Yet no case has ruled as such, including those cases cited by OE3.

For example, OE3 also places much weight on the *El Rancho* decision, another case involving a teachers' strike. However, the decision in *El Rancho* provides further proof that strike-related allegations do not automatically raise an arguable claim for bad faith bargaining.

In *El Rancho*, the Court noted that "strikes are an unfair practice under EERA only if they involve a violation of the act's provisions." *El Rancho, supra,* 33 Cal.3d at 957. Significantly, the Court in *El Rancho* did not mechanically send the case to PERB on the theory that there was a potential for bad faith bargaining, as asserted by OE3 in this appeal. Rather, the Court based PERB's jurisdiction on the potential violation of two **other** provisions of EERA: one that prohibits a union from discriminating against employees who exercise their EERA rights (Gov't Code §3543) and one that prohibits a teachers union from causing an employer to contribute financial or other support to a union. Cal. Gov't Code §3543.3. The Court made no reference whatsoever to Government Code Section 3543.6(c), EERA's requirement that the parties bargain in good faith, a requirement on which OE3's entire argument relies.

In short, no case has adopted the position that OE#3 is advocating here. Rather than simply sending "strike related cases" to PERB under the rubric of bad faith bargaining, the Courts in each instance analyze the facts alleged to determine whether the MMBA is implicated.

2. The MMBA is Not Implicated Unless the Controversy that Could Have Been Presented to PERB is "Identical" to that Presented to the Court

In its Answer Brief, OE3 contends PERB should preempt the Superior Court's jurisdiction because there is a "potential overlap between the controversy presented to the superior court . . . and the controversy that might have been presented to PERB." (Ans. Brief at 24.) In fact, the issues that would be presented to either the Superior Court or PERB do not sufficiently overlap to invoke PERB's jurisdiction. As discussed below, it is only when the controversies at issue in both the state court action and the administrative action are "identical" will the Court find that the *Garmon* rule has been satisfied.

In *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, which was decided ten months after the *San Diego Teachers* case, this Court held that the Superior Court, and not the Agricultural Labor Relations Board ("ALRB"), had jurisdiction to enjoin the United Farm Workers Union from picketing in a manner that obstructed ingress and egress to a wholesale market. Although decided under the Agricultural Labor Relations Act ("ALRA"), the standards for determining whether the ALRB had initial jurisdiction are the same as for determining whether PERB has jurisdiction over labor disputes under the MMBA. *Id.* at 68.

Like OE3's contention in this case as to strike activity, the union in *Kaplan's* argued that picketing activity is both arguably prohibited and protected by the governing labor statute, and thus the ALRB's jurisdiction should preempt the Superior Court's power to issue an injunction. The Court disagreed. Based on the clarification provided by cases decided after *Garmon*, this Court stated "that the preemption issue as to both categories [*i.e.*, the arguably protected and arguably prohibited prongs] turns primarily on whether preemption is necessary to avoid conflicting adjudications

which would interfere with the regulatory activity of the administrative board." *Id.* at 69-70.

Under the arguably protected prong, the ALRB contended that, if in fact the union were innocent of obstructing access to the wholesale market, its picketing activity would be safeguarded by the ALRA. *Id.* at 70. "Since the parties dispute[d] whether the [u]nion did obstruct access, the ALRB reasoned that the case therefore 'arguably' involves protected activity." *Id.* The Court rejected this argument, reasoning that the business owner sought "only to enjoin obstruction of access, a clearly unprotected activity." As stated by this Court:

> The possibility that the Union is innocent of the charged conduct may be grounds for denying injunctive relief, **but it does not invoke the preemptive jurisdiction of the board**. Indeed, whenever any accusation is brought against a union, the charge may be groundless – the union may have engaged only in protected conduct – **but to rest preemptive jurisdiction on that possibility would project the board's preemptive jurisdiction into all cases of charges against a union**, rendering the arguably prohibited branch of the preemption doctrine superfluous.
>
> *Id.* (emphasis added).

In its Answer Brief, OE3 is essentially making the same argument that was rejected in the *Kaplan* case: that the City may have been incorrect in deeming certain employees to be safety-critical and, were that the case, then those employees' right to strike would be implicated. (See Ans. Brief at 27.) As stated in *Kaplan*, however, if the City is indeed wrong, that would be "grounds for denying injunctive relief, but it does not invoke the preemptive jurisdiction of the board." *Id.* Because the Superior Court could only enjoin non-protected activity (*i.e.*, a work stoppage by safety-critical employees), the City's original Superior Court action did not invade PERB's preemptive jurisdiction. *Id.* at 71 ("We conclude that so long as the court's injunction does not restrain conduct which is arguably protected

by the ALRA, it does not invade the ALRB's preemptive jurisdiction to adjudicate controversies concerning arguably protected activity").

The *Kaplan* Court also considered the "arguably" prohibited prong of the *Garmon* rule. In analyzing this prong, the Court recognized that picketing which obstructs access may or may not be an unfair labor practice, depending on the intent and effect of the activity: if the tactic coerced employees or was done in connection with a secondary boycott, then it would be an unfair practice under the ALRA, but if it merely obstructed customer access, then it would not be. *Id.* at 71. As such, the "arguably prohibited" prong was not satisfied because the controversy presented to the Superior Court (whether ingress and egress was blocked) was not identical to that which would be presented to the board (whether employees were being coerced or whether the activity was done in the course of a secondary boycott). As stated by this Court, the "blockage of customer access is not in itself an unfair labor practice under the ALRA and hence . . . under the ALRA, . . . local court decisions enjoining obstructions to access do not threaten significant interference with labor board adjudications." *Id.* at 75.

Similarly, in this case, the controversy presented to the Superior Court is far different from the controversy that could be presented to PERB. Just like picketing activity in *Kaplan*, strike activity does not necessarily amount to an unfair labor practice such as bad faith bargaining. *See San Diego Teachers* 24 Cal.3d at 8. In cases such as the one originally brought by the City in Superior Court, there is a single question asked of the Court: if any of the identified public employees went on strike, would the public health and safety be threatened? If the answer is "no," then no injunction should issue. If the answer is "yes" as to any of the employees, then the

Court should enjoin such employees from participating in the threatened work stoppage.

Whether the Union's actions amounted to bad faith bargaining under the MMBA, however, would be a very different inquiry. An administrative determination on whether the strike amounted to bad faith bargaining could revolve around several different issues such as the events leading up to the threatened strike, the history of bargaining between the parties, the contractual disputes resulting in the impasse, or whether the City had engaged in any unfair labor practices that would have arguably justified the union's actions. These issues are completely independent of, and in no way conflict with, the sole issue that would be before the Superior Court: were specific employees safety-critical or not?

B. THE LEGISLATURE'S DECISION NOT TO ADOPT THE HOLDING OF *COUNTY SANITATION* FURTHER SUPPORTS A FINDING THAT PERB DOES NOT HAVE JURISDICTION OVER *COUNTY SANITATION* CLAIMS

Remarkably, OE3 attempts to contend that the Legislature's decision **not** to codify the holding of *County Sanitation* actually supports its argument that PERB should have jurisdiction over *County Sanitation* claims. It justifies this contention by claiming that the Legislature's adoption of *County Sanitation* would have afforded that case "special status."[2] (Ans. Brief at 34.)

In actuality, the Legislature's decision not to adopt the holding of *County Sanitation* strongly supports the opposite conclusion. Had the Legislature adopted the holding of *County Sanitation*, the rule of the case would have become part of the MMBA. Thus, there would have been very

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[2] OE3 does not explain what it means by "special status."

little question that a *County Sanitation*-based claim would have implicated the MMBA and invoked PERB jurisdiction.

By failing to adopt *County Sanitation*'s holding, however, *County Sanitation* remains a common law rule over which PERB has no jurisdiction. *See Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal. App. 4th 621, 634 (finding Legislature's deletion of language that appeared in statute's earlier version is strong evidence that final statute as enacted should not be construed to include omitted provision.) Therefore, the cited legislative history actually bolsters the City's position that *County Sanitation* remains outside the purview of PERB.

C. THE "LOCAL CONCERN" DOCTRINE OVERRIDES PERB'S JURISDICTION

By taking out of context the nature of PERB's alleged concern for "protecting the public," OE3 defends its position that PERB should retain jurisdiction even despite the "local concern" doctrine espoused by both state and federal courts. (Ans. Brief at 45.) Basically, OE3 contends that that the reference in *Pittsburg Unified School District v. California School Employees Ass'n* (1985) 166 Cal. App. 3d 875 to PERB's interest in "minimizing interruptions in educational services," as referenced in the *San Diego Teachers* and *El Rancho* cases, means that PERB should be immune from the local concern principle no matter what the nature of the health and safety concern is. (See Ans. Brief at 46.) This contention is meritless.

First of all, the type of concern that PERB may have in minimizing work stoppages by teachers or anyone else under its purview is completely different from the fundamental civic responsibility that municipalities have in protecting the health and safety of its citizens. When discussing PERB's interest in the public good, no case claims that Sacramento-based PERB is

obligated to take action that will preserve immediate public health threats to the local community. Rather, PERB's public welfare interests are "longrange," meaning that it may decide, for whatever reason, to withhold seeking injunctive relief in one instance for the benefit of preserving labor peace in the long term. See *Fresno Unified School District v. National Education Ass'n* (1981) 125 Cal. App. 3d 259 (PERB may decide not seek a restraining order or injunction in a particular case in order to support its mission of fostering constructive employment relations, including the "longrange" minimization of work stoppages).

Furthermore, the context in which PERB has been deemed to share the public interest in minimizing work stoppages has come up only in the context of teachers' strikes. A teachers' strike is unfortunate and should be avoided. However, it creates no immediate threat to the public health and safety, as correctly noted by the First District in *County of Contra Costa v. Public Employees Union Local One* (2008) 163 Cal.App.4th 139, also currently under review by this Court (case No. S164640).

The First District in *Contra Costa* dealt with an injunction against nurses, among other employees, working at County hospitals. The Court stated that "[a]s important as teachers are, the public services involved in this case are on a different order of magnitude. A one-day strike by teachers is unlikely to create a 'substantial and imminent threat to the health or safety of the public,' . . . whereas a one-day strike by nurses could have life-threatening implications." *Id.* at 383. This same logic should be adopted in this case, or any other case in which the threat to the public welfare is not

just conjectural or long-term, but immediate and potentially hazardous to the community.[3]

There can be no doubt that the cases' discussion of PERB's interests when it comes to teachers' strikes have no application in situations where the health and safety of the public is immediately at stake. There is simply no way that a public entity's core interest in preserving the public health of a community can be superseded by such tangential references. See *Big Creek Lumber v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 (when local government regulates in an area over which it traditionally has exercised control, California courts will presume, **absent a clear indication of preemptive intent**, that such regulation is not preempted by the state).

The interest that local governments have in preserving the public health and safety of its residents could not be stronger. *See People v. Union Pacific Railroad* (2006) 141 Cal. App. 4th 1228, 1247 (the exercise of the police power to protect the health and welfare of the public and the environment is primarily and historically a matter of local concern); *Chemical Specialties Mfrs.* Ass'n v. Allenby (9th Cir. 1992) 958 F.2d 941, 943 (regulation of harmful toxic substances is primarily, and historically, a matter of local concern). In sum, the local concern principle should apply in this case so as not to strip away the Superior Court's ability to enjoin proven threats to the public health and safety.

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[3] The First District's reasoning is supported by at least one difference between the MMBA and EERA. The MMBA recognizes that in the context of municipal and county workers, the public employer is excused from complying with its "meet and confer" obligations "in cases of emergency." Cal. Gov't Code §3504.5; *Sonoma County Organization of Public/Private Employees, Local 707 v. County of Sonoma* (1991) 1 Cal.App.4th 267, 277-278. The legislature placed no such "emergency" exception within the text of EERA.

D. PERB'S PROCESSES ARE INHERENTLY INFERIOR TO ONE WHERE PUBLIC ENTITIES HAVE DIRECT ACCESS TO THE COURTS

In defending its position that exhaustion should not be excused in cases such as this, OE3 takes the position that PERB is an adequate forum for dealing with health and safety issues. (Ans. Brief at 39-40.) OE3 specifically relies on the particular facts of this case as evidence that PERB "acts as quickly as necessary." (Id.) However, what happened in this case with regard to the City's Superior Court case sheds no light on the unnecessary delay and duplication that is inherent in PERB's administrative procedures.

On May 30, 2006, the City received three days' notice of a work stoppage by OE3. (App. Exh. 3 at 2:25-27.) The City filed its Complaint on June 1, 2006,[4] and PERB served papers in support of its preemption argument (**not** the underlying injunction) also on that day. (App. Exh. 1; Exh. 3 at 36:1-3 and Exh. 10 at 179-188.) All parties appeared at Court the following day, and at that time OE3 agreed to temporarily delay its threatened work stoppage. (RT Vol. 1at 4:24-5:4.)

The only point that can be derived from these facts is that PERB can, at a moment's notice, create pleadings in support of its jurisdictional preemption argument. Had the City actually filed its papers with PERB on June 1, as opposed to the Court, there is no telling how long PERB would have needed to (1) review the City's injunction papers, (2) have its regional attorney complete an investigation as required under the regulations (Pub. Empl. Rel. Bd. Reg. 32455 and 32460), (3) have its general counsel submit

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[4] In light of the task of gathering information for the purpose of determining which of the 808 total employees should be considered safety-critical, a two-day turnaround for the filing of the City's Complaint is not unreasonable.

a recommendation to PERB itself (Pub. Empl. Rel. Bd. Reg. 32460), (4) deliberate and decide whether to seek injunctive relief (Pub. Empl. Rel. Bd. Reg. 32465), (5) and, assuming it decided to seek an injunction, prepare papers to submit to the Superior Court. The chances that this process would have been completed by the following day – the day on which OE3 threatened to strike – are extremely remote if not impossible.

And in this case, the City actually had three days' notice of a work stoppage, plus a union that voluntarily agreed to temporarily delay its strike. The Sixth District's decision makes no clear distinction between reasonably noticed work stoppages and "surprise" strikes, or strikes called with substantially less notice. OE3's position that PERB is fully capable of providing the type of relief that may very well be necessary to protect the public health and safety flies in the face of logic. There can be no question that PERB's procedures add time, and potentially substantial time, to the process.

Because the City's Superior Court case was dismissed eight days after the complaint was filed, there was, of course, no opportunity for discovery or other fact-finding. As such, OE3's position that "there is no evidence that PERB has ever been dilatory" (Ans. Brief at 41) is meaningless in this case. PERB did file papers with the Sixth District in which it cherry-picked examples of how quickly it can allegedly respond to complaints. However, a review of these limited examples demonstrates that, when PERB decided to act, it took three to five days to file papers with the Superior Court. (PERB's Supp. Opp. to Writ of Supersedeas, Exh. C.) If that had happened in this case, OE3's strike would have been in at least its second day before PERB even reached the courthouse steps. This sort of

delay and inefficiency is exactly what should be avoided where quick decisions are vital to ensure that the public safety is preserved.

III. CONCLUSION

For the reasons set forth herein and in the City's Opening Brief on the Merits, the City respectfully requests that this Court reverse the Sixth District's decision in this matter.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: October 31, 2008

By: 
ROBERT FABELA
Sr. Deputy City Attorney

Attorneys for Plaintiff/Appellant
CITY OF SAN JOSE

IV. CERTIFICATE REGARDING WORD COUNT

I, Robert Fabela, counsel for Plaintiff/Appellant City of San Jose, hereby certify, pursuant to California Rules of Court, Rule 8.204(c)(1), that this brief is proportionately spaced, has a typeface of 13 points, and the word count for this REPLY BRIEF ON THE MERITS, exclusive of tables, cover sheet, and proof of service, according to my computer program is 4,269 words.

Respectfully submitted,

Dated: October 31, 2008

RICHARD DOYLE, City Attorney

By: _____
ROBERT FABELA
Sr. Deputy City Attorney

Attorneys for Plaintiff/Appellant CITY OF SAN JOSE

PROOF OF SERVICE

CASE NAME: City of San Jose v. Operating Engineers Local Union No. 3

SUPREME COURT CASE NO.: S162647
(Court of Appeals Case No.: H030272)
(Superior Court No.: 1-06-CV064707)

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San Jose, California 95113-1905, and is located in the county where the service described below occurred.

On **October 31, 2008**, I caused to be served the within:

REPLY BRIEF ON THE MERITS

☒ by OVERNIGHT DELIVERY, with a copy of this declaration, by depositing them into a sealed envelope/package, with delivery fees fully prepaid/provided for, and

- ☐ causing the envelope/package to be deposited for collection
- ☒ causing the envelope/package to be delivered to an authorized courier or driver to receive the envelope/package

designated by the express service carrier for next day delivery.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for overnight delivery by an express courier service. Such correspondence would be deposited with the express service or delivered to the authorized express service courier/driver to receive an envelope/package for the express service that same day in the ordinary course of business.

☒ by MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **October 31, 2008**, at San Jose, California.

Margarita Martinez

SERVICE LIST

CASE NAME: City of San Jose v. Operating Engineers Local Union No. 3

SUPREME COURT CASE NO.: S162647
(Court of Appeals Case No.: H030272)
(Superior Court No.: 1-06-CV064707)

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