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Lorelee Dodge

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**THE AIRLINE DEREGULATION ACT AND  
PREEMPTION—DETERMINING WHETHER CURBSIDE  
BAGGAGE CHECK HAS A SIGNIFICANT IMPACT  
UPON A CARRIER**

LORELEE DODGE\*

**I**N *DIFIORE v. American Airlines*, the First Circuit reversed a district court jury verdict that awarded damages to curbside baggage carriers, called skycaps, for violations of a state labor law.<sup>1</sup> The First Circuit concluded that the Airline Deregulation Act (the ADA) preempted the Massachusetts Tip Law (the Tip Law) for air carriers because tips are “‘related to a price, route, or service.’”<sup>2</sup> However, this rationale is misguided because the Tip Law does not have a “‘significant impact’” on transportation rates, routes, or services.<sup>3</sup> Furthermore, federal preemption might not extend to a state law that affects carriers in a “‘tenuous, remote, or peripheral’” manner.<sup>4</sup> Therefore, the First Circuit should have upheld the jury award.

Airline passengers check their bags either inside the airport or at the curb. Among those customers at Boston’s Logan Airport that used curbside service prior to 2005, nearly all tipped the skycaps for their service.<sup>5</sup> As a result, the skycaps’ primary income was not their hourly wage, but tips.<sup>6</sup> In 2005, American Airlines, Inc. (American) began charging passengers two dollars per bag to check bags at the curb.<sup>7</sup> Many passengers no longer tipped the skycaps because some customers concluded that the

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\* Lorelee Dodge received a M.Phil. from Oxford University and an MBA with distinction from Harvard University Graduate School of Business. She will receive her J.D. from Southern Methodist University Dedman School of Law in 2013. Lorelee would like to thank her husband for his patience and support.

<sup>1</sup> *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 84, 90 (1st Cir. 2011).

<sup>2</sup> *Id.* at 87–88 (quoting 49 U.S.C. § 41713(b)(1) (2006)).

<sup>3</sup> *See Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 371 (2008).

<sup>4</sup> *Id.* (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)).

<sup>5</sup> *DiFiore*, 646 F.3d at 83.

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

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

fee was a mandatory tip and, consequently, the skycaps' income dropped significantly.<sup>8</sup>

Skycaps who worked at Logan Airport sued American in state court alleging, among other things, that the two dollar curb fee violated the Massachusetts Tip Law.<sup>9</sup> American removed the suit to federal court, and filed a motion to dismiss, arguing that the ADA expressly preempted the Tip Law.<sup>10</sup> The district court denied American's motion, and the jury awarded damages to the skycaps based on violation of the Tip Law and tortious interference.<sup>11</sup> American appealed on several grounds.<sup>12</sup>

The central issue on appeal was whether the ADA preempted the Tip Law. The ADA provides that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."<sup>13</sup> The goal of the ADA is to help "assure transportation rates, routes, and services . . . reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices.'"<sup>14</sup>

The First Circuit observed that the key statutory language was "related to a price, route, or service."<sup>15</sup> The First Circuit turned to a Supreme Court case, *Morales v. Trans World Airlines*, which applied the ADA's preemption language to a state regulation.<sup>16</sup> In *Morales*, the Supreme Court concluded that a state advertising regulation was sufficiently "related to a price, route or service of an air carrier" and was therefore preempted.<sup>17</sup> The Court focused on the ultimate outcome of the state advertising guidelines and reasoned that the guidelines would require an airline to create different ads in each of its markets.<sup>18</sup> Moreover, the state's requirement that all restrictions attached to a discounted

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

<sup>9</sup> *Id.* at 84; see MASS. GEN. LAWS ch. 149, § 152A(b) (2008) (providing, in pertinent part, that "[n]o employer or other person shall demand . . . or accept from any . . . service employee . . . any payment or deduction from a tip or service charge given to such . . . service employee . . . by a patron").

<sup>10</sup> *DiFiore*, 646 F.3d at 84.

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

<sup>12</sup> *Id.* at 85.

<sup>13</sup> 49 U.S.C. § 41713(b)(1) (2006).

<sup>14</sup> *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

<sup>15</sup> *DiFiore*, 646 F.3d at 87.

<sup>16</sup> *Id.* at 86.

<sup>17</sup> See *Morales*, 504 U.S. at 389-91.

<sup>18</sup> *Id.* at 389.

air fare be “clear[ly] and conspicuous[ly] disclos[ed]” meant that it would be nearly impossible for an airline to use smaller advertisements.<sup>19</sup> In short, the Court concluded that the state guidelines “related to a price, route, or service” because the “guidelines severely burden[ed]” an airline’s ability to compete in the market.<sup>20</sup>

Other cases, however, declined to preempt state laws because those state laws were not “related to” a carrier’s price, route, or service. For example, several circuits upheld, inter alia, state retaliation laws,<sup>21</sup> anti-discrimination laws,<sup>22</sup> and negligence suits for injuries that occurred during a carrier’s operations,<sup>23</sup> concluding that the ADA did not preempt these state laws. Moreover, one circuit held the ADA did not preempt a state law that required employers who received public contracts to pay a prevailing wage because any impact upon a carrier was merely indirect and thus, “not ‘related to’” the carrier’s price, route, or service.<sup>24</sup> Yet despite these circuit court decisions, the First Circuit noted that the key phrase “related to” is “highly elastic” because many laws could have some connection with an airline’s price or service.<sup>25</sup> Therefore, the First Circuit concluded that the cases that addressed the “related to” clause were of only “limited” use to the case at bar.<sup>26</sup>

Next, the First Circuit looked to the Supreme Court’s view of “service” determined in *Rowe v. New Hampshire Motor Transport Ass’n*.<sup>27</sup> The state law at issue in *Rowe* required carriers to inspect their shipments for unlicensed tobacco and institute a system of services that neither the carrier, nor its competitors, had previously provided.<sup>28</sup> The Supreme Court explained that the ADA preempted this state law because the law required a carrier to offer a delivery service that “differ[ed] significantly” from a service that the carrier would otherwise provide.<sup>29</sup> From this

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<sup>19</sup> *Id.* (internal quotation marks omitted).

<sup>20</sup> *Id.*

<sup>21</sup> *See, e.g., Gary v. Air Grp., Inc.*, 397 F.3d 183, 189 (3d Cir. 2005).

<sup>22</sup> *See, e.g., Wellons v. Nw. Airlines, Inc.*, 165 F.3d 493, 496 (6th Cir. 1999).

<sup>23</sup> *See, e.g., Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261–62 (9th Cir. 1998) (en banc).

<sup>24</sup> *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999).

<sup>25</sup> *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 86 (1st Cir. 2011).

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

<sup>27</sup> *Id.* at 87–88.

<sup>28</sup> *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 368–72 (2008).

<sup>29</sup> *Id.* at 372.

case the First Circuit reasoned that the Supreme Court treated the term "service" expansively, and thereby concluded that curbside baggage check was a "service" under the ADA's preemption clause.<sup>30</sup>

However, the First Circuit acknowledged that the ADA does not preempt "state laws that have only 'tenuous, remote, or peripheral' impact" on carriers.<sup>31</sup> The Supreme Court in *Rowe* explained that state laws are not preempted when those laws are remote to the transportation function.<sup>32</sup> Examples of state laws that are remote to a carrier's function include laws that regulate gambling, prostitution, and smoking in public places.<sup>33</sup> Nonetheless, the First Circuit concluded the Tip Law was not peripheral to American's function as a carrier because the Tip Law regulated both American's service and price.<sup>34</sup> Since the state law interfered with curbside baggage check service, which could affect American's ticket fares, the First Circuit held that the ADA preempted the Tip Law.<sup>35</sup>

The First Circuit was misguided in concluding that curbside baggage check is a "service" under the ADA's meaning of "service." The First Circuit essentially applied an expansive view of service and concluded, without examining, whether curbside baggage check was a "service" under the ADA.<sup>36</sup> Although one could argue that curbside baggage check is a service provided by carriers, this activity would not be considered a service under the meaning of the ADA for three reasons. First, curbside baggage check does not implicate a major role of a carrier. Congress included a preemption provision in the ADA to "ensure that the States would not undo federal deregulation with regulation of their own" in areas "'relating to rates, routes, or services.'"<sup>37</sup> The Supreme Court in *Rowe* examined "prices, routes, or services," and concluded a state law is preempted where it aims directly at a carrier's "major role."<sup>38</sup>

Second, curbside baggage check is not a service under the meaning of the ADA because curbside checking arguably does

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<sup>30</sup> *DiFiore*, 646 F.3d at 88.

<sup>31</sup> *Id.* (quoting *Rowe*, 552 U.S. at 371).

<sup>32</sup> *Rowe*, 552 U.S. at 371.

<sup>33</sup> *DiFiore*, 646 F.3d at 89 (citing *Rowe*, 552 U.S. at 371, 375; *Morales*, 504 U.S. at 390).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 89-90.

<sup>36</sup> *Id.* at 88.

<sup>37</sup> *Morales*, 504 U.S. at 378-79.

<sup>38</sup> *Rowe*, 522 U.S. at 376.

not affect a carrier's economics.<sup>39</sup> Curbside checking likely has only a very minor impact on a carrier's economics because the fee is two dollars per bag, the law applies in one state, and the law applies only to patrons who check a bag at the curb.<sup>40</sup> Therefore, it is reasonable to conclude that the revenue stream under the Tip Law would likely be very small relative to a carrier's total revenues. Further, curbside checking has no impact on a carrier's routes. Skycap tips do not affect where an airline flies, the frequency of its flights, or how many stops the carrier makes along the way.

Third, a determination that curbside baggage check does not represent a service under the ADA is consistent with its objectives. Congress's overarching goal in passing the ADA was to foster competition among carriers.<sup>41</sup> The Supreme Court explained that the ADA was designed to help "assure transportation rates, routes, and services . . . reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices.'"<sup>42</sup> A state law that regulates wages for skycaps does not impair competition among airline carriers because the Tip Law applies to all carriers that provide curbside baggage check at Logan Airport. Further, the Tip Law does not discriminate by a carrier's size or frequency of service at Logan Airport. Rather, the Tip Law merely helps to ensure that monies paid to skycaps are appropriately retained by skycaps. Such a local wage law does not impede competition among carriers in terms of carriers' rates, routes, or services.

Moreover, even if curbside baggage check is a service under the ADA, the First Circuit incorrectly applied an "impact" standard to the doctrine of preemption. The First Circuit concluded that the ADA preempted the Tip Law because the Tip Law impacts American's baggage service, and could ultimately impact the carrier's air fares.<sup>43</sup> According to the Supreme Court, however, preemption occurs where "state laws have a significant impact" on transportation rates, routes, and services.<sup>44</sup>

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<sup>39</sup> See, e.g., *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir. 1998) (en banc) (explaining that since "Congress enacted federal economic deregulation" a service is likely "the provision of air transportation to and from various markets").

<sup>40</sup> *DiFiore*, 646 F.3d at 83–84.

<sup>41</sup> *Rowe*, 552 U.S. at 371.

<sup>42</sup> *Id.*

<sup>43</sup> *DiFiore*, 646 F.3d at 89–90.

<sup>44</sup> *Rowe*, 552 U.S. at 371 (internal quotation marks omitted).

Thus, the appropriate standard to apply in the case at bar is whether a state law has a “significant impact” on carrier rates, routes, or services, not whether the state law has an “impact” on a carrier’s rates, routes, or services.<sup>45</sup> As mentioned above, the state law in *Morales* “severely burden[ed]” a carrier’s ability to place restrictions on lower-priced seats and advertise lower fares.<sup>46</sup> The Supreme Court reasoned that such advertising restrictions effectively impaired a key economic lever used by airlines—the ability to price-discriminate.<sup>47</sup> Thus, the advertising restrictions had a “significant impact upon the airlines’ ability to market their product, and hence a significant impact” upon air fares.<sup>48</sup> In contrast to the advertising regulation in *Morales*, the Tip Law at issue in *DiFiore* does not have such a “significant impact” upon American’s rates, routes, or services. In *Morales*, the law could require carriers to create different ads for different states,<sup>49</sup> whereas the Tip Law only requires a carrier to modify its curbside fee in Massachusetts.<sup>50</sup> Further, whereas the law in *Morales* threatened the carrier’s economic model of providing and advertising discounted fares,<sup>51</sup> the Tip Law merely regulates a curbside activity that is arguably incidental to a carrier’s economics.

Furthermore, the First Circuit mistakenly concluded that the Tip Law was not “tenuous, remote, or peripheral” because the First Circuit failed to focus on the major roles of airline carriers. The First Circuit reasoned that because checking a bag at the airport’s curb is a service provided by an airline, that service is not remote.<sup>52</sup> However, the Supreme Court clarified in *Rowe* that the ADA does not preempt state laws that have “only a ‘tenuous, remote, or peripheral’” impact on a carrier.<sup>53</sup> The Supreme Court concluded that where a state law focused directly on the “major role” of a carrier, that state law was not “tenuous, remote, or peripheral.”<sup>54</sup> The state law in *Rowe* would have required carriers to change their core delivery service, limiting the

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<sup>45</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992).

<sup>46</sup> *Id.* at 389.

<sup>47</sup> *Id.* at 389–90.

<sup>48</sup> *Id.* at 390.

<sup>49</sup> *Id.* at 389.

<sup>50</sup> *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 88–89 (1st Cir. 2011).

<sup>51</sup> *Morales*, 504 U.S. at 390.

<sup>52</sup> *DiFiore*, 646 F.3d at 88–89.

<sup>53</sup> *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 371 (2008).

<sup>54</sup> *Id.* at 375–76.

carriers' future ability to provide other services as a result.<sup>55</sup> But allowing skycaps to check bags at the curb is arguably not a major role of a carrier. Major functions of an airline that are likely to come to passengers' minds include activities such as determining flight routes, training and monitoring transport personnel, and transporting passengers and cargo in a safe manner.<sup>56</sup> In light of these major roles, it would be more reasonable to conclude that checking bags at a curb is at most an ancillary service because whether and how much a passenger tips a skycap for assistance with a bag outside of an airport does not implicate a major role of an airline. Therefore, the First Circuit should have concluded that the Tip Law merely has a peripheral impact on a carrier, and that the ADA does not preempt the Tip Law.

In conclusion, federal preemption should not prevail in this case. The Tip Law does not significantly impact American's operations. Nor does the Tip Law focus directly on American's "major role" as a carrier. Finally, the Tip Law regulates curbside activity that is incidental to American's rates, routes, and services. Therefore, the First Circuit was misguided when it ruled that the ADA preempted the Tip Law. In this case, the First Circuit should have affirmed the jury verdict that awarded damages to the skycaps.

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<sup>55</sup> *Id.* at 376.

<sup>56</sup> *See, e.g.,* Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998) (describing an air carrier's service as including "schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail").



