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**WHO'S THE BOSS?: NEW YORK FEDERAL DISTRICT
COURT HOLDS THAT SIGHT-SEEING FLIGHTS ARE NOT
REGULATED BY THE AIRLINE DEREGULATION ACT OF
1994—SEAAIR NY, INC. V. CITY OF NEW YORK,
2000 U.S. DIST. LEXIS 12115.**

TRAVIS M. PERRY

THE AIRLINE DEREGULATION ACT of 1994 mandates that the federal aviation regulatory scheme preempts any and all state and local airline regulations related to the service of an air carrier.¹ The act states that a “political subdivision of 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 that may provide air transportation.”² The Rules of the City of New York (“RCNY”) provide that “the use of a seaplane base or airport on city property requires a yearly permit from the Commissioner of the Department of Business Services.”³ In *SeaAir NY, Inc. v. City of New York*, a federal district court granted summary judgment for the City of New York (“New York”) and held that SeaAir could not provide seaplane air tours or sightseeing tours out of New York City.⁴ The East 23rd Street Seaplane Base (“Seaplane Base”), where SeaAir operated its tours from, was granted a permit in August of 1999, with the condition that air tours would not be permitted from this base.⁵ The court held that SeaAir was not an air carrier as defined by federal law because it did not provide air transportation.⁶ Therefore, the Airline Deregulation

¹ See *SeaAir NY, Inc. v. City of New York*, No. 99-C6055, 2000 U.S. Dist. LEXIS 12115 (S.D.N.Y. Aug. 21, 2000); see also, Airline Deregulation Act of 1994, 49 U.S.C.S. § 41713(b)(1).

² See 49 U.S.C.S. § 41713(b)(1).

³ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *2.

⁴ *Id.* at *1.

⁵ *Id.* at *1-2.

⁶ *Id.* at *3.

Act did not apply to SeaAir, and federal law did not preempt local law in this case.⁷

SeaAir argued that it does indirectly provide air transportation; therefore, the Airline Deregulation Act exempts New York from regulating its service.⁸ A complete review of the facts shows that the court may have granted summary judgment for New York in haste. New York, as a moving party, must shift the burden of proof by showing that no reasonable factfinder could find for SeaAir if the issue were to go to trial.⁹ If New York did not meet this burden, then summary judgment should not have been granted.¹⁰ New York did not meet this burden, and SeaAir did provide enough evidence for a reasonable factfinder to find for them. Therefore summary judgment was not appropriate.

In the City of New York, an RCNY regulation provides that the Commissioner of the Department of Business Services may grant a yearly permit that allows a seaplane base to operate.¹¹ The Commissioner, however, may only issue the permit under the condition that the base "will not be detrimental to the public safety and will be in the public interest."¹²

SeaAir, a seaplane company, used the Seaplane Base to provide both air tours and charter services.¹³ The bulk of SeaAir's business was derived from its sightseeing air tours.¹⁴ In March 1999, SeaAir began offering air tours from the Seaplane Base.¹⁵ In August of 1999, the Seaplane Base was granted its yearly permit with the restriction that the Seaplane Base could not provide service for sightseeing tours.¹⁶ Thus, SeaAir was no longer able to provide its most profitable service.

SeaAir and New York filed motions for summary judgment in the United States District Court for the Southern District of New York.¹⁷ SeaAir claimed that the action by New York violated the Airline Deregulation Act of 1994, the Federal Aviation Act, the Supremacy Clause, the Due Process Clause, the Equal Protec-

⁷ *Id.* at *6.

⁸ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *6 n.1.

⁹ *See* FED. R. CIV. P. 56.

¹⁰ *See id.*

¹¹ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *2.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at *3.

¹⁵ *Id.* at *2.

¹⁶ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *2-3.

¹⁷ *Id.* at *1.

tion Clause, and the Commerce Clause.¹⁸ The court granted summary judgment to New York on all counts and denied SeaAir's motion for summary judgment.¹⁹ By finding summary judgment, the court held that no reasonable person could find for SeaAir on any of these claims.²⁰

Regarding SeaAir's violation of due process claim, the court found that New York's action did not violate SeaAir's due process.²¹ In order to prevail on its due process claim, SeaAir was required to show that New York's government action was "arbitrary, conscience-shocking, or oppressive in a constitutional sense," and not simply "incorrect or ill advised."²² The court reasoned that New York did not violate the Due Process Clause because it was simply trying to reduce noise pollution in a noisy city.²³ In legislating a noise reduction ordinance to protect its citizens' health, New York provided a reasonable remedy for a legitimate government purpose.²⁴ Noise reduction is not arbitrary nor is it conscience-shocking because it is rationally related to the protection of the public welfare.²⁵ Therefore, the court held that there was no due process violation.²⁶

Following the same reasoning, the court also found that New York did not violate the equal protection requirements. First, the court pointed out that air tour providers are not a suspect class, and therefore, the government restrictions at issue were entitled to a rational basis review, rather than strict scrutiny review.²⁷ Second, New York had a legitimate government purpose for issuing its restriction, namely noise reduction.²⁸ Finally, New York's decision to restrict air transportation was rationally related to reducing noise.²⁹ Since the rational basis test was satis-

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See* FED. R. CIV. P. 56.

²¹ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *6. *See also* U.S. CONST. amend. XIV, § 1 ("No State shall. . .deprive any person of life, liberty, or property, without due process of law").

²² *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995).

²³ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *9; *see also Kaluczky*, 57 F.3d at 211.

²⁴ *See SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *9.

²⁵ *See id.* Noise regulation objectives are to protect the citizens' health (via their ears). Protecting the health of the public is a legitimate government purpose and not arbitrary. *See id.*

²⁶ *Id.*

²⁷ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *8.

²⁸ *Id.* at *8-9.

²⁹ *Id.*

fied, the court found no violation of the Equal Protection Clause.³⁰

In regard to the Supremacy Clause or Airline Deregulation Act issue, the federal district court's main contention was that SeaAir is entitled to federal preemption protection only if it is an air carrier.³¹ The court simply held that SeaAir is not an air carrier.³² Therefore, SeaAir is not covered by federal law and thus, can be regulated by local law.³³

The court argues that SeaAir is not an air carrier under the legal definition because it does not provide air transportation.³⁴ The court claims that individuals who travel on the seaplane tour do not go from a place in one state to another place in another state.³⁵ In describing SeaAir's service, the court states that "they depart from East 23rd Street Seaplane Base, fly around for a while, then deposit all passengers back where they started."³⁶ Crossing into New Jersey airspace does not constitute a place in another state.³⁷ The opinion points out that the tourists do not board the plane to go to New Jersey.³⁸ Since SeaAir cannot meet the requirements to be classified as an "air carrier" under federal law, the court refuses to grant it federal protection, and thus, New York is not violating the Supremacy Clause through its regulations.³⁹

But, the court's refusal to classify SeaAir as an "air carrier" may be subject to controversy. In determining whether SeaAir is an air carrier under federal law, it is logical to first analyze the appropriate statute. Under federal law, "air carrier" means "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."⁴⁰ SeaAir is a United States citizen, however it is not clear whether it provides air

³⁰ *Id.* at *9.

³¹ *Id.*

³² *Id.* at *3-4.

³³ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *6. *See also* U.S. CONST. art. VI, cl. 2. The Constitution is the supreme law of the land. If an RCNY regulation preempted the Airline Deregulation Act, it would be violating the Sixth Amendment of the Constitution, the Supremacy Clause.

³⁴ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *5-6; *see also* 49 U.S.C. § 40102(a)(2).

³⁵ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *6.

³⁶ *Id.*

³⁷ *Id.* at *5.

³⁸ *Id.* at *6. The court holds that "[p]assengers do not board a SeaAir tour plane in order to get to New Jersey (and if they do, they are solely disappointed when the plane brings them right back to the East River)." *Id.*

³⁹ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *6; *see also* U.S. CONST. art. VI, cl. 2.

⁴⁰ 49 U.S.C. § 40102(a)(2).

transportation directly or indirectly. New York and the court argue that SeaAir is not an air carrier because it does not own and operate the planes that are used in its business; it subcontracts these duties out to another company.⁴¹ Yet, some federal courts have held that a company whose business was selling tours and charters is an indirect air carrier.⁴² This authority is directly applicable to this fact situation. These holdings show that reasonable people could find that SeaAir is an indirect "air carrier."

However, New York and the court argue that SeaAir is not an air carrier because it does not provide "air transportation" as defined by federal law.⁴³ "Air transportation" is defined as "foreign air transportation, *interstate air transportation*, or the transportation of mail by aircraft."⁴⁴ SeaAir argues that since it operates over both New Jersey and New York state airspace, it provides interstate transportation.⁴⁵ Interstate air transportation under the code is "the transportation of passengers. . .by aircraft. . .between a place in. . .a State. . .and a place. . .in another State."⁴⁶ SeaAir does charter flights that fly commuters from New Jersey to New York.⁴⁷ That type of air transportation seems to meet the requirements to be classified as an air carrier.⁴⁸

When analyzing only the air tour service of its business, the fact that SeaAir's tours do cross into New Jersey airspace is undisputed.⁴⁹ Being a sightseeing tour, this space over and around New Jersey is the *place* the public is paying to visit. So, a passenger is transported between one place in New York (the base on 23rd) and another place in New Jersey (and/or the views from its airspace). It seems a reasonable person could find that this airspace could be considered a place in another State.

⁴¹ See *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *4-6.

⁴² See *Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 522 (9th Cir. 1972); see also *Civil Aeronautics Bd. v. Int'l Exch. Sch.*, 357 F. Supp. 819 (D. Utah 1973). These cases dealt with the former 49 U.S.C.S. App. § 1301 (1970). This code, with the same language, was incorporated into 49 U.S.C.S. § 40102, by Acts on October 17, 1978 and January 12, 1983.

⁴³ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *5-6.

⁴⁴ 49 U.S.C. § 40102(a)(5) (emphasis added).

⁴⁵ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *6.

⁴⁶ 49 U.S.C. § 40102(a)(25).

⁴⁷ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *2-3.

⁴⁸ See *id.* at *4; see also 49 U.S.C. § 40102(a)(25). SeaAir has provided charter services in the past. This would seem to definitively characterize SeaAir as an air carrier. However, even though the court does concede this fact, they fail to address the issue.

⁴⁹ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *6.

A hypothetical may better explain SeaAir's point. For example, imagine there is a charter bus company that takes individuals from a hotel in New Mexico to see the Grand Canyon in Arizona. One day, the chartered bus tour takes a group of people to see the Grand Canyon and then back to their hotel. This entire trip is accomplished in one day, over a period of hours. In this trip, has not the bus taken the tourists from a place in one state (New Mexico hotel) to a place in another state (Grand Canyon in Arizona)? Save for the fact that it did not occur in the air, no one would deny that the bus provided "interstate transportation" for these individuals under the definition of federal aviation law.⁵⁰ The objectives for the hypothetical's bus charter and for SeaAir's air tours are identical: sightseeing. The only difference is that one does it by air and one by ground. The contention that SeaAir provides interstate transportation from one state to another is not an unreasonable assertion.

Though the court did not decide the issue, New York argued that SeaAir was not an "air carrier" because it was not licensed.⁵¹ New York was referring to the provision that all air carriers must obtain and hold an air carrier certificate.⁵² SeaAir does not have a certificate. But the lack of a federal air carrier certificate does not prevent SeaAir from being classified as an (indirect) air carrier.⁵³ There is no language in the statute that requires an air carrier to have a certificate to be classified as an air carrier. SeaAir may be in violation of that provision that mandates certificate compliance, but this fact has no bearing on the Act's definition of "air carrier" itself.

The opinion that the court issued with respect to SeaAir's status as an "air carrier" is not unreasonable.⁵⁴ There are definitely some ambiguities in the law that do not address some substantive issues in this case. It is not clear whether SeaAir is an indirect air carrier, or whether it is providing air transportation. However, a reasonable person could find for either argument in this case. Since a reasonable person could find for SeaAir, New York did not meet its burden of proof. The United States Fed-

⁵⁰ See 49 U.S.C. § 40102(a)(25).

⁵¹ *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *5 n.1.

⁵² See 49 U.S.C. § 41101(a)(1) ("An air carrier may provide air transportation only if the air carrier holds a certificate issued under this chapter.").

⁵³ See 42 U.S.C. § 40102(a)(2). This law states that an air carrier "means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." *Id.*

⁵⁴ See *SeaAir*, 2000 U.S. Dist. LEXIS 12115, at *6.

eral District Court for the Southern District of New York was incorrect in granting summary judgment for New York. The court should have allowed the Supremacy Clause issue to go to trial for a reasonable factfinder could find for SeaAir.

