1979

State Regulation of Airlines and the Airline Deregulation Act of 1978

John W. Freeman

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
https://scholar.smu.edu/jalc/vol44/iss4/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
STATE REGULATION OF AIRLINES AND THE AIRLINE Deregulation ACT OF 1978

JOHN W. FREEMAN*

STATE REGULATION of airlines played an interesting role in the political decision to loosen federal controls on the aviation industry. Throughout the long, heated debate over deregulation, airlines operating under state jurisdiction were cited frequently as evidence that federal regulation had produced excessive fares and prevented innovative, low-cost services.¹ So it might seem ironic, at first glance, that the Airline Deregulation Act of 1978 (ADA) includes a provision which will have the practical effect of stripping the states of most of their economic regulatory authority over airlines.²


² Airline Deregulation Act of 1978, Pub. L. No. 95-504 § 4(a), 92 Stat. 1707 (1978) (adding § 105 to the Federal Aviation Act of 1958, 49 U.S.C. § 1305). The ADA generally forbids state regulation of routes, rates, or services of carriers having federal authority under Title IV of the Federal Aviation Act. While there is a theoretical area of jurisdiction left to states—airlines without federal authority—as a practical matter few airlines will remain under state jurisdiction. All airlines operating aircraft with more than 56 seats now have federal certificates under Title IV, including those airlines previously regulated by the states. For example, Pacific Southwest Airlines (PSA), Air California, Southwest Airlines, and Air Florida, all now have federal certificates. CAB Order No. 78-11-41 (November 9, 1978) and CAB Order No. 78-12-70 (December 12, 1978). Airlines
Upon closer inspection, any apparent inconsistency in the congressional approach to state regulatory authority disappears. When the experience of intrastate airlines was cited, it was intended to show how the industry would react once freed from the public utility type of regulation imposed under the existing federal statutes. The experiences cited generally predated the introduction of comprehensive state regulatory schemes. Moreover, since the thesis of deregulation is that the rigors of the marketplace will produce a more efficient industry than government regulation, it was logical for Congress to include as part of the ADA limitations restrictions on the states' power to engage in economic regulation. It is important to keep this congressional policy in mind in analyzing issues that arise under the preemption provisions of the ADA.

I. PREEMPTION UNDER PRE-ADA FEDERAL AND STATE REGULATORY SCHEMES

Prior to the ADA, there was no explicit statutory preemption of state regulation of airlines. There was, however, a significant body of case law on the subject of preemption generally, and on its application to airline regulation. The Supreme Court has analyzed a variety of state exercises of police power in the area of interstate commerce, most recently in *Ray v. Atlantic Richfield Co.* Under the Supremacy Clause of the Constitution, federal law is supreme and binding on the states, notwithstanding contrary provisions of state law. While the Court acknowledges that historic police powers of the states are not to be superseded by federal law with less than 56 seats are guaranteed federal authority through the statutory commuter exemptions and the Board's air taxi regulation if they comply with a few relatively non-burdensome requirements. See note 83 infra.

*See note 1 supra.*

*Id.*

*See generally S. REP. No. 631, 95th Cong., 2d Sess. 1-5; H.R. REP. No. 1211, 95th Cong., 2d Sess. 1-5 (1978).*


U.S. CONST. art. IV, § 2,

This Constitution, and the laws of the United States which shall be made in pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of the State to the contrary notwithstanding.
absent clear congressional intent, the congressional purpose may be evidenced in several ways. Short of an explicit statement of preemption, the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the goal sought to be obtained by the federal law and the character of the obligations imposed by it may reveal a similar need for exclusive federal control.

The above standards are used to determine whether Congress has completely foreclosed state legislation in a particular area. Even if this is not the case, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found where compliance with both federal and state law is physically impossible, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Federal involvement in economic regulation of air transportation began in 1926, when Congress passed legislation to promote aviation through mail subsidies. Indeed, most of the early federal programs which sought to foster commercial aviation utilized protective and lucrative systems of air mail subsidies. Strict public-utility type regulation began with the Civil Aeronautics Act of 1938. By 1958, Congress had recodified the economic regulation

---

10 Hines v. Davidowitz, 312 U.S. 52 (1941).
13 Id.
of commercial aviation in the Federal Aviation Act of 195817 (Act), complete with a system of federal licensing, rate regulation, subsidy and regulation of mergers, acquisitions and inter-carrier agreements. Under the Act, federal economic regulatory responsibility was vested in the Civil Aeronautics Board (CAB).18

Meanwhile, a number of states were developing their own forms of economic regulation of aviation, a few of which included extensive licensing and rate regulation.19 For example, California, through its Public Utilities Commission (CPUC), regulated intra-state rates of all carriers and imposed licensing requirements on carriers not holding certificates from the CAB.20 A questionnaire circulated in 1976 by the National Association of State Aviation Officials to its members revealed the following statistics: twenty-five states required certificates or permits of service; fifteen states regulated flight schedules; seventeen regulated quality of service; nineteen regulated discontinuance of service; and nineteen regulated rates.21 In addition, many states attempted to control airline mergers, liability insurance, and accounting.22

Obviously, there was a great potential for conflict between the federal and state governments. In analyzing such conflicts, it is important to recognize that Congress defined federal economic regulatory authority in terms of "interstate, overseas and foreign air transportation."23 For illustrative purposes, the statutory definition of interstate air transportation can be generally summarized as common carriage by aircraft between a point in one state and a point in any other state.24 This definition is applicable whether

---

18 Id.
19 CAL. PUB. UTIL. CODE §§ 2739-2769.5 (West 1975).
20 See id.
21 Memorandum to members from the National Association of State Aviation Officials, 1000 Vermont Avenue, N.W., Washington, D.C., 20005 (September 22, 1976) (summarizing results of questionnaire to members).
22 Id.
24 49 U.S.C. § 1301(22) (1976) defines the term as follows:
   "Interstate air commerce" . . . mean[s] the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, . . . in commerce between . . .
   (a) a place in any State of the United States, or the District of
such commerce moves wholly by aircraft, or partly by aircraft and partly by other forms of transportation.\footnote{25} In defining interstate air transportation, the origin and destination of the traffic, not a particular flight leg, determines the nature of the flight. For example, a passenger traveling from New York to Sacramento, who flies on one airline to Los Angeles and connects there with a second airline, is in interstate air transportation even with respect to the "intrastate" leg of his journey.\footnote{26} Therefore an airline operating within one state can engage in interstate air transportation by carrying traffic that is on an interstate movement. As every airline may at some time carry an interstate passenger, the CAB has in the past tempered this broad definition by asserting jurisdiction only over carriers with more than a de minimis amount of interstate traffic.\footnote{27}

Under the above definition of interstate air transportation the states were left to regulate airlines that carried a de minimis amount of interstate traffic. As noted, several states established regulations for intrastate airlines. In some cases, states also tried to regulate intrastate aspects of operations by carriers engaging in interstate air transportation pursuant to federal authority.\footnote{28} A single flight was thus subject to concurrent state and federal regulation of its operating authority and rates.

In the area of route authority, state regulation was struck down by the Supreme Courts of Massachusetts and Nebraska, where it

\begin{center}
\begin{itemize}
\item[25] Id.
\item[28] See note 19 supra.
\end{itemize}
\end{center}
involved the movement of planes on interstate schedules, and the state regulation would seriously frustrate the federal scheme of regulation. The Massachusetts Supreme Court struck down a state law forbidding supersonic passenger aircraft landings in that state. The Nebraska Supreme Court ruled that the state could not require an airline to serve part of an interstate route that the CAB had allowed the airline to drop. Similarly, the Colorado Public Utilities Commission reluctantly decided to suspend Frontier's service obligation to coincide with similar CAB action.

In the area of rate regulation, on the other hand, the California Supreme Court upheld the state's authority to regulate the fare paid by San Francisco-Los Angeles passengers on United and Western Airlines. The court found no implicit or explicit federal preemption of intrastate rate regulation, notwithstanding claims that federal rate and subsidy policies were affected by it. Later, however, the District Court for the Northern District of California struck down the CPUC's minimum rates for services provided by motor carriers that were exempt from Interstate Commerce Commission (ICC) rate regulation on the grounds that the ICC exemption preempted the state regulation. The United States Court of Appeals for the District of Columbia Circuit made it clear that only the CAB could set intrastate rates of federal carriers in Cali-

---


41 Re Frontier Airlines, 93 P.U.R. 71 (1952). See also Braniff Int'l, Inc. v. Fla. Pub. Serv. Comm'n, 576 F.2d 1100 (5th Cir. 1978) (regarding procedures for attacking Florida's regulation of interstate carriers' routes). In the regulation of surface transportation there is precedent for the idea that a state may not deny intrastate authority to a carrier that has authority from the federal government to carry interstate traffic in a particular market. Railroad Transfer Serv., Inc. v. Chicago, 386 U.S. 351 (1967); Interstate Busses Corp. v. Holyoke Street Ry. Co., 273 U.S. 45 (1926).

42 People v. Western Airlines, 42 Cal. 2d 621, 268 P.2d 723 (1954).

43 268 P.2d at 738.

In contrast to the scope of federal economic regulation, Congress established broader control over federal environmental and safety regulation. The Federal Aviation Administration (FAA) has broad authority over "air commerce." This term has been defined to include all operations within the limits of any "federal airway" or which directly affect or may endanger safety in "interstate, overseas or foreign air commerce." Federal regulation of aviation safety and noise therefore leaves no room for state police power regulation.

When a state or local government is acting as an airport owner or proprietor, however, the need to permit the government to impose restrictions on aircraft operations has been recognized by the courts. This is due to the requirement that the state compensate...

57 City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973). It is fairly clear that Congress could, if it chose to, totally occupy the field by extending economic regulation to local activities that are related to and have an effect on interstate commerce. See Colorado v. United States, 271 U.S. 153 (1926); Minnesota Rate Cases, 230 U.S. 352, 398-99 (1915).
59 The term "federal airway" means a portion of the navigable airspace of the United States designated as such by the FAA. 49 U.S.C. § 1301(18) (1976).
60 Interstate air commerce is defined as follows: (20) "interstate air commerce" . . . means the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, of the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

adjacent landowners for any constructive taking of their property.\(^4\) The Supreme Court specifically recognized these "proprietary
devices" in City of Burbank v. Lockheed Air Terminal, Inc.\(^5\) Under
the proprietary rights doctrine, courts have upheld reasonable, non-
discriminatory restrictions imposed by an airport proprietor acting
on his own, but not under compulsion of the state police power.\(^6\) The pattern of CAB regulation of airlines prior to the enactment
of the ADA was at times exclusive, occasionally concurrent with
state regulation, and even absent in some cases. Although the CAB
had broad jurisdiction, its de minimis rule left certain intrastate
routes unregulated by the federal government. Certain regulatory
powers were left to the states under the doctrine of "proprietary
rights" and other powers were exercised by the states under ques-
tionable authority. It was against this background that Congress en-
acted Section 105 of the ADA, explicitly preempting state regula-
tion of airline "rates, routes, and services."

II. THE AIRLINE DEREGULATION ACT OF 1978

The ADA establishes a thorough program of economic deregula-
tion of the airline industry, following a transition period culminat-
ing in the dissolution of the CAB.\(^7\) In the transition period, entry
into the industry is greatly liberalized, the CAB’s authority to
regulate rates is significantly reduced, and the standards used in
exempting transactions from the anti-trust laws are more difficult
to satisfy.\(^8\)

The principal new provisions on state regulation of air com-
merce are contained in Section 105.\(^9\) Section 105(a) generally
preempts state regulations of the “rates, routes, or services” of an

---

\(^{4}\) Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby,
328 U.S. 256 (1946).

\(^{5}\) 411 U.S. 624, 635 n.14.

\(^{6}\) See note 41 supra.

\(^{7}\) See note 48 infra. The term "economic regulation" will be used interchange-
ably with the term regulation of "rates, routes, and services."

\(^{9}\) See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705

\(^{4}\) See generally id. §§ 3(a), 7-16, 22, 26-28, and 37.

\(^{8}\) Id. § 4(a) (to be codified in 49 U.S.C. § 1305).
air carrier having authority under Title IV of the Act to provide interstate air transportation.\textsuperscript{49} The legislative history of Section 105 makes it clear that Congress intended to end dual federal-state economic regulation of interstate carriers.\textsuperscript{50} The House Report on a previous bill, H.R. 12611,\textsuperscript{51} which contained preemption provisions substantially equivalent to ADA Section 105, explains that the effect of the provision was to "prevent conflicts and inconsistent regulations . . . ."\textsuperscript{52} The Senate Report on S. 2493,\textsuperscript{53} which differed from the ADA only in very insignificant respects, specifically mentions various instances of state regulation of federal carriers’ rates and concludes, "[c]learly, a Federal grant of authority, whether a certificate or exemption, to engage in interstate transportation issued by the Federal Government should give the Federal Government the sole responsibility for regulating that air carrier."\textsuperscript{54} Plainly Congress did not want its decision to deregulate federal carriers to be undermined by increased or continued state regulations. As the House Committee on Public Works and Transporta-

\textsuperscript{49} Id. § 105(a) provides:

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision hereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide interstate air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under Section 401 of this Act, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property or mail conducted wholly within the State of Alaska.

Both the House and Senate Bills contained preemption provisions. The primary difference between the two provisions was then under the Senate version; preemption would not take effect so long as a carrier derived more than 50 percent of its revenues from intrastate operations. S. 2493, 95th Cong., 2d Sess. § 17 (1978). The Conference Committee selected the House version [which provided for immediate preemption]. Earlier regulatory reform measures, such as H.R. 8813 (Air Service Improvement Act of 1977), also contained preemption provisions. See Cong. Rec. H10,007-008 (daily ed. Sept. 23, 1977).


\textsuperscript{52} H.R. REP. No. 1211, 95th Cong., 2d Sess. 16 (1978).

\textsuperscript{53} S. 2493, 95th Cong., 2d Sess. (1978).

\textsuperscript{54} S. REP. No. 631, 95th Cong., 2d Sess. 98 (1978).
tion pointed out when considering H.R. 8813,\textsuperscript{55} which had a similar preemption provision:

with the passage of legislation . . . loosening Federal regulation of airline service and fares, it is possible that some states will enact their own regulatory legislation, imposing utility-type regulation on interstate airline service and fares. The Act includes a specific statutory provision precluding state interference with interstate service and fares.\textsuperscript{56}

Other provisions in the ADA include Section 105(c) which guarantees that an intrastate carrier receiving interstate authority will automatically be entitled to all of the authority it previously held from the state.\textsuperscript{57} Section 105(b)(1) preserves existing state and local authority to exercise proprietary rights as the owner or operator of an airport served by federal carriers.\textsuperscript{58} Section 105(b)(2) provides that an aircraft operating between two points in the same state shall not be considered to be operating in interstate air transportation solely by reason of crossing a state or federal boundary.\textsuperscript{59} Another provision of the ADA affecting the federal-

\textsuperscript{57} § 105(c) provides:
When any intrastate air carrier which on August 1, 1977, was operating primarily in intrastate air transportation regulated by a State receives the authority to provide interstate air transportation, any authority received from such State shall be considered to be part of its authority to provide air transportation received from the Board under title IV of this Act, until modified, suspended, amended, or terminated as provided under such title.

\textsuperscript{58} Pub. L. No. 95-504 § 4(a) (to be codified in 49 U.S.C. § 1305) § 105(b)(1) provides:
Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

\textsuperscript{59} Id. § 105(b)(2) provides:
Any aircraft operated between points in the same State (other than the State of Hawaii) which in the course of such operation crosses a boundary between two States, or between the United States and any other country, or between a State and the beginning of the territorial waters of the United States, shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transportation.

This provision, in effect, overrides the contrary language concerning aircraft op-
STATE REGULATION OF AIRLINES

state division of regulatory responsibility is Section 401(d)(4). This section allows intrastate carriers to operate under interline arrangements with federal carriers.

III. SPECIFIC AREAS OF POSSIBLE CONTROVERSY AS TO THE EFFECT OF THE ADA ON STATE REGULATION

The Section 105 preemption provisions were effective immediately upon adoption of the ADA. The CAB has issued interim policy statements in which it purports to take exclusive jurisdiction over all operations of certified carriers and air taxis which have received federal authority. There are several areas of possible conflict with states under the ADA and this policy which will be addressed in this article: state route and rate regulation of certificated carriers; state regulation of air taxis; the definition of "services"; and the status of the proprietary rights doctrine.

A. State Rate and Route Regulation of Certificated Carriers

Under the ADA, the clearest case of preempted state regulation is state refusal to give a federally certificated carrier intrastate route authority or state regulation of such a carrier's intrastate rates. Such a situation has arisen in California, where the CPUC

---

60 § 401(d)(4) provides in part:

Notwithstanding any other provision of this Act, any citizen of the United States who undertakes, within any State, the carriage of persons or property as a common carrier for compensation or hire with aircraft capable of carrying thirty or more persons pursuant to authority for such carriage within such State granted by the appropriate State agency is authorized—

(i) to establish services for persons and property which includes transportation by such citizen over its routes in such State and transportation by an air carrier or a foreign air carrier in air transportation; and

(ii) subject to the requirements of section 412 of this title, to enter into an agreement with any air carrier or foreign air carrier for the establishment of joint fares, rates, or services for such through services.


61 Id.

62 Id. at § 4(a).


64 See note 49 supra.
operates under a state constitution which provides that a state agency:

has no power to declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.65

Upon passage of the ADA, the CPUC sent all carriers which were operating in that state a letter indicating that it was constitutionally required to uphold the state statute and that, in its view, all carriers were required to file tariffs and abide by state regulations.66 The letter67 may indicate that the CPUC's defense of its regulation will be more than pro forma. Several certificated carriers, the United States, and the CAB obtained an injunction in Federal District Court to bar the CPUC from asserting jurisdiction in this area.68 Other states which have abstained from what they believe to be the full scope of their jurisdiction may reassert their regulatory authority if the California case upholds the state's authority.69

California's regulatory scheme over intrastate rates is similar to the CAB's. It includes advance filing of tariffs, suspension of potentially unlawful tariffs pending a hearing, and ultimate authority to prescribe the lawful rate after a final determination that the filed rate is unlawful.70 It is difficult to conceive of a more vivid illustration of the type of regulation that Congress sought to pre-

65 CAL. CONST., art. 3, § 3.5.
66 Letter from Frederick E. John, Executive Director of the California Public Utilities Commission to John M. Harmon, President of Golden West Airlines, Inc. (November 15, 1978).
67 Id.
68 Hughes Air Corp. v. Cal. Pub. Util. Comm'n, No. 78-2880 (N.D. Cal. March 9, 1979). The injunction was granted on a motion for summary judgment. As of the time of this writing, however, the time for appeal has not passed. The court did not issue a written opinion.
70 See note 19 supra.
empt. If the California scheme is upheld, then federal carriers may remain subject to dual regulation on the same flight. The state would regulate passengers whose origin and destination are within the state, and the Board would regulate interstate passengers.

This is the precise example of regulation which was cited in the House, Senate, and Conference Reports as the primary target of the preemption provision. For example, the House Report on H.R. 12611, which contained preemption provisions substantially equivalent to the final ADA, concluded:

The lack of specific provisions [concerning preemption] has created uncertainties and conflicts, including situations in which carriers have been required to charge different fares for passengers traveling between two cities depending on whether these passengers were interstate passengers whose fares were regulated by the CAB or intrastate passengers, whose fares were regulated by a State.

H.R. 12611 will prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to Title IV of the Federal Aviation Act, no State may regulate that carrier's rates, routes, or services.

The wording of Section 105(a) could not be more explicit. It provides that "no State shall regulate rates, routes, or services of an air carrier having authority under Title IV to provide interstate air transportation."

Since the statute clearly provides for preemption, it would appear that the state's only remaining argument would be that Congress lacks the constitutional authority to preempt intrastate regulation. However, the United States Supreme Court has repeatedly held Congress could, if it chose, extend federal economic regulatory authority to local activities that are related to, and have an effect on, interstate commerce. Even in the absence of explicit preemption such as provided for in Section 105 of the Act, courts have held that intrastate transportation is so closely related to interstate commerce that various state economic regulations were

71 See notes 51-54 supra and accompanying text.
72 See note 51 supra.
74 See note 49 supra.
incompatible with the federal regulatory schemes. Courts have held that a congressional intent to leave a particular subject free from government interference can preempt states just as clearly as an affirmative federal regulation.

Congress has, however, very clearly expressed its intent to preempt state economic regulation in areas it has deregulated at the federal level. Congress was aware, with the passage of legislation loosening federal regulation of airline service and fares, states might impose public utility type regulation. It sought to preclude this result by enacting Section 105.

The actual and anticipated attempts by states to fill the vacuum left by federal deregulation invite a contest over the legality of such action. The express language of the ADA indicates that Congress envisioned open entry and pricing as a means of encouraging competition. Further, the legislative history of the ADA is replete with evidence which establishes that Congress intended that states be stripped of all regulatory power over the routes and rates of federal carriers. Under the Commerce Clause and the Supremacy Clause, Congress has authority to regulate interstate commerce and to override any state law which interferes with that authority. Congress has clearly exercised its prerogative to legislate a national policy on economic regulation of airlines and to preempt state rate and route regulation. Such state regulation of federally certificated air carriers is, therefore, invalid.

B. State Regulation of Air Taxis

As noted above, states are preempted from economic regulation

---


77 "For a state to impinge on an area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act forbids." Garner v. Teamsters Union, 346 U.S. 485, 500 (1953).


79 Id.


81 See note 7 supra.
of carriers having "authority under Title IV [of the Act] . . . to pro-
vide interstate air transportation." There is a large group of
carriers known as air taxis which operate small aircraft (generally
less than fifty-six seats) and are exempt under Section 416 of the
Act and Part 298 of the CAB's Economic Regulations from the
certification and rate regulation requirements of the Act. Based
upon statutory construction, states may advance theories to justify
regulating some or all of the air taxis registered under Part 298
of the CAB's Economic Regulations.

A state asserting jurisdiction over all air taxis would have to
establish that a federal exemption under Section 416(b)(4) is not
"authority under Title IV [of the Act] . . . to provide interstate air
transportation" within the meaning of Section 105(a). Thus,
state regulation of air taxis would not be preempted
by virtue of
Section 105(a). This argument, however, runs against both the
clear meaning of Section 105(a) and the legislative history.

An airline registered under the CAB's air taxi regulations is
authorized to serve all points in the United States so long as it
meets the requirements of Part 298. As such, it would clearly
seem to have authority, by virtue of Section 416 of the Act, to
provide interstate air transportation.

This interpretation is reinforced by the legislative history of the
ADA. An earlier version of the ADA, S. 2493, specifically trig-

---

83 See note 49 supra.
COMMUTER EXEMPTION

(4) Subject to paragraph (5) of this subsection any air carrier
in air transportation which provides (A) passenger service solely
with aircraft having a maximum passenger capacity of less than
fifty-six passengers or (B) cargo service in air transportation solely
with aircraft having a maximum payload capacity of less than
eighteen thousand pounds, shall be exempt from the requirements
of subsection (a) of Section 401 of this title, and of such other sec-
tions of this Act as may be prescribed in regulations promulgated
by the Board, if such air carrier conforms to such liability insur-
ance requirements and such other reasonable regulations as the
Board shall from time to time adopt in the public interest. The
Board may by regulation increase the passenger or property capaci-
ties specified in this paragraph when the public interest so requires.
85 See note 83 supra.
86 Id.
87 See note 54 supra.
gered preemption for any carrier "certificated or exempted by the Board" under Title IV. The Conference Committee's selection of the even broader House language "authority under Title IV" would seem to include at least the two forms of authority specifically mentioned in S. 2493. In explaining the Senate provision, Senator Cannon stated that if Part 298 taxis retained their exempt status, federal law preempts state regulation over them.

The preemption of state regulation of air taxis is further reinforced by the fact that in Alaska, Congress specified that the state was only prohibited from regulating federally certificated carriers. In other states, therefore, it seems clear that exemption authority under Title IV would be sufficient. If Congress had intended otherwise, there would have been no need to create a specific exception for Alaska.

Finally, an argument could be made that an exemption from the federal certification requirement is not federal authority, but is simply action removing the need for federal authority. This argument runs counter to previous court interpretations of preemption in aviation and other areas. A congressional grant of authority to the CAB to exempt airlines from certain provisions of the Act has been held to take on the character of a decision that once a carrier is exempted, it should not be fully regulated. For example, in Pioneer Airways, Inc. v. City of Kearney, a Nebraska court relied upon this theory and overruled the state Public Utilities Commission's order preventing an exempted air taxi from dropping a route between two Nebraska points that were part of a flight that included out-of-state points. Also, in the rates area,
a surface carrier's federal exemption preempts state rate regulation.85

Even if a state concedes that it cannot regulate all air taxis, it may attempt to regulate air taxis which do not fly across state lines. The justification for state regulation would be that such carriers are not in "interstate air transportation," and thus, are not operating, within the meaning of Section 105(a), under "authority . . . to provide interstate air transportation."86 This approach is unsound. An airline need not operate across state lines to be engaged in interstate air transportation.87 The determinative factors are where the passenger's journey began and ended.88 Aircraft whose origin and destination lie in a single state can be carrying a significant number of connecting passengers who are on an interstate journey. The mere fact that an air taxi does not operate across state lines does not, therefore, remove it from the realm of congressional authority.

Where preemption is conceded as to those airlines carrying interstate traffic pursuant to their registration as federal air taxis, there is a theoretical, although highly unlikely, possibility that a few of the air taxis registered with the CAB carry no (or de minimis) interstate traffic, and the issue arises as to whether states can regulate those airlines.89

The language of Section 105, "air carriers having authority under Title IV . . . ," suggests that it is sufficient to have federal authority to provide interstate operations regardless of whether the airline's operations actually require federal authority—i.e., to conduct those operations without federal authority would violate the Act. As discussed above, the legislative history of Section 105 shows that Congress clearly intended to preempt state regulation of air taxis, and it gave no indication that any subgroup of taxis

88 Id.
89 There is, of course, no bar to state regulation of an airline that has no authority to and does not in fact carry interstate traffic.
(i.e., those that do not, in fact, carry interstate traffic) was to be excluded. Thus, in explaining S. 2493, which was in all relevant respects identical to Section 105, Senator Cannon indicated that, if a Part 298 carrier retains the exempt status which it had prior to the ADA, federal law preempts state regulation over it. Moreover, as noted above, there are exceptions to both the pre-emption provision and the statutory commuter exemption for air taxis in Alaska. Those exceptions reinforce the conclusion that other states are preempted from regulating all air taxis. This is because the exceptions would be unnecessary if states could regulate air taxis.

It is possible, however, to construct an argument that the ADA does not preempt state regulation of air taxis that carry no interstate traffic. Section 105 of the Act applies only to "air carriers." In the past this term has meant a carrier engaged in interstate traffic. Moreover, the CAB has declined to exercise jurisdiction over carriers with less than an unspecified "de minimis" percentage of interstate traffic. Further, there is some legislative history to the effect that Congress did not intend to diminish state authority over truly intrastate carriers. However, the CAB's de minimis rule is vague and is not statutorily required. Thus, it is difficult to argue that Congress implicitly sanctioned that rule by enacting Section 105.

Two other provisions of the ADA may bear on this issue. Section 416(b)(4) provides a statutory exemption from the certificate requirement for carriers operating aircraft with a maximum capacity of less than fifty-six passengers, provided that the carrier complies with CAB regulations regarding insurance and other re-
For the reasons set out above, an exemption granted pursuant to Section 416, whether directly by the statute or indirectly by CAB regulations, is "authority under Title IV [of the Act] . . . to provide interstate air transportation." Therefore, Section 416(b)(4) does not alter the above analysis of the question of preemption of state regulation of air taxis.

Finally, Section 401(d)(4) permits intrastate carriers with more than thirty-seat aircraft to interline with federal carriers without complying with other provisions of the Act, including those which would otherwise require a federal certificate to carry interstate traffic. This provision makes sense only if it is read to apply to airlines that lack federal authority from other sources such as Section 416(b) or Part 298. Thus, an intrastate carrier that chooses not to obtain any type of federal authority may interline with the federal system and not violate the Act. The provision would seem to have no applicability to a carrier that holds federal authority to carry interstate traffic (via interlining or otherwise) under Part 298 or Section 416(b).

As a practical matter, it makes little difference whether Section 105 is limited to CAB authorized air taxis which actually carry interstate traffic. It is difficult to conceive of an air taxi that affirmatively restricts its passengers to travelers on intrastate journeys, so all air taxis will in fact carry a measurable amount of interstate traffic. Therefore, it is reasonable to conclude that preemption extends to all air taxis registered with the CAB.

In evaluating the issues discussed above regarding state regulation of air taxis, there is an important federal interest at stake: throughout the ADA, Congress has relied heavily on competition by air taxis, unrestricted by government regulation, to provide incentives for industry efficiency. For example, air taxis are allowed to apply for authority that is currently held by other carriers, but not used. Air taxis are eligible to bid for subsidies to provide essen-

110 See note 83 supra.


113 See note 83 supra.

tial air service to small communities that is scheduled to be dropped by the incumbent certificate holder.\footnote{115} And, air taxis are guaranteed an exemption from the Act's licensing requirement.\footnote{116} To permit states to restrict the rate structure and pricing policies of authorized air taxis would seriously undermine these important federal policies.\footnote{117}

C. Definition of Services

Thus far, the discussion has revolved around the issue of which carriers fall within the scope of the Section 105(a) preemption. Remaining issues revolve around the scope of federal and state regulatory responsibility over carriers that are within the scope of that provision. States are preempted from regulating those carriers' "routes, rates, or services."\footnote{118} The explicit preemption of state regulation of rates and routes is fairly straightforward. The term "services," on the other hand, is susceptible to interpretation. Clearly, it includes such state regulations as those discussed above in the pre-ADA cases: an outright ban on all supersonic aircraft;\footnote{119} regulations protecting intrastate carriers from interstate competitors;\footnote{120} and regulation of the manner and pattern of service provided to points designated in the federal certificate.\footnote{121}

The CAB has in the past taken an expansive interpretation of its jurisdiction over carriers' services. Under such interpretation the CAB has regulated diverse aspects of air transportation such as liquidated damages for overbooking,\footnote{122} segregation of smoking and nonsmoking passengers,\footnote{123} notice of the minimum liability for


\footnote{116} See note 83 supra.

\footnote{117} See note 90 supra.


\footnote{120} Braniff Int'l, Inc. v. Fla. Pub. Serv. Comm'n, 576 F.2d 1100 (5th Cir. 1978).

\footnote{121} Pioneer Airways, Inc. v. City of Kearney, 199 Neb. 12, 256 N.W.2d 324 (1977).

\footnote{122} 14 C.F.R. §§ 250.1-.10 (1978).

\footnote{123} 14 C.F.R. §§ 252.1-.5 (1978).
loss, damaged and delayed baggage,\textsuperscript{154} charges for headsets,\textsuperscript{155} alcoholic beverages,\textsuperscript{156} excess baggage,\textsuperscript{157} and entertainment,\textsuperscript{158} ground packages tied to charter transportation,\textsuperscript{159} and space allocable to various classes of service for ratemaking purposes.\textsuperscript{160} A recent decision from another area of transportation by the United States Court of Appeals for the District of Columbia, \textit{D. C. Transit Systems, Inc. v. Washington Metropolitan Area Transit Commission},\textsuperscript{181} supports an expansive reading of service regulation.

Based on the CAB's traditionally expansive definition of services, and \textit{D. C. Transit Systems, Inc.}, the CAB has maintained its broad reading of the term "services."\textsuperscript{155}\textsuperscript{182} Preemption is considered, by the CAB, to extend to all of the economic factors that go into the provision of air service and make up the \textit{quid pro quo} for the passenger's fare.\textsuperscript{183} Under this interpretation, states would be preempted from regulating any of the aspects of service received by passengers including flight frequency, minimum liability insurance, smoking, meals, and other aspects of flight services. Other state attempts to affect the quality of carrier service through bonding or minimum capitalization requirements would also be preempted.\textsuperscript{184}

Certain types of state regulation may continue to be valid in the absence of a finding that their enforcement is contrary to federal policies. For example, tariff filing with advance notice provisions consistent with the federal notice provisions might be

\textsuperscript{154} 14 C.F.R. § 221.176 (1978).
\textsuperscript{155} Price v. Trans World Airlines, 481 F.2d 844 (9th Cir. 1973); see generally 14 C.F.R. § 221.3 (1978).
\textsuperscript{156} 33 Fed. Reg. 4456 (1968).
\textsuperscript{157} Baggage Allowance Tariff Rules in Overseas & Foreign Air Transportation, CAB Order No. 76-3-81 (March 12, 1976).
\textsuperscript{158} Price v. Trans World Airlines, 481 F.2d 844, 847 (9th Cir. 1973).
\textsuperscript{159} See 14 C.F.R. § 378 (1978).
\textsuperscript{160} Continental Air Lines v. CAB, 551 F.2d 1293 (D.C. Cir. 1977) (citing Domestic Passenger Fare Investigation Phase 9, CAB Order No. 74-3-82 (March 18, 1974)).
\textsuperscript{161} 466 F.2d 394 (D.C. Cir. 1972).
\textsuperscript{162} See note 63 supra.
\textsuperscript{163} Id.
\textsuperscript{164} Id. This would be under the type of analysis in D.C. Transit Systems, Inc. v. Washington Metro. Area Transit Comm'n, 466 F.2d 394 (D.C. Cir. 1972), which recognizes that capitalization is an aspect of rate regulation.
valid for informational, not regulatory, purposes. This may not be true, however, if the CAB limits or abolishes advance filing. Assuming such a change was an effort to prevent competitors from engaging in parallel pricing behavior, state regulation may frustrate federal policy, and thus, would be preempted.

State regulation of false or misleading practices also may survive preemption. The CAB has extensive regulations on overbooking. In Nader v. Allegheny Airlines, however, the Supreme Court of the United States specifically upheld an action at common law for misrepresentation as a result of overbooking. The Nader case concluded that there was no irreconcilable conflict between the Act's scheme and the state common law remedy. The case may not, however, stand for the proposition that a state may generally regulate false or misleading carrier practices. The reason for this is the CAB's overbooking rules specifically permit the passenger to waive the liquidated damages which have been set by the CAB and pursue common law rights. If the CAB chose to eliminate that option it is not clear whether the common law right would survive.

In sum, even with the explicit statutory provision on preemption there may be gray areas in deciding the permissible scope of state regulation of federally authorized carriers. In those cases, courts will resort to the type of interest analysis used where there is no explicit provision on preemption. In those cases, the court will also balance the federal interest in freeing airlines carrying interstate traffic from economic regulation so as to encourage competition against the state interest in regulating aviation in order to protect the public health, safety, and welfare. Obviously, the state's

---

136 See note 121 supra.
138 Id.
139 See 14 C.F.R. § 250.7 (1978).
140 For example, if the Board concluded that disclosure of overbooking was not required and would exacerbate the problem of multiple reservations, then enforcement of the common-law right might conflict with federal policy.
142 Id.
interest in public health, safety, and welfare will be given greater weight than its interest in purely economic regulation.

D. Proprietary Rights

The one area that is clearly preserved for the state is its "proprietary right" as an airport owner or operator. The section-by-section analysis of a substantially identical earlier version of the House Bill, H.R. 8813, which had an identical provision, states: "This is not intended to preempt the exercise of normal proprietary functions by airport operators, such as the establishing of curfews and landing fees which are consistent with other requirements in Federal law and do not unduly burden interstate commerce."

This language is consistent with pre-ADA cases upholding local airport authorities' rights to impose landing fees, noise regulations, and curfews. However, those local rights are limited by prior case law in several important respects. First, the local action must truly be that of the airport proprietor and not that of the state acting under its police power. Second, the regulation cannot interfere with the FAA's flight patterns. Finally, the regulation must be reasonable, nondiscriminatory, nonburdensome to interstate commerce, and the local process for resolving issues arising under its proprietary regulations cannot be unreasonably slow.

---


144 See note 58 supra.

145 See note 55 supra.


152 See British Airways Bd. v. Port Auth. of New York, 558 F.2d 75 (2d Cir.), on remand, 437 F. Supp. 809 (S.D.N.Y.), aff'd & modified, 564 F.2d 1002 (2d Cir. 1977).
Airport curfews are currently in effect in various cities. In some instances, the FAA has refused to permit a specific curfew on the grounds that it would disrupt federal flight plans and be a safety hazard. There are now specific procedures for evaluating such measures as curfews with Environmental Protection Agency input.

Where a state is preempted from a specific type of regulation, it cannot attempt to accomplish indirectly what it is forbidden from doing directly. This principle, coupled with the general requirement of reasonable and nondiscriminatory treatment of airport users and the general policy of liberal entry in the ADA, would create a very strong barrier against efforts to use environmental regulation to exclude new entrants. This is particularly true where incumbent airlines are allowed to expand their aircraft operations (and therefore their noise and pollution) without suffering the restrictions placed on new entrants.

In sum, the Airline Deregulation Act phases out economic regulation of airlines having federal authority at both the federal and state level. The CAB has interpreted the ADA to preempt all state regulation of traffic on airlines with federal certificates, or with an exemption from federal certification. Thus, during the transition to complete deregulation the CAB will generally treat former intrastate carriers the same as existing interstate carriers for most regulatory purposes. It is the author's opinion that the CAB's interpretation of the preemption provision correctly recognizes the congressional intent to deregulate airlines at both the federal and state level. While this approach may end virtually all state economic regulation of airlines, that result is consistent with the policy behind the ADA—that unregulated airlines will operate more efficiently than regulated airlines.

---

154 411 U.S. at 639.
155 Id.
157 See note 44 supra and accompanying text.
158 See note 47 supra and accompanying text.
159 See note 1 supra.
Comments
and
Case Notes