Federal Preemption of State Laws Regulating For-Hire Motor Carriers Transporting Property (Including Baggage) as Part of an Intrastate Air/Truck Shipment*

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In some states, a motor carrier may be required to obtain intrastate operating authority when it is transporting property (including baggage)[1],

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1. For purposes of this paper, the focus is on intermodal movements of property, not passengers. While some references to passenger transportation do appear in the following discussion, an in-depth analysis of federal preemption relative to passenger movements has not been attempted.

subsequent to its movement by an air carrier, in intrastate commerce. Defending the integrity of their motor carrier regulation from further encroachment by the federal government, those states discern no federal preemption of state motor carrier regulation when the entire movement, including the air portion, occurs wholly within the boundaries of one state. They argue they are free to impose different forms of economic regulation on the involved motor carriers.[2] There is little doubt, however, that economic regulation by the individual states is federally preempted under certain circumstances even in the context of wholly intrastate movements. Resting on the premise that motor vehicle service which is rendered under certain circumstances constitutes the service of an air carrier, not the independent service of a motor carrier, federal preemption reaches services rendered in connection with movements that do not cross a state's boundary. The parameters within which such preemption occurs are the focus of this paper.

STATUTORY FRAMEWORK

The preemption provision of the Federal Aviation Act (also referred to as the Airline Deregulation Act) contained in Section 1305(a) provides:

> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof 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 subchapter IV of this chapter to provide air transportation.[3]

Application of this provision revolves around three criteria: (1) the nature of the air carrier involved; (2) the relationship between the state regulation and an air carrier's rates, routes or services; and (3) the characterization of the activities which would be affected by the state regulation as "air carrier services."

Section 10526(a)(8) of the Interstate Commerce Act[4] exempts from the jurisdiction of the Interstate Commerce Commission (ICC) certain motor vehicle movements (i.e. motor carrier operations) which are performed in connection with air movements. Generally referred to as the "Incidental to Air" exemption, Section 10526(a)(3) provides in pertinent part:

> (a) The Interstate Commerce Commission does not have jurisdiction under this chapter over. . .
> (8)(B) transportation of property (including baggage) by motor vehicle as part of a *continuous movement* which, prior or subsequent to such part of the

2. An examination of each state's regulatory scheme is beyond the scope of this paper.
3. 49 U.S.C. app. § 1305(a)(1) (1988).
4. 49 U.S.C. § 10526(a)(8) (1988).

continuous movement, has been or will be transported by an air carrier. . . .[5]

The pertinent legislative history of this provision, as well as decisions of the ICC and the federal and state judiciaries which have considered this statutory enactment and its predecessor,[6] are helpful in determining the extent to which motor carrier services in the context of an intermodal air/truck movement should be viewed as air carrier services rather than the independent services of a motor carrier.

ARE WHOLLY INTRASTATE ACTIVITIES WITHIN THE SCOPE OF THE SECTION 1305 PREEMPTION?

Section 1305(a)(1) is not expressly limited to transportation which moves across a state boundary. The only limitations apparent from the express terms of the provision relate to the nature of the air carrier which must be involved and the nature of the activities which must be affected by the state regulation. With regard to the nature of the air carrier, Section 1305(a)(1) refers to an *air carrier having authority under Subchapter IV [of the Federal Aviation Act] to provide air transportation.* An examination of the Aviation Act's definitions of an air carrier[7] and air transportation[8] in conjunction with the licensing requirements of Section 1371 (Subchapter IV) demonstrate that Section 1305(a)(1) applies to any air carrier which undertakes to provide interstate, overseas or foreign air transportation and has either received authority from the Civil Aeronautics Board[9] (CAB) or been exempted from certification requirements.[10] By the plain language of the statute, Section 1305(a)(1) applies to any state law which relates to the rates, routes, or services of air carriers engaged in interstate commerce. It is not limited in application only to the *interstate* rates, routes, or services of an air carrier.[11] Any doubts which might exist in this regard are dispelled upon examination of the legislative history of Section 1305.

The language of Section 1305(a)(1) was originally passed by the

5. *Id.* (emphasis added).

6. 49 U.S.C. § 1303(b)(7a).

7. 49 U.S.C. app. § 1301(3).

8. 49 U.S.C. app. § 1301(10).

9. All functions, powers, and duties of the Civil Aeronautics Board were terminated or transferred by Pub. L. No. 95-504, § 40(a), 92 Stat. 1744, (1978) effective on or before January 1, 1985. The function of issuing certificates of authority pursuant to §§ 1371(a)-(c) was transferred to the Department of Transportation. *See* 49 U.S.C. §§ 1551(a), (b).

10. *See* Hughes Air Corp. v. PUC of Calif., 644 F.2d 1334, 1337-1339 (9th Cir. 1981) holding that Congress intended to include carriers exempted from CAB certification pursuant to [49 U.S.C. § 1386(b)(1)] within the scope of the preemption provision.

11. *See* Hughes at 1339-1341 holding, *inter alia*, that Section 1305(a)(1) preempts state regulation of the intrastate services of CAB-certificated carriers.

House as an amendment to the Airline Deregulation Act of 1978.[12] With a minor change relating to shipments between points in Alaska[13], which will be discussed below, the House version of the preemption provision survived the Conference Committee and was enacted as part of the Act in 1978.[14]

Notably, the original preemption provision as proposed by the Senate would have allowed the individual states to continue regulating an interstate carrier as long as such carrier was generating at least fifty percent of its revenues from intrastate operations and the state had issued intrastate authority to such carrier prior to January 1, 1979.[15] Further, it contemplated that as soon as such a carrier derived more than fifty percent of its revenues from its interstate operations, all of its operations would become subject to the CAB's jurisdiction.[16]

Rejecting the Senate's scheme in this regard, the House Committee on Public Works and Transportation noted that:

> [E]xisting law contains no specific provision on the jurisdiction of the States and the Federal Government over *airlines which provide both intrastate and interstate service.* The lack of specific provisions has created uncertainties and conflicts. . . . [Section 1305(a)(1)] 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 routes, rates or services.*[17]

One area in which the uncertainties and conflicts arose due to such lack of specific provisions related to situations in which carriers had been required to charge different fares for passengers traveling between two cities depending on whether they were interstate or intrastate passengers.[18] The Committee noted that an interstate carrier may carry intrastate passengers whose entire journey is between two cities in a single state and interstate passengers who are traveling between the same two cities in a single state then connecting to another airline to complete an out-of-state journey.[19] Under the existing law, the Committee noted the interstate passengers fares would be regulated by the CAB while the intrastate fares would be regulated by a state.[20] It was this dichotomy

12. H.R. REP. No. 1211, 95th Cong., 2d Sess. 15-16 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3751-52.

13. Now contained in 49 U.S.C. app. § 1305(a)(2).

14. S. 2493, 95th Cong., 2d Sess. (1978).

15. See reference thereto in H.R. REP. No. 1779, 95th Cong., 2d Sess. 94, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3773, 3804.

16. *Id.*

17. H.R. REP. No. 1211, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3751-52 (emphasis added).

18. *Id.*

19. *Id.* at 16 n.1.

20. *Id.* at 16.

which the House intended to eliminate by proposing its version of preemption.

The only amendment made by the Conference Committee to the House version of preemption related to certain transportation between points in Alaska. In the case of such transportation, the amendment limited federal preemption pursuant to Section 1305(a)(1) to air transportation *provided under a Section 1371 certificate of public convenience and necessity.*[21] Thus, in Alaska's case, the preemption is governed by the characterization of the transportation as regulated interstate traffic, as opposed to the focus in all other states which is the involvement of a carrier operating pursuant to authority under Subchapter IV of the Federal Aviation Act. The Conference Committee noted that the limitation on federal preemption in the case of Alaska was necessitated by the special circumstances present there with regard to cargo. It stated that "[d]ue to geographic and climatic conditions a great deal of cargo is shipped to and consolidated in southern points in Alaska and is subsequently distributed to points throughout the State. Where such shipments occur, the conferees intend that the subsequent shipments by air between points in Alaska be subject *only to State* economic regulation. . ."[22] Obviously, there would have been no need to exempt from preemption intrastate transportation within the State of Alaska if the framers of the legislation had not intended that the preemption language of subparagraph (a)(1) would apply to operations conducted by an interstate air carrier wholly within a single state.[23]

Federal preemption under Section 1305(a)(1) in the context of wholly intrastate transportation by air has been recognized by some of the very states that presently seek to regulate the truck portion of intrastate air/truck movements. In 1981, the Texas legislature amended the Texas Aeronautics Act. The Texas Aeronautics Act, as amended, defines an air carrier as "every person owning, controlling, operating or managing any air craft as a common carrier in the transportation of persons or property for compensation or hire which conducts all *or part* of its operation in the State of Texas."[24] However, it excludes from the definition "air carriers carrying passengers or property as common carriers for compensation or hire in commerce between a place in [Texas] and a place outside

21. *See* H.R. REP. No. 1779, 95th Cong., 2d Sess. 95, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3773, 3805 (emphasis added).

22. *Id.*

23. *See also* discussion of Section 1305(a)'s legislative history, in Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 780 (5th Cir. 1990), holding that Section 1305(a)(1) preempts state regulations of advertising activities conducted within the State of Texas by an interstate air carrier.

24. Tex. Rev. Civ. Stat. Ann. art. 46c-1(e) (Vernon's Supp. 1990) (emphasis added).

[Texas]."[25] Pursuant to these provisions, the Texas Aeronautics Commission considered regulating interstate air carriers with respect to their wholly intrastate services. Interpreting the language of the Texas Aeronautics Act for the Commission, the Attorney General of Texas noted that the precise purpose of the amendatory legislation was to "exemp[t] air carriers who carried passengers or property for commercial compensation between Texas and a place outside of Texas."[26] The Attorney General therefore opined that:

> *[N]o* provision of the Texas Aeronautics Act applies to entities carrying passengers or property as a common carrier for hire between any point in Texas and any point outside of the state. The statute . . . twice states that interstate carriers are beyond the reach of the Texas Aeronautics Act. . . .
>
> [T]he statute is unambiguous. Any entity that *at any time* carries passengers or property as a common carrier for hire between a place in Texas and a place outside of Texas is not an "air carrier" as defined by the Act. It is not subject to *any* provision of the Act. . . .
>
> [T]he Act does not reach entities offering interstate air service. They are outside of the jurisdiction of the [Texas Aeronautics] Commission *even if they offer some service solely between points within Texas*. The Commission has *no jurisdiction over interstate carriers and has no authority to impose any burden* on or extend benefits to them under the Texas Aeronautics Act.[27]

Federal preemption of state regulation of interstate carriers' intrastate air transportation pursuant to Section 1305(a)(1) does not offend the tenth amendment. In *Hughes Air Corp. v. PUC of California*[28], the Ninth Circuit rejected the notion that air transportation regulation is such an integral and important aspect of state life that federal preemption of state regulation of intrastate air transportation would interfere with the state's sovereignty guaranteed by the tenth amendment. Finding that "[t]here is little difference between state regulation of air transportation and state regulation of railroad transportation", the Ninth Circuit concluded that Congress could (and did) preempt state regulation of the *intrastate* rates of air carriers encompassed by Section 1305(a)(1) (i.e. both carriers holding authority or exempted pursuant to Subchapter IV of the Federal Aviation Act). The court held that there was no conflict between such preemption and the tenth amendment of the Constitution because Congress had a rational basis for its legislation and the regulation of air transportation is not an integral governmental function.[29]

Drawing on the parallel between air and rail regulation (or rather, deregulation) in recent years can be very instructive to our analysis here. In

25. *Id.*
26. *See* 1981 Tex. Gen. Law Ch. 767, § 1(e).
27. Op. Tex. Att'y Gen. JM-868 (1988) (emphasis added in part).
28. 644 F.2d 1334 (9th Cir. 1981).
29. *Id.* at 1339-1341.

the area of rail regulation, federal preemption of state regulation of interstate rail carriers' intrastate activities has been scrutinized by the United States Supreme Court. In *Interstate Commerce Commission v. Texas*[30], the Court determined the extent of the ICC's authority to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement under 49 U.S.C. § 10505(f).[31] The Court found that the ICC had authority to exempt from state regulation the motor freight portion of Plan II TOFC/COFC shipments, even though the intermodal shipment *moved entirely within the State of Texas*, when the rail carrier was an *interstate* rail carrier.[32]

In *ICC v. Texas*, the State of Texas acknowledged that it had no power to regulate the intrastate truck portion of interstate intermodal rail/truck shipments. Texas asserted jurisdiction only in the case of wholly intrastate intermodal shipments conducted by interstate rail carriers in Plan II TOFC/COFC service. In support of its position, Texas argued that 49 U.S.C. § 10521(b)(1) preserved its jurisdiction to regulate the intrastate transportation provided by a motor carrier.[33] The Court disagreed. It stated:

> Since all of the railroads . . . are engaged in interstate commerce, the [ICC] has authority over the intrastate transportation, as well as the interstate transportation, provided by such carriers. . . .
>
> [T]he State's interpretation of Section 10521(b)(1) would make that section authorize state regulation of TOFC/COFC services in areas where it has already been rejected. The term "intrastate transportation provided by a motor carrier" [in Section 10521(b)(1)] must refer either to the intrastate motor portion of any TOFC/COFC movement or to the entire intrastate movement when a portion of it is performed by truck service. If the term refers only to the motor portion, the State's reading of the statute would preserve the State's power to regulate the intrastate motor portion of an interstate Plan II TOFC/COFC shipment. But Texas acknowledges that it has no such power. Alternatively, if the term refers to every intrastate shipment that includes a motor segment, the railroad must be regarded as a "motor carrier" even during the rail portion of the intermodal movement, and the [Railroad Commission] would retain the power to regulate the entire intrastate movement. Again, Texas does not claim that authority. We think it clear that the only way to square the words of the statute with those aspects of the ICC's jurisdiction that the State does accept is to hold that the ICC's authority over intrastate transportation provided by an interstate rail carrier encompasses the entire movement, even when it includes a truck segment under Plan II.[34]

Attempts to distinguish *ICC v. Texas* on the basis that there the over-

30. 479 U.S. 450 (1987).
31. *Id.* at 452-453.
32. *Id.* at 455-457 (emphasis added).
33. *Id.* at 455 n.8.
34. *Id.* at 456, 458-459.

the-road transportation was provided in rail-owned equipment and the motor carriers involved were affiliates of the railroads are unpersuasive. The pivotal factor in *ICC v. Texas* was the Court's finding that the intermodal service provided pursuant to a Plan II rail tariff is a rail carrier's service and the truck component thereof is not to be viewed as the service of an independent motor carrier. Similarly, as will be discussed further in this paper, Congress has indicated instances where the truck component of an air/truck movement is not to be treated as the service of an independent motor carrier. In such instances, truck service is integral to the service of the involved air carrier and should be viewed as a component of air service. Thus, the Supreme Court's reasoning is set fort in *ICC v. Texas* is equally applicable in this context. Distinguishing between the wholly intrastate truck portion of an air/truck movement which crosses the state's boundary (i.e., an interstate movement) and the wholly intrastate truck portion of a wholly intrastate air/truck movement is an illogical in the context of air transportation as it was in the context of rail regulation. Section 10521(b)(1) of the Interstate Commerce Act[35] does not preserve the states' jurisdiction to regulate such service in either case.

Does State Economic Regulation of Motor Carriers "Relate to" Air Carrier Services?

Pursuant to Section 1305(a)(1), a state's regulation is preempted only if it "relates to" the rates, routes, or services of an air carrier. In order for the state regulation to "relate to" these matters, there must be a connection or reference thereto. Whether a state regulation has the necessary nexus to an air carrier's activities is not always readily apparent. Certainly, the relationship between a state law aimed at economic regulation of most carriers would upon initial examination seem to have no connection with air carriers' rates, routes, or services. However, where the state seeks to apply such a law to motor carriers providing transportation which is integral to air service,the connection becomes more discernable. The connection is made even more clear when the airlines are threatened with civil penalty enforcement actions as a consequence of their use of motor carriers not complying with a state's licensing or rate requirements.

In *Trans World Airlines, Inc. v. Mattox*, the Fifth Circuit concluded that although the state laws under examination were not aimed specifically at airlines, and did not clearly attempt to prescribe the airlines' rates, it was inescapable that such laws (in that case, deceptive advertising laws) did "relate to" rates when applied to airline fare advertising since the enforcement of a state law regulating fare advertising against airlines obvi-

35. 49 U.S.C. § 10521(b)(1).

ously had a connection with or reference to the airlines' rates within the meaning of Section 1305(a)(1).[36] To define the "relating to" phrase of Section 1305(a)(1), the Fifth Circuit relied on the Supreme Court's decision in *Shaw v. Delta Airlines, Inc.*,[37] in which the Court noted that a law related to an employee benefit plan, in the normal sense of the phrase, if it had "a connection with or reference to" such a plan.[38]

In *Shaw v. Delta* the Supreme Court held that it had to give effect to the plain "relating to" language of the statute preempting state laws unless there was good reason to believe that Congress intended the language to have some restrictive meaning.[39] To determine Congress' intent, the Court used what is, in essence, a three-prong test. First, it examined the language used by Congress. Second, it examined the sections of the same statute which created specific exemptions from the preemption language. Third, it examined the legislative history of the preemption section.[40]

Applying the *Shaw* test to Section 1305, it is clear that its structure and its legislative history require giving effect to the plain language of Section 1305(a)(1). The only exceptions to the provisions of Section 1305(a)(1) specifically refer to certain wholly intrastate operations. The provisions of Section 1305(a)(2), (b) and (c) demonstrate that Congress was aware of the states' interest in certain activities, such as the operation of airports and transportation between points in Alaska. If Congress had not intended to incorporate wholly intrastate activities in the language in subsection (a)(1), there would have been no need to provide specifically that such activities were saved from the preemption clause.[41] The legislative history of Section 1305(a)(1), previously discussed,[42] clearly indicates Congress' intent to preclude all *state* regulations so as to "prevent conflicts and inconsistent regulations."[43] In addition, the House Conference Committee's Report notes that one of the purposes of the Deregulation Act was "to encourage, develop and attain an air transportation system which relies on competitive market forces to determine the *quality, variety and price* of air services."[44]

Like the state enactments scrutinized in *TWA*, it is inescapable that

36. TWA, 897 F.2d 773, 783 (5th Cir. 1990).
37. 463 U.S. 85 (1982).
38. TWA, 897 F.2d at 783, *quoting* Shaw v. Delta Airlines, 463 U.S. at 96-97.
39. 463 U.S. 85, 97.
40. *See id.* at 96-100.
41. *See supra* notes 21-22 and accompanying text.
42. *See supra* text accompanying notes 12-22.
43. H.R. REP. No. 1211; 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3752 (emphasis added).
44. H.R. REP. NO. 1779; 95th Cong. 2d Sess. 53, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3773 (emphasis added).

state statutes prescribing economic regulation of motor carriers do have a "connection with or reference to" airline rates and services when the state regulation is enforced against motor carriers used by airlines in the performance of intermodal movements or against the airlines themselves. Entry regulation restricts the availability of motor carriers to provide the truck component of such movements. In the case of rate regulation that prescribes the rates charged by the motor carriers to the airlines, there will generally be a direct correlation between the charges which the airline pays for the motor carrier service and the airlines' rates to the public for the involved services. The connection between civil penalty enforcement actions against the airlines for their use of non-complying motor carriers and the airlines' provision of services which are dependent on use of motor carriers is self-evident.

The Fifth Circuit is not alone in utilizing the *Shaw v. Delta* test to determine whether state regulations are preempted pursuant to Section 1305(a)(1). The First, Seventh and Ninth Circuits have also embraced the test.[45] For example, in *New England Legal Foundation v. Massachusetts Port Authority*, the First Circuit found a state landing fee structure "related to" the rates, routes, and services of air carriers because in setting standards for the size of aircraft and frequency of air carrier service that would enable carriers to qualify for lower landing fees, the program "ha[d] a connection with or reference to" such activities.[46] Moreover, like the Fifth Circuit in *TWA*,[47] the First, Seventh, and Ninth Circuits found *express* rather than implied preemption pursuant to Section 1305(a)(1). Accordingly, these cases held that the involved state regulations were preempted, even though there was *no* regulation of the involved activity on the federal level. By expressly preempting state and local law, the *New England* court found, "Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation."[48] Similarly, in *Illinois Corporate Travel v. American Airlines*, a case involving an airline's proscription of price discounting by travel agents, the Seventh Circuit held that the "relating to language in Section 1305(a)(1) substantially increases the extent of preemption."[49] In light of such express preemption, the court found that the savings clause contained within the Federal Aviation Act[50] did not preserve state common law claims,

45. *See* New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157 (1st Cir. 1989); Illinois Corporate Travel v. American Airlines, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 1948 (1990); Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984).

46. New England, 883 F.2d at 175.

47. 897 F.2d 773, 783 (5th Cir. 1990).

48. New England, 883 F.2d at 173.

49. 889 F.2d 751, 754 (7th Cir. 1989).

50. 49 U.S.C. app. § 1506 (1988).

notwithstanding the absence of contrary federal law on the particular matter to which the state law would apply.[51] In *Hingson*, the Ninth Circuit said that the "relating to" language of Section 1305(a)(1) constitutes *express* preemption which preempts not only state laws or regulations that conflict with federal law, but ALL state laws which *relate to* such matters.[52]

While it might appear that the district court in *Federal Express Corp. v. California Public Utilities Commission*[53] rejected the *Shaw v. Delta* test in the process of determining whether the purely truck transportation services of Federal Express, an air carrier, were subject to state regulation or were protected pursuant to Section 1305(a)(1), that is not the case. *Federal Express* stated that *Shaw's* reading of the ERISA preemption should not be taken as a canon of statutory interpretation. However, the court did not reject the *Shaw* test. It recognized that where the legislative history of preemption language indicates that Congress specifically intended a broad reading of preemption, it must be given effect.[54] In that case, the plaintiff, Federal Express, asserted that Section 1305(a)(1) preempted state regulation of the ground transportation services rendered by it, even when no prior or subsequent movement by air was involved. Federal Express pointed to the fact that it was an air carrier within the scope of Section 1305(a)(1), and therefore all state regulations relating to its operations were preempted by that section.[55] The court disagreed. It found that Federal Express had not presented any legislative history concerning Section 1305(a)(1) comparable to that underlying the ERISA preemption which would require preemption of all state regulations relating to activities with which an air carrier might have some connection, irrespective of whether the activities affected were, in fact, air carrier services.[56] Thus, the court in *Federal Express*, instead of rejecting the *Shaw* test, merely recognized a limitation inherent in Section 1305(a)(1): to be preempted, the state regulation must relate to air carrier services, rates, or routes.[57]

IS THE TRUCK PORTION OF AN AIR/TRUCK MOVEMENT AN AIR CARRIER'S SERVICE WITHIN THE MEANING OF SECTION 1305?

Federal Express demonstrates that although a regulation may affect an air carrier, it is not preempted unless it affects the "rates, routes, or

51. Illinois Corporate Travel, 889 F.2d at 754 (emphasis added).
52. Hingson v. Pacific Southwest Airlines, 743 F.2d 1408, 1415 (9th Cir. 1984) (emphasis added).
53. 716 F. Supp. 1299 (N.D. Cal. 1989).
54. *Id.* at 1303.
55. *Id.* at 1302.
56. *Id.*
57. *Id.* at 1303.

services" of an air carrier. In determining whether the wholly intrastate and wholly by truck services of an air carrier were services within the scope of Section 1305(a)(1), the court in *Federal Express* employed the test enunciated by the Ninth Circuit in *Air Transport Association v. Public Utility Commission of State of California*.[58]

The *Air Transport* court took a rather restrictive view of the scope of Section 1305's phrase ". . .services of an air carrier." That case involved the monitoring of telephone (both interstate and intrastate) conversations by airlines. The monitored conversations were between the airlines' reservations agents and members of the general public. The airlines claimed that such monitoring was necessary to assure that their agents were giving information accurately, efficiently, and courteously.[59] The airlines characterized the contested PUC regulations (which required a third person wishing to listen in on a conversation to give notice by giving warning) as one relating to the services of an air carrier. On this basis, the airlines claimed the regulation was preempted pursuant to Section 1305. The court disagreed.[60] The court found that the regulation was not preempted because it did not relate to either the rates, routes or services of an air carrier within the meaning of Section 1305. The telephone operations utilized by the airlines, the court said, were not "services of an air carrier" because they were "*not peculiar to airlines*;" but rather, were "similar to those operations used by other national service industries where reservations are required. . . ."[61]

Applying the *Air Transport* test, the court in *Federal Express* determined that state regulation of wholly intrastate motor carrier transportation of property by an air carrier, where the motor carrier operations were unaccompanied by a prior or subsequent movement by air, was not preempted under Section 1305 because such motor transportation services of an air carrier were not "singularly airline services."[62] *However, it specifically distinguished joint air/motor vehicle movements* from the involved motor vehicle operations throughout its opinion. The court distinguished *ICC v. Texas* on the basis that it was limited to an "intermodal" transportation situation, which the CPUC was not seeking to regulate in the case of Federal Express.[63] Furthermore, referring to Section 10526(a)(8)(B) of the Interstate Commerce Act, the court stated:

> One key to Congressional thinking on this matter is the Interstate Commerce Act, which deprives the [ICC] of jurisdiction over certain motor carriers when

58. 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236, 108 S. Ct. 2904 (1988).
59. *Id.* at 202.
60. *Id.* at 207.
61. *Id.* (emphasis added).
62. Federal Express, 716 F. Supp. at 1303.
63. *Id.* at 1304 n.3.

> air transport is also involved. For example, where transportation of property by motor carrier is part of a continuous movement involving air transportation, the ICC does not have jurisdiction. However, the exemption does not extend to motor carrier service of an air carrier. It is limited to those goods *actually transported by joint air and ground carriage. . . .*[64]

The court concluded that although under normal circumstances ground and air transportation have been viewed by Congress as belonging to two different regulatory regimes, *Congress specified in Section 10526(a)(8) instances when motor carrier transportation is to be seen as an adjunct to air transportation and therefore exempt.*[65]

The distinction recognized in *Federal Express* between the wholly motor carrier operations of an air carrier and joint air/truck operations is sound. In contrast to the operations scrutinized in *Federal Express*, intermodal air/motor vehicle operations are "peculiar to airlines." The very nature of airline operations precludes airlines from serving each and every point directly by aircraft. Historically, the airlines have had to rely on other modes of transportation, particularly motor vehicles, to reach shippers and receivers in outlying communities which are not served directly by air. Since the infancy of the air transportation industry, airlines engaging in the transportation of package express have also been dependent on motor carriers to transport such packages within the municipalities served by the airlines. This use of motor carriers by airlines apparently gave rise to the "incidental to air" exemption in the Interstate Commerce Act of 1938[66] to which the *Federal Express* court made reference.[67] The ICC interpreted this exemption to include motor transportation rendered *on behalf of an air carrier*, distinguishing such motor carriage from the motor service of an independent motor carrier.[68]

The structure of the Federal Aviation Act also supports the distinction recognized in *Federal Express*. The Act defines air transportation with reference to interstate air transportation, *inter alia*.[69] Interstate air transportation is defined as transportation by aircraft or in intermodal opera-

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64. *Id.* at 1305 (emphasis added).

65. *Id.*

66. *See* discussion in Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71, 84 (1964) (explaining that such use of motor carriage by airlines was the genesis for the "incidental to air" exemption).

67. The Federal Express court referred to § 10526(a)(8) where the "incidental to air" exemption is now found. This exemption was previously contained in 49 U.S.C. § 303(b)(7a). When Congress amended the Interstate Commerce Act in 1980 and enacted 49 U.S.C. § 10526(a)(8), it expanded the exemption as it applies to the transportation of property. The purpose and scope of the exemption, as amended, are discussed in the following section.

68. *See* Motor Transportation of Property Incidental to Air, 95 M.C.C. 71, 76 (1964), *citing* Kenny Extension-Air Freight, 61 M.C.C. 587, 594-596 (1953) (emphasis added).

69. 49 U.S.C. app. § 1301(10) defines "air transportation" as *"interstate, overseas, or foreign air transportation* or the transportation of mail by aircraft." (emphasis added).

tions.[70] Interpreting that definition[71] in the context of joint air/truck operations, the Court of Appeals for the District of Columbia found that the term *"air transportation" was not restricted to that portion of the service provided by aircraft; it included the trucking service also.*[72] The definition of an air carrier includes, *inter alia*, one who undertakes to engage in air transportation.[73] Nothing could be more essentially a "service" of an air carrier than the performance of "air transportation." Thus, the term "services of an air carrier" must relate to transportation wholly by aircraft or to intermodal transportation where at least some part of the movement is by aircraft.

Significantly, certain motor carrier services were recognized by CAB as "servicers in connection with transportation by air."[74] Such services have been included in airline tariffs pursuant to 49 U.S.C. app. § 1373 requiring specification of airlines' rates, fares and charges for air transportation.

WHAT ARE THE CHARACTERISTICS OF MOTOR CARRIER TRANSPORTATION WHICH IS AN ADJUNCT TO AIR TRANSPORTATION?

In determining the parameters of preemption under the Federal Aviation Act, it is instructive to examine in more depth Congress' subsequent amendment of the Interstate Commerce Act. As the court in *Federal Express* noted, Congress specified in Section 10526(a)(8) of the Interstate Commerce Act those instances in which ground transportation would be treated as an adjunct to air service.[75] Subsection (A) declares ground transportation of passengers that is "incidental to air" shall be so treated. For property (including baggage), Congress specified in Subsection (B) that this category would include ground transportation that is "part of a

70. Interstate air transportation, overseas air transportation, and foreign air transportation are defined in 49 U.S.C. app. § 1301(24) as "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce . . . *whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.*" (emphasis added).

71. The definition of interstate air transportation then appeared in the Federal Aviation Act at § 1301(21). The definition contained there was identical to the present definition found in § 1301(24).

72. City of Philadelphia v. Civil Aeronautics Board, 289 F.2d 770, 773-774 (D.C. App. 1961); *see also* Air Dispatch, Inc. v. United States, 237 F. Supp. 450, 453 (E.D. Penn. 1964), *aff'd*, 381 U.S. 412 (1965) (emphasis added).

73. 49 U.S.C. app. § 1301(3) provides in pertinent part: " 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation."

74. *See* reference thereto in Motor Transportation of Property Incidental to Transportation by Aircraft, 112 M.C.C. 1, 11-12 (1970).

75. Federal Express v. California Public Utilities Comm'n, 716 F. Supp. 1299, 1305 (N.D. Cal. 1989).

continuous movement which includes a prior or subsequent movement by air." Subsection (C) declares substitute ground transportation in emergency situations also qualifies as an adjunct to air service.

Prior to the enactment of Section 10526(a)(8), Congress' provision for the treatment of adjunct ground transportation was contained in Section 303(b)(7a) and 303(b)(7b). Pursuant to the scheme then in place, both property and passenger movements had to be "incidental to air."[76] However, the exemption insofar as the intermodal transportation of property (as opposed to passengers) was expanded considerably through Congress' enactment of Section 15026(a)(8)(B) in 1980. Unquestionably, by such amendment, Congress meant to remove the restrictions applicable to the "incidental to air" exemption as it had been previously applied by the ICC to the transportation of property. In pertinent part, the legislative history of Section 10526(a)(8)(B) states:

> This section also expands the statute's current exemption of motor carrier transportation which is incidental to air transportation. The current exemption has been interpreted by the Commission and the courts to be limited to transportation of air freight which constitutes bona fide collection, delivery, or transfer service. It does not include line-haul transportation by motor carriers. In addition, the exemption has been limited under Commission regulations to geographical areas surrounding airports and cities adjacent to those airports. *The bill eliminates the distinction between exempt pick-up, delivery, or transfer operations and regulated line-haul transportation. Further, the bill does away with the geographical limitations imposed by the Commission.*[77]

The ICC's interpretation of the previous exemption required the existence of as "through bill of lading" referring to the ground transportation in order to prove the involved ground transportation was in fact incidental to air, in other words, truly a bona fide collection, delivery, or transfer service, and not line-haul transportation.[78] But, since Congress specifically noted that the exemption would no longer be restricted geographically or to bona fide collection, delivering, or transfer service but would also encompass what would otherwise be regulated line-haul transportation,[79] evidently there is no longer a "through bill" requirement in connection with this exemption. It is also clear from the Committee's report that there is no longer a requirement that the motor vehicle service be restricted to points within the air carrier's "terminal area."[80]

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76. 49 U.S.C. § 303(b)(7a).

77. H.R. REP. No. 1069, 96th Cong., 2d Sess. 19 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2283, 2301 (emphasis added).

78. *See* Motor Transportation of Property Incidental to Transportation by Aircraft, 112 M.C.C. 1, 12 (1970); Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71, 84 (1964); Kenny Extension-Air Freight, 61 M.C.C. 587, 594-596 (1953).

79. H.R. REP. No. 1069, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2283, 2301.

80. *Id.*

Significantly, the statute does not use the term "incidental to air transportation" with regard to the property exemption. Instead, it specifically spells out the two requirements which are applicable: (1) that there be a prior or subsequent movement by an air carrier and (2) that the motor vehicle operation be part of a continuous movement.[81] This was apparently done in order to avoid the future application of unintended restrictions to the exemption.[82]

Congress did carry forward one of the four elements required under the previous interpretation of the "incidental to air" exemption for property: the "continuous movement" requirement. This term is not defined in Section 10526(a)(8) or any other section of the Interstate Commerce Act. However, in other contexts where the existence of a "continuous movement" has been at issue, the courts and the ICC have focused on the shipper's "fixed and persistent intent" at time of shipment to make the determination.[83] Certain ICC and court decisions interpreting the old "incidental to air" exemption for property are also helpful in understanding what Congress must have intended to include in the exemption by reference to the term. For example, in *Kenny Extension-Air Freight*[84], the ICC held that requiring that the intermodal shipment constitute a *continuous movement* moving pursuant to a through air bill of lading would ensure that the line-haul services of an independent carrier as part of a *through air-motor service* would not qualify under the exemption. The ICC reasoned that line-haul movement by an independent carrier would not move on air billing.[85] Likewise, in *National Bus Traffic Association v. United States*[86], the court distinguished *"[c]onnecting-carrier line-haul motor operations* [which] are complimentary to air transportation services with which they connect and are conducted regularly as a part of *through interline service"* from those which would normally be encompassed within the "incidental to air" exemption.[87] From such cases we learn that continuous movements include those that move by independent connecting

81. 49 U.S.C. § 10526(a)(8)(B) (1988).

82. Notably, there was no requirement under the previous "incidental to air exemption" that the motor vehicle portion of an intermodal movement be provided in the air carrier's own equipment or even by the air carrier itself. No such requirement exists today under Section 10526(a)(8)(B) nor in the Federal Aviation Act. In fact, the definition of the term "air carrier" indicates that an entity may engage in air transportation directly, indirectly, by lease, or *any other arrangement*. 49 U.S.C. app. § 1301(3) (1988).

83. *See e.g.*, Central Freight Lines v. Interstate Commerce Commission, 899 F.2d 413 (5th Cir. 1990); Texas v. United States, 866 F.2d 1546, 1549 (5th Cir. 1989); Package Express Services, Ltd.—Petition for Declaratory Order, 133 M.C.C. 124 (1983); Yellow Cab Company of Pittsburgh v. Pennsylvania Public Utility Commission, 501 A.2d 323 (Pa. 1985).

84. 61 M.C.C. 587 (1953).

85. *Id.* at 595-596 (emphasis added).

86. 249 F. Supp. 869 (N.D. Ill. 1965), *aff'd*, 382 U.S. 369 (1966).

87. *Id.* at 872-873 (emphasis added).

carriers in line-haul service and that are intended by their shippers to move from point of origin to ultimate destination point. It is this very type of regularly conducted, connecting-carrier, line-haul operation which Congress apparently meant to include within the scope of Section 10526(a)(8)(B). Only by expanding the exemption in that fashion would Congress achieve its declared purpose of achieving the "maximum flexibility" in the movement of air cargo.[88]

Congress also specifically incorporated in the Section 10526(a)(8)(B) exemption the "prior-or-subsequent movement" by air test which had been previously rejected by the ICC when interpreting the "incidental to air" exemption. The ICC had rejected such a test on the basis that it would impermissibly extend the scope of the exemption.[89] The ICC again rejected the prior-or-subsequent test in a later case dealing with the geographical limits of the "incidental to air" exemption for property:

> [W]e are not convinced that we should depart from the 25-mile "rule of thumb" terminal area for most airports, and we believe that any enlargement of this standard must be supported by compelling reasons. To conclude otherwise would lead to the unbridled expansion of "exempt" motor operations on a showing that such service is *"in connection with" transportation by air*;, i.e. that the traffic handled has a prior or subsequent air movement. . . .[90]

Undoubtedly, Congress was aware of these ICC decisions. The legislative history of Section 10526(a)(8)(B) reflects that Congress meant to do exactly what the ICC had previously been unable or unwilling to do under the Interstate Commerce Act prior to its amendment in 1980.[91] That is, Congress meant to include in this exemption all motor carrier movements performed *in connection with transportation by air.*

By expanding the property exemption in this fashion, Congress eliminated the potential for continued conflicts and uncertainties which would arise from having different regulatory schemes applicable to the same service merely as a consequence of joint air/ground modes having been used as opposed to transportation wholly by aircraft. Again, the legislative history of Section 10526(a)(8)(B) clearly explains Congress' intent in this regard:

> The Committee's purpose in expanding the existing exemption is to bring it in line with what Congress has done on air cargo movements. Since the transportation of air cargo now is exempt from federal economic regulation, the

88. H.R. REP. No. 1069, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2283, 2301.

89. *See* Motor Transportation Incidental to Air, 95 M.C.C. at 86.

90. Motor Transportation of Property Incidental to Transportation by Aircraft, 112 M.C.C. 1, 16 (1970) (emphasis added).

91. *See supra* text accompanying note 75.

> Committee believes that it makes sense to exempt the entire movement, *including the motor carrier transportation portion.* Further, extending the exemption will allow maximum flexibility in dealing with air cargo which generally requires specialized and expedited handling.[92]

Section 10526(a)(8)(B) can thus be seen as a natural extension of Congress' goal of eliminating conflicts between varying regulatory schemes in the area of air service regulation. While in the Federal Aviation Act it proscribed state regulation in the area, in the Interstate Commerce Act it eliminated the potential for conflicting regulation emanating from the ICC. Of course, its task in this latter regard was considerably easier since it had only to deal with those areas of potential overlap over which the ICC retained jurisdiction: motor carrier and freight forwarder activities.[93] By describing in the Interstate Commerce Act the characteristics of ground transportation which are to be viewed as an adjunct to air service, Congress provided a better understanding of the extent to which it views truck transportation as integral to air service. But, preemption pursuant to Section 1305 is not dependent on such movements being encompassed within the Section 10526(a)(8)(B) exemption. Section 10526(a)(8)(B) is merely indicative of those truck services which are to be viewed as an adjunct to air services. Therefore, even if it is assumed that neither Section 10526(a)(8)(A) nor (8)(B) applies to intermodal movements performed wholly within the same state[94], preemption of state regulation of such movements pursuant to Section 1305(a)(1) of the Federal Aviation Act is not precluded.

Is State Regulation of Motor Vehicle Movements of Unintentionally Unaccompanied Baggage Preempted?

It is undisputed that intentionally unaccompanied baggage in intermodal air/truck service is encompassed by the Interstate Commerce Act's "incidental to air" exemption applicable to property.[95] But, an interesting question is presented when one considers unintentionally unac-

92. H.R. Rep. No. 1069, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2283, 2301.

93. 49 U.S.C. § 10521.

94. There is dictum in the ICC's decision in San Juan Air Services, Ltd.—Petition for Declaratory Order, 1988 Fed. Carrier Cases (CCH) ¶ 37,574 (I.C.C. October 20, 1988) *aff'd* Evergreen Trails, RNC v. I.C.C., No. 89-1024 (D.C. Cir., Jan. 11, 1990) which could be interpreted to limit the scope of the exemptions in 49 U.S.C. § 10526(a)(8) in this fashion. Of course, San Juan is not applicable here. That case involved passenger, rather than property, movements. Thus, the ICC was interpreting Subsection (A), not Subsection (B). In any event, the ICC specifically declined to address the preemption question under 49 U.S.C. § 1305, because of the Commission's view that it would be "inappropriate" for it to interpret ". . .a statute that [it] do[es] not administer."

95. *See* Fourmen Delivery Service, Inc.—Petition for Declaratory Order, 112 M.C.C. 866, 871 (1971).

companied—that is, lost, misrouted, or delayed—baggage, because the movement of such baggage has historically been governed by the rules and regulations pertaining to the transportation of passengers and not the transportation of property.[96] *Fourmen Delivery Service, Inc.—Petition for Declaratory Order* held that baggage accompanying a passenger would normally come to rest at the destination airport and thus would not move on a through bill of lading. At that point, the ICC reasoned, the air movement was completed. Any subsequent movement required because the baggage had been misrouted or delayed would not be "intended" until the passenger arrived at the destination airport. Therefore, the subsequent movement would constitute a separate and distinct movement wholly apart from the air movement. If that subsequent movement was between two points within the same state, the ICC concluded, that movement would be in intrastate commerce, even though the prior air movement had originated in a different state.[97] Under the *Fourmen* reasoning, therefore, the subsequent motor carrier movement of such baggage would not be part of a continuous movement. It would then follow that motor carrier service would not be integral to the services of an air carrier and state regulation thereof would be permitted.

But the ICC overruled its *Fourmen* decision in this regard in *Package Express, Ltd.—Petition for Declaratory Order.*[98] There the ICC held that the movement of lost or delayed baggage, prior or subsequent to a movement by air, constituted a part of a continuous movement. The ICC expressly rejected the *Fourmen* reasoning, concluding instead that the delayed, misplaced, or misrouted baggage does not come to rest until it is delivered to the passenger it originally accompanied. The ICC stated:

> [T]he fixed and persistent intent of the passenger is that the baggage will move through to his ultimate destination. The delay, misplacement, or misrouting of the baggage by the airline should not be viewed as altering the intention or as causing the baggage to "come to rest." An air passenger expects that the airline [will] be responsible for his baggage, and if the baggage is not tendered to the traveler at his destination [airport], he expects that the air carrier will make all arrangements and payment for the surface transportation of the baggage to his ultimate destination. . . .the airline takes on the status of a shipper in arranging for the continued movement of the baggage to the passenger's ultimate destination.[99]

Having concluded that the motor vehicle movement of lost, delayed or misplaced baggage was part of a continuous movement which was intended as necessary by the passenger at origin, the ICC held such movement was exempt under Section 10526(a)(8)(B). It noted that the section

96. *Id.*
97. *Id.* at 868-869.
98. 133 M.C.C. 124 (1983).
99. *Id.* at 126-127.

does not distinguish between types of baggage or the conditions under which the baggage is being transported. The determinant factor, it held, is whether the involvement property is a part of a continuous movement.[100] There is no basis upon which to distinguish motor carrier service provided as an adjunct to air service when it involves lost, delayed, or misrouted baggage as opposed to other forms of property.

Although *Package Express* and the one case that we have found relying on it, *Yellow Cab Co. of Pittsburgh v. Pennsylvania PUC*[101], involved intermodal movements *which crossed a state boundary*, the ICC's reasoning in *Package Express* is equally applicable in the context of a wholly intrastate movement. In any event, as discussed earlier, whether the intermodal air/truck movements are interstate or intrastate is not the controlling factor in the case of preemption under Section 1305(a)(1). The issues are whether such intermodal movements are "services of an air carrier", whether the involved state regulation "relates to" such services, and whether the air carrier is licensed (or exempted) under Subchapter IV of the Federal Aviation Act. The phrase "services of an air carrier" is broad enough to include truck transportation when the truck service is part of a continuous movement which involves a prior or subsequent movement by air, as specified in Section 10526(a)(8)(B). The ICC has concluded that movements of lost, delayed or misrouted baggage are continuations of the originally embarked movement. Therefore, it is clear that state regulation of intrastate intermodal movements of lost, delayed or misrouted baggage is preempted by Section 1305(a)(1).

CONCLUSION

There seems little doubt that state motor carrier entry regulations are preempted under 49 U.S.C. app. § 1305(a)(1) where the state seeks to apply them to motor carriers performing the truck portion of an intermodal air/truck movement of property (including lost, delayed, or misplaced baggage), if the truck portion is a part of a continuous movement which includes a prior or subsequent movement by an air carrier licensed or exempt under Subsection IV of the Federal Aviation Act. Such truck service is integral to air service and is included in Section 1305(a)(1)'s reference to the "service of an air carrier." This is amply illustrated by Congress' actions in respect to Section 10526(a)(8)(B) where Congress recognized that truck service used in the transportation of property is an adjunct to air service if it is a part of continuous movement having a prior or subsequent movement by an air carrier. Since it is an adjunct to air

100. *Id.*

101. 501 A.2d 323 (Pa. 1985).

service, that type of truck service has been exempted from ICC jurisdiction pursuant to Section 10526(a)(8)(B).

A continuous movement for air freight is one where the intent of the shipper at origin of the intermodal movement is that the freight move in continuous movement between point of origin and point of final destination. A continuous movement for lost, delayed, or misrouted baggage is one in which the motor vehicle operation is conducted between the origin (or destination) airport and the passenger's ultimate destination (or returned to the passenger's home), and it is not limited to service within terminal zones. Once it is demonstrated that the motor vehicle operation is part of a continuous movement which includes prior or subsequent transportation by an interstate air carrier, state regulation thereof appears preempted even though:

(1) the entire intermodal movement is performed wholly within the same state;

(2) the motor vehicle operations are not performed by the air carrier itself, but by an unaffiliated motor carrier;

(3) the motor carrier operations are conducted using equipment which is not owned or leased by the air carrier; and

(4) there is no "through bill" for the intermodal movement.

There do not appear to be any geographical limitations within which the motor vehicle portion of the intermodal movement must be performed in order to be part of an air carrier's service. As long as the other requirements are met, the length of the truck movements is of no consequence.