



U.S. Department of
Transportation

General Counsel

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Washington, D.C. 20590

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Chip Wagoner, Assistant Attorney General
Environmental Protection Unit
Office of Attorney General
State of Arizona
1275 West Washington
Phoenix, AZ 85007

Dear Mr. Wagoner:

Thank you for your letter requesting my opinion on the applicability of the Federal Preemption Section of the Federal Aviation Act ("Act") (Section 105 of the Act; 49 U.S.C. §1305) to the State of Arizona's regulation of emergency air ambulance operations.

As you are aware, section 105 prohibits states from regulating "rates, routes, or services of any air carrier having authority under title IV of [the] Act to provide interstate air transportation." It was enacted as section 4 of the Airline Deregulation Act of 1978 (ADA) whose goal was to loosen regulatory restraints over air carriers and to rely, to a greater extent, on competitive market forces to provide efficiency, innovation, and low prices in air transportation. (Section 102 of the Act; 49 U.S.C. §1302). The culmination of the air transportation regulatory reform program was the termination of the Civil Aeronautics Board's (CAB or Board) economic regulatory authority over air carriers' domestic route and rate decisions and the transfer of the remaining functions to the Department of Transportation (DOT). By including the Federal Preemption Provision in the ADA, Congress intended to prevent any State interference with or frustration of the benefits of the deregulation program.

Section 105 prohibits states from regulating "rates, routes, or services" of federally authorized air carriers. This means the states may not regulate in areas formerly within the CAB's jurisdiction. Regulatory responsibilities over air transportation had been divided between the Federal Aviation Administration (FAA), which has had primary responsibility for safety and health matters, and the Board, which mainly handled economic matters, such as pricing and licensing. (See Delta Air Lines v. C.A.B., 543 F.2d 247, 260 (D.C. Cir. 1976); ACAP et al., Carrier Emergency Medical Equipment, 85 CAB 2478, 2479 (1980) and 14 CFR 399.110(d)). Accordingly, I believe that section 105 does not preempt Article 1 of the Arizona legislation (Chapter 21.1, Emergency Medical Services), relating to air ambulance emergency medical equipment and care, because this is in the FAA's health and safety area. It does, however, preempt Article 2 of the legislation, to the extent Article 2 governs the economics of air ambulance operations by interstate air carriers. The preemption is effective regardless of the State's motivation for enacting Article 2 or for promulgating regulations under it.

Article 2 authorizes the State to issue certificates of public convenience and necessity to an air ambulance operator; to regulate its rates, operating and response times, base of operations, and accounting and report systems; and to impose bonding requirements. These activities were formerly the CAB's responsibility, and now fall within the Department's regulatory jurisdiction. (See Sections 401(d)(1) and 416(b)(1) of the Act; 49 U.S.C. §§1371(d)(1) and 1386 (b)(1)). Although the State exempted air ambulances from filing their rates, the Article 2 statutory authority to fix rates nevertheless is preempted by section 105. Further, a "base of operations" is a service area which imposes a sufficient constraint on a carrier's geographic operations to constitute a route, for purposes of section 105 of the Act. (See 14 CFR 201.5).

I appreciate your concern that air ambulances which receive exemption authority under Title IV of the Act and operate as so-called "Part 298 air taxis" (14 CFR Part 298) may, in fact, not conduct interstate air transportation and be "air carriers" in name only. The definition of "air carrier" for purposes of section 105, however, is well-settled, and includes any air carrier with exemption authority under Part 298. (See 14 CFR 399.110(d) and Hughes Air Corp. v. Public Utilities Com'n, 644 F.2d 1334 (9th Cir. 1981).^{1/} Moreover, the status of air carrier attaches to an operator at the time it receives that authority (See 14 CFR 399.110(c)). Your suggested approach, to exclude from section 105 of the Act those Part 298 air taxis that do not in fact undertake to engage in air transportation, has several flaws. It would be contrary to congressional intent in enacting the ADA; it would conflict with the plain language of section 105; it would weaken the effectiveness of Part 298 exemptions; and it would create the anomaly of greater federal regulation and oversight of air taxis in an era of federal deregulation. Additionally, I cannot accept your suggestion that I should consider section 105 inapplicable to the State scheme because the latter does not conflict with the ADA. Section 105 is a congressionally mandated preemption provision that directs DOT to fully occupy economic regulation of air carriers.

As I said above, the Federal Preemption provision does not affect Article 1 of the legislation insofar as that Article pertains to health and safety matters. The State may regulate in these areas as long as the FAA has not occupied the

^{1/} Indeed, the Chief Counsel of the House Committee on Public Works and Transportation, in a letter to Representative Dale Milford, found the Federal Preemption Section of H.R. 12611, which the Conference Committee substantially adopted as Section 4 of the ADA, directly applicable to Part 298 carriers. (June 8, 1978 Cong. Rec. at H5238 - H5241).

field. ^{2/} I advise you, however, to coordinate State regulation in these areas with your local FAA offices to determine the extent to which federal regulations may govern.

Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Original signed by
Jim J. Marquez
Jim J. Marquez
General Counsel

Enclosure

CC: Eldon S. Gubler
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2/ In 1977, it had issued an Advanced Notice of Proposed Rulemaking on Air Ambulance Service, setting safety standards for operators. 42 Fed. Reg. 37825, July 25, 1977. The rulemaking was withdrawn the following year. 43 Fed. Reg. 36461, August 17, 1978.

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