



No Good Deed Goes Unpunished: The Recodification of the Airline Deregulation Act's Preemption Provision

By Alexander Simpson and Claire McKenna



The Airline Deregulation Act (ADA)¹ was enacted in 1978, amending the Federal Aviation Act of 1958.² Since then, courts and academics have spilled abundant ink about various aspects of the ADA, including the scope of its preemptive effect.

Less analyzed, however, has been the effect on the ADA of the 1994 recodification of title 49 of the U.S. Code.³ More specifically, notwithstanding the recodification law's assurance that it was "not [to] be construed as making a substantive change in the laws replaced,"⁴ the "changes in phraseology" that were nevertheless made to various aviation laws have posed a dilemma for the aviation bar, prompting one member to remark that the pre-recodification version of title 49 "continues to live on, in what might be described as a 'shadow' existence—repealed and unpublished, but nevertheless controlling in the event that the terms of the statutes now enacted in subtitle VII substantively depart from those of their predecessors."⁵

The changes in phraseology to the ADA's preemption provision⁶ have proven especially troublesome, such that the U.S. Supreme Court has twice commented on the matter. In *American Airlines, Inc. v. Wolens*,⁷ the Court noted that the ADA's preemption provision had been changed from laws "relating to rates, routes, or services" of an operator to laws "related to a price, route or service" of an operator, but that this change was intended by Congress to be nonsubstantive. More recently, in *Northwest, Inc. v. Ginsberg*,⁸ the Court observed that the recodification's omission of "rule" and "standard" from the prohibition of state enforcement of any "law, rule, regulation, standard, or other provision" was nonsubstantive.

Yet few tribunals have examined several ostensibly minor changes in the phraseology of the ADA's preemption provision and the associated definitions section in the Federal Aviation Act—changes that, in fact, have materially altered how courts evaluate the threshold question of whether the ADA's preemption

provision applies in the first place. These changes in phraseology have affected how courts analyze (1) the application of the ADA's preemption provision to *intrastate* operators, and (2) the type of authority—economic or safety—that is required to be held by an operator in order to trigger the ADA's preemption provision.

The following are the post- and pre-recodification versions of the ADA's preemption provision, with emphasis on the changes in phraseology that will be discussed below. Post-recodification, the ADA's preemption provision states, in pertinent part:

[A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of *an air carrier that may provide air transportation under this subpart* [(subpart II of part A of subtitle VII of title 49)].⁹

Whereas pre-recodification, the preemption provision read:

[N]o 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 [title IV of this Act] to provide air transportation*.¹⁰

Application of the ADA's Preemption Provision to Intrastate Operators

Post-Recodification

Generally, the ADA's preemption provision applies to an operator holding the necessary licensure from the federal government to fly *interstate*, even if in practice the operator flies purely *intrastate*. Yet the post-recodification version of the ADA's preemption provision arguably indicates the opposite result:

- The ADA, as recodified, preempts any state requirement "related to a price, route, or service of an air carrier that may provide air transportation under this subpart."
- 49 U.S.C. section 40102—the definitions section of the Federal Aviation Act of 1958, as

Alexander Simpson (alex.simpson@dot.gov) and **Claire McKenna** (claire.mckenna@dot.gov) are senior attorney advisors in the Office of the General Counsel, U.S. Department of Transportation. The opinions expressed herein are solely their own, and do not represent the views of the Department.

recodified—defines “air carrier” as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”¹¹

- “Air transportation” is defined as “foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.”¹²
- Thus, per the ADA’s plain language and associated definitions, a predicate for ADA preemption is that the operator is an “air carrier,” i.e., a U.S. citizen that “undertak[es] . . . to provide” *foreign, interstate, or mail transportation*.

An operator that “may” provide foreign/interstate/mail air transportation (i.e., has the necessary authority from the federal government to do so) but in practice flies purely *intrastate* passenger carriage arguably has not “undertak[en] to provide” foreign/interstate/mail air transportation. Thus, cases tying the applicability of the ADA’s preemption provision to an intrastate operator satisfying the statutory definition of “air carrier”¹³ have reached a predictable result.

For example, in *SeaAir NY, Inc. v. City of New York*,¹⁴ SeaAir brought suit in federal court, contending that its city permit, which forbade “air tour operations,” was preempted by the ADA. SeaAir, a sightseeing operator, “principally argue[d] that because its planes fly into New Jersey airspace during the course of their flights” from New York, ADA preemption applied:

[I]n order to benefit from federal preemption, SeaAir must establish that its air tours constitute [“interstate air transportation”]. . . . This is so because if SeaAir does not engage in such transportation, it does not fall under the provision of the Airline Deregulation Act of 1994 that expressly preempts state and local aviation regulations.¹⁵

The court held, however, that SeaAir’s flights were not “interstate air transportation”—and thus the ADA’s preemption provision did not apply—because, while those flights briefly entered New Jersey, they began and ended in New York.

*Med-Trans Corp. v. Benton*¹⁶ reached the opposite result from *SeaAir*, but relied in part on the same analytical framework. In finding a state requirement preempted, the court noted that the case before it was “readily distinguished” from *SeaAir* because “plaintiff does transport patients via air ambulance between North Carolina and South Carolina Plaintiff therefore would satisfy the requirement set out by the Second Circuit that it ‘carry its passengers’ from one state to another.”¹⁷

In contrast, some post-recodification courts have looked past the statutory definition of “air carrier” in order to bring intrastate operators within preemption’s orbit. In *Stout v. Med-Trans Corp.*, the court cursorily acknowledged the statutory definition of “air carrier,” but also

observed that “the text of the preemption provision provides that it applies to ‘an air carrier that *may* provide air transportation.’”¹⁸ The court concluded: “Based on the plain language of the statute, an air ambulance need only have the necessary authority to provide interstate, foreign, or mail transportation to fall within the preemption provision, and it need not provide interstate transportation in the certain instance to trigger preemption.”¹⁹

In *Scarlett v. Air Methods Corp.*, meanwhile, the court found:

The ADA preemption clause is written in broad terms to preempt state regulation of an air carrier that *may* provide interstate air transportation. As such, the air carrier need not *always* or *exclusively* provide interstate air transportation, but need only have the ability or potential to provide air transportation in order for the preemption clause to apply.²⁰

While these courts did not affirmatively state that they intentionally overlooked the statutory definition of “air carrier” in order to (appropriately) accommodate application of the ADA’s preemption provision to an intrastate operator, their analyses indicate just that. U.S. Department of Transportation (DOT) guidance is consistent with the holdings of *Stout* and *Scarlett*:

[A]ny operator with Federal air carrier authority is to be accorded the protections of the Federal preemption provision, regardless of its precise flight operations. Thus no practical niche is carved out for only its intrastate operations. Given our experience, we are of the view that consideration of trying to carve out intrastate service as a mechanism to avoid preemption would neither be a realistic nor productive exercise.²¹

Pre-Recodification

Had the courts above relied instead on the plain language of the pre-recodification versions of the ADA and the Federal Aviation Act’s definitions provision, they might have reached a different result (*SeaAir*, *Med-Trans*), or reached the same, correct result but without appearing to stray from the statutory definition of “air carrier” (*Stout*, *Scarlett*) in contravention of the Supreme Court’s position that “[s]tatutory definitions control the meaning of statutory words . . . in the usual case.”²²

In holding that the ADA’s preemption provision applied to *foreign* operators²³—notwithstanding the definition of “air carrier” as being limited to U.S. citizens—the Second and Ninth Circuits, in *In re Air Cargo Shipping Services Antitrust Litigation*²⁴ and *In re Korean Air Lines Co., Ltd., Antitrust Litigation*,²⁵ respectively, remained faithful to the statutory text by emphasizing the caveat in the pre-recodification version of the Federal Aviation Act that its definitions, including that of “air carrier,”

were to apply “unless the context otherwise requires.” While not focusing on that exception, *Lawal v. British Airways, PLC*,²⁶ harmonized its holding with the statutory text by emphasizing the context in which the term appeared. More specifically, because “air carrier” followed “any” and preceded “having authority under title IV of this Act to provide air transportation,” the court “endeavor[ed] to interpret the statutory language according to its natural meaning” rather than in accordance with its defined terms.²⁷

Such reasoning applies equally, as it must, to intrastate operators, in order to ensure Congress’s intent of a uniform system of aviation regulation, free from a patchwork of state laws.²⁸ In other words, context necessitates nonapplication of the statutory definition of “air carrier” in order to provide intrastate operators, which do not “engage to provide”²⁹ interstate/foreign/mail air transportation, with the safe harbor of preemption.³⁰ While we are unaware of any court to have performed this analysis in the intrastate (as opposed to foreign) operator context, the Ninth Circuit may have suggested it when it stated, “[t]he preemption provision preempts states from regulating the *intrastate* activities of any carrier ‘having authority under Title IV’”—notably omitting quotation marks around “air carrier.”³¹

Yet the statutory language that led *Lawal* and other courts to a contextual interpretation of “air carrier” no longer exists. As recodified, the ADA’s preemption provision refers to “an” air carrier rather than “any” air carrier, and the Federal Aviation Act’s definitions provision no longer includes the caveat that its definitions apply “unless the context otherwise requires.” Nevertheless, section 1(a) of the recodification law states that the law was “not [to] be construed as making a substantive change in the laws replaced,” and the Supreme Court has acknowledged that, ordinarily, “it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect.”³² Therefore, post-recodification, it remains proper to interpret “air carrier” broadly and in context, thus inclusive of intrastate operators. In fact, referencing *Lawal*, one court has noted that “use of the term ‘any air carrier’ in the pre-1994 ADA provision is critical, and its import carries over into the interpretation of the provision post-1994.”³³

DOT Economic Authority vs. FAA Safety Authority as the Preemption Trigger

Another overlooked change to the ADA’s preemption provision, promulgated by title 49’s recodification, also has altered judicial analyses. Pre-recodification, the ADA’s preemption provision applied to an operator “having authority under title IV of this Act to provide air transportation,” whereas post-recodification the provision applies to an operator that “may provide air transportation under this subpart.”

Post-Recodification

Since the 1994 recodification of title 49, some courts

have cited FAA safety authority as demonstrating that the operator is authorized to “provide air transportation under this subpart.” *Bailey v. Rocky Mountain Holdings, LLC*,³⁴ *Valley Med Flight, Inc. v. Dwelle*,³⁵ and *EagleMed, LLC v. Wyoming ex rel. Department of Workforce Services*³⁶ are all examples of recent federal district court opinions where the court cited the operator’s safety certification under 14 C.F.R. part 135, in addition to economic authority from the DOT, as evidence that the ADA’s preemption applied.

In other cases, courts have not considered economic authority at all.³⁷ For example, in *Stout v. Med-Trans*, the court found that “the ADA’s preemption provision is implicated . . . because Defendant Med-Trans is an ‘air carrier’ under the Act.”³⁸ More specifically, because “Med-Trans holds a Part 135 ‘Air Carrier Certificate’ from the Federal Aviation Administration certifying that it is ‘authorized to operate as an air carrier’ . . . it certainly may provide interstate air transportation.”³⁹

Pre-Recodification

In contrast to the generic post-recodification language, the pre-recodification ADA states that preemption applies to an operator having “authority under title IV of this Act to provide air transportation.” To be sure, title IV of the Federal Aviation Act of 1958, as amended, was labeled “Air Carrier Economic Regulation” and provided for *economic* authorization of operators in the form of a certificate of public convenience and necessity or an exemption, such as authorization to operate as an air taxi or commuter operator under 14 C.F.R. part 298. Thus, throughout the 1980s and early 1990s, courts focused exclusively on economic authority from the DOT as the trigger for ADA preemption. For example, in *Hughes Air Corp. v. Public Utilities Commission of State of California*, the Ninth Circuit held that the ADA applied to an operator because it was registered as a commuter operator under part 298.⁴⁰

To be clear, FAA safety authority is, and always has been, separate and distinct from DOT economic authority.⁴¹ In conjunction with 49 U.S.C. section 44705, in order to conduct “common carriage”—i.e., when an operator “‘holds itself out’ to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it”⁴²—an operator requires either an “air carrier certificate” or an “operating certificate,” containing the “operating specification” (e.g., part 121 or part 135) under which the operations must occur.⁴³

Had the *Stout* court and certain other courts reviewed the pre-recodification language, they would have discerned that FAA safety authority is not pertinent to the applicability of the ADA’s preemption provision. While this may ultimately have made no difference, to the extent the operators in those cases possessed both DOT economic and FAA safety authorizations, it would be critical where a purely intrastate

operator that *lacked* DOT economic authority but possessed FAA safety certification under 14 C.F.R. part 135 sought the benefit of ADA preemption.

Conclusion

While well intentioned, the 1994 recodification of title 49 of the U.S. Code made substantive changes to the text of the ADA's preemption provision, and the associated definitions section in the Federal Aviation Act. These changes materially altered the manner in which courts evaluate, as a threshold matter, the applicability of the ADA's preemption provision. Instead of slavishly abiding by the current text, courts must familiarize themselves with the pre-recodification law so as to correctly find the ADA applicable to intrastate operators, with economic authority constituting the appropriate predicate for such a finding. We hope that this article may serve as a lodestar for such future analysis.

Endnotes

1. Pub. L. No. 95-504, 92 Stat. 1705 (1978).
2. Pub. L. No. 85-726, 72 Stat. 731 (1958).
3. The Federal Aviation Act of 1958, as amended, previously resided in an appendix to title 49. Congress reenacted title 49 in 1994 via Pub. L. No. 103-272.
4. Pub. L. No. 103-272, § 6(a), 108 Stat. 745 (1994).
5. Jol A. Silversmith, *"It, Being Dead, Yet Speaketh": The Recodification of the Federal Aviation Act of 1958*, 29 AIR & SPACE LAW., no. 1 (2016), at 8.
6. The ADA's preemption provision, Pub. L. No. 103-272, § 4, added new § 105 to the Federal Aviation Act.
7. 513 U.S. 219, 223 n.1 (1995).
8. 134 S. Ct. 1422, 1429 (2014).
9. 49 U.S.C. § 41713(b)(1) (emphasis added).
10. 49 U.S.C. app. § 1305(a)(1) (emphasis added). As enacted by Congress, the provision stated "title IV of this Act," but that language was changed to "subchapter IV of this chapter," i.e., subchapter IV of chapter 20 of title 49 of the U.S. Code, when originally codified. And as originally enacted, the provision referred to "authority under title IV of this Act to provide *interstate* air transportation," but the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, removed "interstate."
11. 49 U.S.C. § 40102(a)(2).
12. *Id.* § 40102(a)(5).
13. See, e.g., *Schneberger v. Air Evac EMS, Inc.*, No. CIV-16-843-R, 2017 WL 1026012, at *2 (W.D. Okla. Mar. 15, 2017) ("The initial question, then, is whether air ambulance providers such as Air Evac and EagleMed qualify as 'air carriers' under the ADA and thus may invoke the federal-preemption defense at all."); *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 731 (E.D.N.C. 2008) ("Thus, to benefit from federal preemption under this provision, plaintiff must show it is an air carrier for purposes of the ADA[.]"); *SeaAir NY, Inc. v. City of New York*, No. 99-C6055, 2000 WL 1201379, at *2 (S.D.N.Y. Aug. 23, 2000) ("SeaAir, however, only gets the benefits of such preemption if it is an 'air carrier' under the statute.").
14. 250 F.3d 183 (2d Cir. 2001).
15. *Id.* at 186 & n.1.
16. 581 F. Supp. 2d 721.
17. *Id.* at 732. Interestingly, while *Med-Trans's* reasoning as to this point may be awry, based on other factors it ultimately reached the correct conclusion regarding preemption.
18. No. 17-cv-115-MW-GRJ, slip op. at 5 (N.D. Fla. May 2, 2018).
19. *Id.*; see also *LeMay v. USPS*, 450 F.3d 797, 799 (8th Cir. 2006) (observing "as a general rule of statutory construction, 'may' is permissive, whereas 'shall' is mandatory").
20. No. 16-cv-02723-RBJ, 2018 WL 2322075, at *5 (D. Colo. May 22, 2018).
21. Letter from James R. Dann, Deputy Assistant Gen. Counsel, DOT, to Donald Jansky, Assistant Gen. Counsel, Tex. Dep't of State Health Servs. (Feb. 20, 2007).
22. *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949).
23. Congress had intended as much. The Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703, amended the ADA's preemption provision by removing "interstate" from "having authority under title IV of this Act to provide *interstate* air transportation." One court has explained: "the Sunset Act's deletion of the limiting term 'interstate' from the ADA preemption provision leads us to conclude that Congress intended to expand the ADA's preemptive scope to cover state regulation of 'foreign air carrier[s].'" *In re Korean Air Lines Co., Ltd.*, Antitrust Litig., 642 F.3d 685, 695 (9th Cir. 2011).
24. 697 F.3d 154, 159 (2d Cir. 2012).
25. 567 F. Supp. 2d 1213, 1217 n.4 (C.D. Cal. 2008), *aff'd*, 642 F.3d at 693 n.5.
26. 812 F. Supp. 713 (S.D. Tex. 1992).
27. *Id.* at 718; *accord In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1775, 2008 WL 5958061, at *21 (E.D.N.Y. Sept. 26, 2008) ("*Lawal's* interpretation gave meaning to the modifying words before and after 'air carrier.'").
28. See generally *Air Cargo*, 697 F.3d at 160-61; *Korean Air Lines*, 642 F.3d at 694.
29. Recodification did not substantively change the definitions of "air carrier" and "air transportation." Compare 49 U.S.C. § 40102(a)(2), (5), with § 101(3), (10) of the pre-recodification Federal Aviation Act. Thus, to avoid further complication, we refer to the post-recodification definitions in this section.
30. Cf. *Arcie Izquierdo Jordan & Kenneth R. Hoffman, Federal Preemption of State Laws Regulating For-Hire Motor Carriers Transporting Property (Including Baggage) as Part of an Intrastate Air/Truck Shipment*, 19 TRANSP. L.J. 335, 337 (1990) ("An examination of the Aviation Act's definitions of an air carrier and air transportation 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 (CAB) or been exempted from certification requirements.").
31. *Hughes Air Corp. v. Pub. Utilities Comm'n of State of*

Cal., 644 F.2d 1334, 1337 (9th Cir. 1981) (emphasis added).

32. *Finley v. United States*, 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912)).

33. *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1775, 2008 WL 5958061, at *21 (E.D.N.Y. Sept. 26, 2008) (emphasis added).

34. 136 F. Supp. 3d 1376 (S.D. Fla. 2015).

35. 171 F. Supp. 3d 930 (D.N.D. 2016).

36. 227 F. Supp. 3d 1255 (D. Wyo. 2016).

37. *See Schneberger v. Air Evac EMS, Inc.*, No. CIV-16-843-R, 2017 WL 1026012, at *2 (W.D. Okla. Mar. 15, 2017) (finding that because Air Evac and EagleMed had FAA air carrier certificates with part 135 operations specifications permitting service throughout the country, they were “air carriers” under the ADA); *Med Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 732 (E.D.N.C. 2008) (concluding that because Med Trans actually operated interstate, and held part 135

operations specifications permitting service throughout the country, it was “an air carrier for purposes of the ADA”).

38. No. 17-cv-115-MW-GRJ, slip op. at 8 (N.D. Fla. May 2, 2018).

39. *Id.*

40. 644 F.2d 1334, 1337–38 (9th Cir. 1981); *see also Hiawatha Aviation of Rochester v. Minn. Dep’t of Health*, 389 N.W.2d 507, 509 (Minn. 1986).

41. *See U.S. Air Carriers*, DOT, <https://www.transportation.gov/policy/aviation-policy/licensing/US-carriers> (“[T]he economic authority issued to air carriers by the Department is separate from the safety authority (commonly referred to as Part 135 or Part 121 Operations Specifications) granted to them by the [FAA].”).

42. FAA, ADVISORY CIRCULAR AC 120-12A, PRIVATE CARRIAGE VERSUS COMMON CARRIAGE OF PERSONS OR PROPERTY (Apr. 24, 1986).

43. *See generally* 14 C.F.R. pt. 119.