



# Airlines' Common Carrier Liability Protection: Will Proposed Hemp and Telecom Rules Weaken the Shield?

By Sophie Hayashi

Air carriers have long enjoyed liability protection as common carriers under an enduring doctrine that transporters of goods are generally not liable for the legality of the goods. However, common carriers' liability protection, including that enjoyed by air carriers, for the unintentional transportation of illegal goods has become unsettled with ongoing state actions implicating the U.S. Department of Agriculture's (USDA's) interim final rule, Establishment of a Domestic Hemp Production Program (Hemp Rule),<sup>1</sup> and the U.S. Department of Commerce's notice of proposed rulemaking on Securing the Information and Communications Technology and Services Supply Chain (Proposed ICTS Rule).<sup>2</sup> If made final, these rulemakings (and ongoing state actions) would undermine air carriers' role as common carriers by failing to incorporate the well-established liability protection doctrine.<sup>3</sup>

In 2019, air carriers transported approximately 63.44 million tons of cargo.<sup>4</sup> In 2018, U.S. air carriers transported 58,000 tons of cargo per day.<sup>5</sup> This economic-driver situation is possible because of air carriers' unique global operations in nearly every jurisdiction around the world. In fact, one operation may involve many foreign countries in a single day. Typically, air carriers are also in the special position as nonparties to transactions involving the transportation of goods.<sup>6</sup>

The potential liability for air carriers created by these two rulemakings will have industry-wide implications if not addressed before release as final rules. Additionally, these two rulemakings, by agencies that do not normally regulate transportation entities, may reflect a remarkable and concerning degradation of the common carrier doctrine.

## History of the Common Carrier

Common carriers have long enjoyed special liability protections while also being held to a high standard of care for the goods and services they transport. Since at least 1702, common carriers have been

considered insurers of the goods they transport. In *Coggs v. Bernard*, Lord Holt wrote that a common carrier must transport goods safely "against all events but acts of God and of the enemies of the King."<sup>7</sup> In 1713, Lord Chief Justice Hale wrote that private businesses that serve a public interest must do so in a manner that complies with public expectations.<sup>8</sup> Lord Mansfield later expanded on the duties of a common carrier, noting that, "by definition, a common carrier had to serve all comers—if he wrongfully refused to accept a consignment, he was suable in tort."<sup>9</sup> Because common carriers have long been expected to serve the public interest, they have been afforded liability protections to facilitate their unique role in commerce.<sup>10</sup>

By modern standards, a common carrier holds itself out to the public as being engaged in the transportation of persons or property from place to place for compensation, offering its services to the public generally. The distinctive characteristic of the common carrier is that it undertakes to carry for all people indifferently and is regarded, in some respects, as a public servant.<sup>11</sup> Regarding air carriers, the FAA has determined that "a carrier becomes a common carrier when it '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."<sup>12</sup> In turn, because air carriers, as common carriers, serve the public at large and play a vital role in facilitating commerce, they have been afforded special liability protections. For example, common carriers are excepted from the Controlled Substances Act when their possession of a controlled substance or List I chemical is in the usual course of its business or employment.<sup>13</sup>

## Interstate Transportation of Hemp Threatened by New Federal Hemp Rule and Actions in Idaho

Traditionally, air carriers refused to transport hemp, largely because of its inclusion as a federally controlled substance. Although hemp became legal in certain states before 2018, Congress did not legalize hemp production until it passed the 2018 Farm Bill.<sup>14</sup> The express preemption provision in the 2018 Farm Bill is incorporated in the USDA's Hemp Rule: states may not prohibit the transportation of hemp in interstate commerce.<sup>15</sup> The Farm Bill's preemption language supports the legal transportation of legally produced hemp across state lines.

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Importantly, the USDA's general counsel has clarified that the 2018 Farm Bill did *not* preserve states' and Indian tribes' authority to enact and enforce laws regulating the interstate transportation or shipment of hemp.<sup>16</sup> Congress only gave states and Indian tribes the authority to regulate "the *production* of hemp."<sup>17</sup> In fact, state regulation that burdens interstate hemp transportation is directly contrary to Congress's intent to remove "heavy-handed regulations" and "roadblocks" for the hemp industry and to create a regulatory environment that realizes hemp's economic potential in the United States.<sup>18</sup> Additionally, state regulation of airline routes and services is explicitly preempted by the Airline Deregulation Act of 1978 (ADA).<sup>19</sup> Simply put, states cannot frustrate interstate commerce in hemp or the federal government's regulation of airlines' transportation of hemp.

While the express preemption provisions in the 2018 Farm Bill, the Interstate Commerce Act, and the USDA's Hemp Rule should prevent states from regulating the interstate transportation of hemp, this has not been the case. Common carriers have already found themselves potentially liable for the transportation of legal hemp across state lines. The uncertainty this has created must be resolved before common carriers, including air carriers, fully partake in interstate hemp commerce as transporters. In this context, it is noteworthy that the USDA recently reopened the comment period on the Hemp Rule, asking with respect to interstate commerce "whether the IFR [interim final rule] is sufficient, or if additional regulatory requirements are needed, to facilitate domestic interstate commerce and transactions."<sup>20</sup>

The Hemp Rule is currently being tested by the state of Idaho, where state police seized a transporter's shipment of legal hemp and arrested its driver. Big Sky Scientific, LLC, a Colorado company, had purchased a shipment of legal hemp from a hemp farm in Oregon. Idaho state police seized a shipment of 13,000 pounds of cargo that included roughly 7,000 pounds of Big Sky's legal hemp. After the court denied Big Sky's motion for a temporary restraining order and preliminary injunction, Big Sky appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit refused to consider Big Sky's case because the *in rem* forfeiture case was still ongoing in Idaho state court.

The Ninth Circuit's decision to abstain creates an uncertainty for potential transporters of legal hemp in interstate commerce, leaving unanswered the question of whether Idaho's seizure of Big Sky's legal hemp and arrest of its driver are preempted under the 2018 Farm Bill, the Interstate Commerce Act, and the ADA. In January 2020, an Idaho state court held that the Idaho state police had the authority to seize the shipment of legal hemp.<sup>21</sup> The court argued that Big Sky was premature and had attempted to transport hemp that had been produced prior to enactment of the

2018 Farm Bill.<sup>22</sup> It is unclear if Big Sky will appeal the state court decision in that case. Big Sky's original case is still ongoing, and air carriers, and transporters generally, may wait for a ruling before engaging in the interstate transportation of legal hemp.

To further complicate matters, the Governor of Idaho issued Executive Order No. 2019-13 in November 2019; it requires any transporter of hemp to "stop at the first port of entry encountered in the State of Idaho."<sup>23</sup> The Idaho Executive Order implicates the express preemption under the Federal Aviation Administration Act;<sup>24</sup> the ADA, which prohibits state regulation of airlines' routes and services;<sup>25</sup> and the 2018 Farm Bill. While the Idaho Executive Order clearly presents a host of legal issues,<sup>26</sup> perhaps the most salient issue for transporter liability is that transporters must consent to inspection of shipments that may involve the inspection of hemp for an unspecified period of time and testing of the hemp shipments at an off-site lab.<sup>27</sup> This will likely deter transporters from carrying legal hemp and stifle Congress's intent to boost the economy by legalizing hemp.

Under the Idaho Executive Order, air carriers who choose to transport legal hemp risk the grounding of their plane, the seizure of their entire cargo load for an indefinite amount of time, and the arrest of their pilot. While Idaho is the only state that has seized a shipment of apparently legal hemp in interstate transportation since the passage of the 2018 Farm Bill, the lack of resolution in Big Sky's case leaves open the possibility of other state actions that could threaten common carriers' traditional liability protection and ability to engage in the interstate transportation of legal hemp. In fact, Big Sky is still without its hemp shipment, worth approximately \$1.3 million; its driver was arrested; and it has been in ongoing litigation with the state for over a year. Other transporters will likely risk a similar fate, stifling the transportation of legal hemp until they have assurances of safe passage across state lines.

### Proposed ICTS Rule

On May 15, 2019, the President issued Executive Order No. 13873 (ICTS executive order), which declared that "foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services. . . . To deal with this threat, additional steps are required to protect the security, integrity, and reliability of information and communications technology and services [ICTS] provided and used in the United States."<sup>28</sup> The ICTS Executive Order follows two decades of intelligence documenting the dangers of products and services from firms associated with the Chinese government and military.<sup>29</sup> Senate Judiciary and Intelligence Committee hearings have corroborated the threat foreign-owned or controlled ICTS poses to the supply chain.<sup>30</sup>

Pursuant to the ICTS Executive Order, the

Department of Commerce proposed regulations to address perceived vulnerabilities of the critical infrastructure and digital economy of the United States. However, the Proposed ICTS Rule unintentionally may create liability exposure for all air carriers who unknowingly transport items resulting from a prohibited transaction but who are not a party to the transaction that the Department of Commerce seeks to regulate.

Specifically, the Commerce Department secretary may prohibit any

acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service where the Secretary finds that the transaction: (i) involves property in which a foreign country or national has an interest; (ii) includes information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary; and (iii) poses certain undue risks to critical infrastructure or the digital economy in the United States or certain unacceptable risk to U.S. national security or U.S. persons.<sup>31</sup>

A transaction that meets the Commerce Department's conditions will be subject to a post-transaction review by the Secretary and may require mitigation, prohibition, or an unwinding of the transaction if determined to be prohibited.<sup>32</sup>

Some argue that the Proposed ICTS Rule is simply too broad and does not account for the operational realities of transporters.<sup>33</sup> In addition, the Proposed ICTS Rule contains traps of ambiguous language that might catch unsuspecting common carriers. For example, *importation*, *transfer*, and *dealing in* are not defined by the Proposed ICTS Rule. If the rule becomes final as is, carriers must interpret these terms as best they can—all while risking liability for the unknowing transportation of prohibited ICTS.

As critical drivers of the global supply chain and under the well-established common carrier liability protection doctrine, air carriers should not be liable for the transportation of ICTS deemed prohibited, particularly if the ICTS may be deemed prohibited after an investigation by the Secretary. The envisioned investigation is a multilayered process that includes an initial report by the Secretary and an opportunity for interested parties to respond, followed by a final determination by the Secretary.<sup>34</sup> Until that final determination is made, air carriers may unwittingly transport prohibited ICTS. Air carriers run the risk of transporting prohibited ICTS because they are often not a party to transactions and therefore have no way to determine whether they carry potentially prohibited

ICTS among the enormous volume of their cargo operations. Additionally, should ICTS be deemed prohibited by the Secretary, the proposed rule provides no clear process for air carriers to remedy their unknowing carriage of prohibited ICTS.

Moreover, U.S. airlines, both passenger and cargo, heavily rely on ICTS, which may be subject to the ICTS Executive Order and the Proposed ICTS Rule in their normal operations. For example, air carriers use ICTS to communicate air traffic control and flight plan information, transmit passenger and cargo manifest information to foreign authorities, communicate with customs authorities for clearances, arrange overseas sales and administer overseas operations and transactions, and automatically report aircraft maintenance data. In addition to using ICTS, air carriers, as part of the global supply chain, also may provide freight forwarding services, brokerage services, and other related services for the transportation, importation, and exportation of ICTS.

Although it seems unlikely that the Department of Commerce intended the proposed rule to cover air carriers that transport ICTS in the normal course of business, the proposed rule leaves open questions as to air carriers' potential liability for the transportation of prohibited ICTS, particularly in instances when a carrier is not a party to the transaction. The Proposed ICTS Rule appears to contain a potential solution, but it still leaves carriers with too much uncertainty. The Secretary may exempt certain classes of transactions where such transactions are outside the scope of the ICTS Executive Order and, therefore, could exempt from the rules air carriers' unknowing transportation of prohibited ICTS or transportation of unclassified ICTS.<sup>35</sup> However, the potential for an exemption does not give air carriers certainty. Moreover, without a carveout in the rules or an exemption for air carriers, the unintended liability created by the Proposed ICTS Rule may stifle trade and have far-reaching implications for the U.S. aviation industry as a whole. For example, air carriers may lose their ability to participate in key markets and maintain that special role as a public servant for all shippers that Lord Hale recognized in 1713.

## Conclusion

Under these two new rulemakings and as a result of ongoing state actions, common carriers, including air carriers, may have diminished legal protection for shipping goods if those goods turn out to be illegal. The airline industry, and the transportation industry more generally, makes interstate and international commerce possible—cargo services must operate efficiently across jurisdictional boundaries. Governments appear to not recognize that air carriers have a special position in the supply chain and that the potential degradation of the common carrier protection will have far-reaching implications, stifling U.S.

participation in important markets and industries, which will result in the loss of jobs and effectively bar carriers from participating in new economic opportunities. If these concerns are not addressed, air carriers will be unable to fulfill their role as common carriers, and, ultimately, the public will suffer harm.

## Endnotes

1. Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58,522 (Oct. 31, 2019) (interim final rule with request for comments).

2. Securing the Information and Communications Technology and Services Supply Chain, 84 Fed. Reg. 65,316 (Nov. 27, 2019).

3. See 49 U.S.C. § 40102; see also 14 C.F.R. § 298.2 (“Interstate air transportation is defined in section 40102(a)(25) as the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft. . .”).

4. U.S. DEP’T OF TRANSP., AIR CARGO SUMMARY DATA, <https://www.transtats.bts.gov/freight.asp>.

5. AIRLINES FOR AMERICA, <https://www.airlines.org/blog/how-air-cargo-connects-the-world> (last visited Sept. 29, 2020).

6. Air carriers do have some protection from transporting certain goods, such as dangerous goods, by relying on shippers’ declarations and/or certifications. INT’L AIR TRANSP. ASS’N, DG SHIPPER’S DECLARATION (DGD) AND E-DGD, available at <https://www.iata.org/en/programs/cargo/dgr/shippers-declaration> (last visited Sept. 25, 2019).

7. John R. Pagan, *English Carriers’ Common-Law Right to Reject Undeclared Cargo: The Myth of the Closed-Container Conundrum*, 23 WM. & MARY L. REV. 791 (May 1982), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2282&context=wmlr>.

8. Phil Nichols, *Redefining “Common Carrier”: The FCC’s Attempt at Deregulation by Redefinition*, 1987 DUKE L.J. 501, 507 (1987), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2992&context=dlj> (quoting M. HALE, *THE ANALYSIS OF LAW* (1713)).

9. Pagan, *supra* note 7, at 806.

10. See Nichols, *supra* note 8.

11. *Kieronski v. Wyandotte Terminal R.R. Co.*, 806 F.2d 107, 108 (6th Cir. 1986) (quoting *Kelly v. Gen. Elec. Co.*, 110 F. Supp. 4, 6 (E.D. Pa. 1953)); see also *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 250 (3d Cir. 2007); *Nat’l Ass’n of Regul. Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976); *Las Vegas Hacienda, Inc. v. Civ. Aeronautics Bd.*, 298 F.2d 430, 434 (9th Cir. 1962).

12. FED. AVIATION ADMIN., ADVISORY CIRCULAR NO. 120-12A, at 1 (Apr. 24, 1986).

13. 21 U.S.C. § 822(c)(2); see Laura Stevens, *FedEx Uses ‘Common Carrier’ Defense Against DOJ Drug-Shipping Charges*, WALL ST. J. (Mar. 26, 2015), <https://www.wsj.com/articles/fedex-uses-common-carrier-defense-against-doj-drug-shipping-charges-1427395841> (dismissing all charges against FedEx for transporting prescription pharmaceuticals that, according to the government, had been dispensed pursuant

to prescriptions issued by doctors in violation of federal law).

14. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (Dec. 20, 2018), <https://www.congress.gov/bill/115th-congress/house-bill/2/text> (complete legislative history of Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. (2017–2018)). The 2018 Farm Bill defines *hemp* as cannabis “with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.” *Id.* Pursuant to the Farm Bill of 2018, the DEA clarified that hemp plants are no longer considered a controlled substance under the Controlled Substances Act.

15. See Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58,522, 58,538 (Oct. 31, 2019) (interim final rule with request for comments) (“[N]o State or Indian Tribe may prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.” (quoting 2018 Farm Bill, § 10114)); see also Pub. L. 115-334, § 10114(b), 132 Stat. 4914 (Dec. 20, 2018).

16. Memorandum from Stephen Alexander Vaden, Gen. Counsel, U.S. Dep’t of Agric., to Sonny Perdue, U.S. Sec’y of Agric., Legal Opinion on Certain Provisions of the Agriculture Improvement Act of 2018 Relating to Hemp 2 (May 28, 2019).

17. *Id.* (emphasis in original).

18. 164 CONG. REC. S3,929 (daily ed. June 14, 2018) (statement of Sen. McConnell) (“It is time to remove the roadblocks and let American farmers explore this growing market.”); 164 CONG. REC. S4,460 (daily ed. June 27, 2018) (statement of Sen. McConnell):

So American consumers are buying hemp, but thanks to heavy-handed regulations, the only option at scale is importing hemp from foreign producers. Enough is enough. Industrial hemp is a completely different plant than its illicit cousin. It is time we get Washington out of the way and let American farmers meet the growing demand of American consumers. . . . Hemp will be a bright spot for our future. It is full of economic potential in Kentucky and the Nation.

19. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4, 92 Stat. 1705, 1708 (codified at 49 U.S.C. § 41713(b)(1)): Except as provided in this subsection, 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 relating to a price, route, or service of an air carrier that may provide air transportation under this subpart.

20. U.S. Dep’t of Agric., Establishment of a Domestic Hemp Production Program; Comment Period Reopened, 85 Fed. Reg. 55,363 (Sept. 8, 2020).

21. *Idaho State Police v. One White 2013 Freightliner Commercial Vehicle*, Case No. CV01-19-2219, 2020 WL 1129187 (Idaho Dist. Ct. Jan. 21, 2020).

22. *Id.*:

[T]he prohibition on states interfering with the inter-state transportation of low-THC *C. sativa* plants in Section 10114(b) of the 2018 Farm Bill applies

only to low-THC *C. sativa* plants grown after the 2018 Farm Bill was enacted and grown pursuant to either an approved state regulatory plan or pursuant to those regulations promulgated by the Secretary of Agriculture to govern cannabis production.

23. Idaho Exec. Order No. 2019-13, at 2 (Nov. 19, 2019), <https://isp.idaho.gov/wp-content/uploads/2019/11/2019-11-19-Executive-Order-No-2019-13.pdf>.

24. 49 U.S.C. § 14501(c)(1) (establishing that a state “may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property”).

25. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4, 92 Stat. 1705, 1708 (codified at 49 U.S.C. § 41713(b)(1)).

26. Idaho Exec. Order No. 2019-13. The Idaho executive order also requires affirmation from the transporter that hemp is legal, verification from the hemp producer that hemp is legal, lab test results, bill of lading, and labeling of the hemp.

27. *Id.* at No. 4.

28. Exec. Order No. 13873 (May 15, 2019).

29. Roslyn Layton, *What About The Small Firms That Must Rip and Replace Their Huawei Equipment?*, FORBES (May 17, 2019), <https://www.forbes.com/sites/roslynlayton/2019/05/17/what-about-the-small-firms-that-must-rip-and-replace-their-huawei-equipment/#526f99347717>.

30. Roslyn Layton, *White House and Commerce*

*Department Put China's Tech Sector on Notice*, AEI (May 21, 2019), <https://www.aei.org/technology-and-innovation/white-house-and-commerce-department-put-chinas-tech-sector-on-notice>; see *Worldwide Threats: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. (Feb. 13, 2018), <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-0#>; see also *5G: National Security Concerns, Intellectual Property Issues, and the Impact on Competition and Innovation: Hearing Before the S. Comm. On the Judiciary*, 116th Cong. (May 14, 2019).

31. U.S. Dep't of Commerce, *Securing the Information and Communications Technology and Services Supply Chain*, 84 Fed. Reg. 65,316 (Nov. 27, 2019).

32. *Id.* at 65,316–17.

33. See Letter from Multiple Ass'ns to Wilbur L. Ross Jr., Sec'y, U.S. Dep't of Commerce, *Multi Association Letter—ICTS Supply Chain Proposed Rule* (Jan. 10, 2020), <https://www.uschamber.com/comment/multi-association-letter-icts-supply-chain-proposed-rule>; see also Airlines for America, *Comments on Proposed Rulemaking Regarding Securing the Information and Communications Technology and Services (ICTS) Supply Chain*, <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&D=DOC-2019-0005> (The proposed rule has received 68 comments to date.)

34. *Securing the Information and Communications Technology and Services Supply Chain*, 84 Fed. Reg. at 65,317.

35. *Id.*