

**PREEMPTION DOCTRINE VOIDS  
NEW YORK AIR PASSENGER BILL OF RIGHTS:  
THE RIGHT DECISION, BUT NO RELIEF  
FOR BELEAGURED PASSENGERS**

**BY**

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Among other indignities New Yorkers have recently suffered, we can include: gasoline in excess of \$ 4 per gallon; watching a certain storied basketball franchise suffer loss after loss after loss, and; sitting for hours in an aircraft stranded on the runway of one of our major airports. The first we can do little about; the second dilemma is being addressed by new management; and the third *was* the subject of some very helpful legislation aimed at ameliorating the suffering of woebegone fliers.

However, that remedial lawmaking was swiftly struck down by the United States Court of Appeals for the Second Circuit, for reason that it was violative of certain doctrines of federal preemption. Certainly, sad news for airline travelers desperate for a "passenger Bills of Rights," but, at the end of the day, a judicious exercise of the maxims of federal supremacy by one of our leading courts. Given that this new decision teaches

important lessons in the limitations placed upon local lawmakers when the federal government has occupied a field with pre-existing law, it is worthy of our analysis.

This new case is encapsulated Air Transport Association of America, Inc. v. Cuomo, 520 F.3d 218 (2d Cir. 2008), and represented a contest between the plaintiff-appellant ATAA, best described as the principal trade organization of the American airline industry, and the State of New York, as represented by its Attorney General. Id. at 219-20. The airline trade group was seeking declaratory and injunctive relief against the enforcement of New York's nascent "Passenger Bills of Rights," ("PBR"), a consumer protection measure passed by New York's lawmakers in reaction to "a series of well-publicized incident during the winter of 2006-2007 in which airline passengers endured lengthy delays grounded on New York runways, some without being provided water or food." Id. at 220. Judge Kahn of New York's Northern District granted summary judgment to the New York AG, and dismissed the action. The ATAA appealed, claiming the PBR was expressly preempted by federal aviation law.

There was no suspense here, as the Second Circuit, in a per curiam opinion, immediately reversed the district court, and declared the New York statute preempted by the federal Airline Deregulation Act of 1978 ("ADA"). Id. at 220. As an initial matter, the tribunal first parsed the relevant provisions of the PBR, noting as most important its requirements that when passengers embarking from a New York airport were already onboard an aircraft and were delayed more than three hours, the air carrier had to provide electricity for fresh air and light, operative onboard lavatories, and adequate food, water,

and other refreshments. Id. at 220, formerly codified at at N.Y. Gen. Bus. Law § 251-g(1) (effective January 1, 2008).

The federal district court had rejected the trade group's contention that the New York State promulgation was preempted by the ADA and the Commerce Clause of the U.S. Constitution, instead finding that the PBR was not expressly preempted by federal law because the former did not relate to the price, route or service of an air carrier, all matters the federal law explicitly addressed. Likewise, the district judge found implied preemption lacking, on that basis that Congress did not intend for the ADA to occupy the entire field of aviation safety. Id. at 220. See also 528 F.Supp.2d at 62, 66-67 (N.D.N.Y. 2007). The granting of summary relief on legal grounds by the trial court was, as always, reviewed de novo by the higher court. Id. at 220.

Against this backdrop, the Second Circuit first reviewed the essentials of the preemption doctrine. Since the beginnings of the Republic, the Supremacy Clause has invalidated state laws that interfere with or contradict federal law. Id. at 220. See U.S. CONST., Art. VI, cl. 2; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). This preemption comes in two varieties; the first is express preemption, arising when a federal statute ousts related state law. Id. at 220, citing Association of Int'l Auto Manufacturers v. Abrams, 84 F.3d 602, 607 (2d Cir. 1996). This is complemented by implied preemption, evidenced when Congress intends for federal statutes to occupy the field or when a state enactment actually conflicts with federal law. Id. at 220, citing English v. General Electric Co., 496 U.S. 72, 79 (1990). Implied preemption is also found when

federal regulation is so pervasive that it precludes any supplementation by state legislation. *Id.* at 221, citing Scheidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988).

The Second Circuit first tested the federal ADA against these doctrines of preemption. The tribunal was handily assisted by the text of the ADA itself, which contained an explicit provision barring the States from enacting or enforcing any law whatsoever related to the price, route or service of an air carrier operating under federal authority. *Id.* at 221, citing 49 U.S.C. § 41713(b)(1). That the foregoing was a cogent expression of preemption by Congress had been recognized over a decade before by the Supreme Court in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 and 389-91 (1992). The ATAA panel confirmed that when Congress deregulated the airline industry in 1978, it made clear that this relaxation of economic restraint was not to be undone by state reregulation. ATAA, *supra*, at 221.

To be sure, the Second Circuit recognized that it had not yet defined the term “service” as found in the ADA preemption clause, but “we have little difficulty concluding that requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relates to the service of an air carrier.” *Id.* at 222. Notably, the tribunal referred to a very new Supreme Court landmark, Rowe v. New Hampshire Motor Transp. Ass’n, 552 U.S. ---, 128 S. Ct. 989 (2008), wherein the high Court held that a Maine law imposing obligations on common carriers when delivering tobacco products within that state was preempted by existing federal law regulating

interstate commerce. Rowe, U.S. at ---, S. Ct. at 995. The panel found instructive the Justices' repeated references to the ADA as a broad and express preemption, designed to deregulate and prohibit state rules from filling the vacuum left behind when the airline industry was deregulated thirty years ago. Id. at 222.

Continuing, the tribunal acknowledged that a majority of its sister circuits have construed "service," as found in the ADA proviso, to include any expenditure of labor by the airline towards passengers, including the full gamut of boarding, handling baggage, the provision of food and drink----"matters incidental to and distinct from the actual transportation of passengers." Id. at 223 (citations omitted). To be sure, the Second Circuit allowed that its colleagues on the Third and Ninth Circuits have taken a much narrower view of what constitutes "service," delimiting that term to matters that strictly pertain solely to the pricing and scheduling of actual transportation, and not encompassing incidentals such as food and beverage service, handling luggage, and similar amenities. Id. at 223, citing Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9<sup>th</sup> Cir. 1998) (en banc).

The Second Circuit now decided to align itself with the majority camp, and reject the stance taken by tribunals calling for a more restrictive view of what encompasses "service" pursuant to the ADA. Relying again upon the Supreme Court's new declaration in Rowe, the ATAA court decreed that the term "service" under the federal aviation law has a natural extension beyond mere prices and schedules of air travel. The imposition by the States of other, ancillary requirements does indeed impact "services,"

concluded the Second Circuit, and therefore the ADA's express preemption statute worked to invalidate the New York PBR in the instant case. Id. at 223-24. Indeed, the tribunal reasoned that "[the PBR] substitutes New York's commands for the competitive market forces" Congress intended to unleash with the passage of the ADA, and "threaten[ed] the same 'patchwork of state service-determining laws, rules, and regulations' that concerned the Court in Rowe." Id. at 224 (quotation omitted). Therefore, the airline passenger bill of rights inaugurated by New York was expressly preempted by the explicit provisions of federal aviation law dating from 1978. Id. at 224.

Having disposed of the express preemption argument made by the airline industry group, the panel was nothing if not thorough in next addressing the ATAA's contentions regarding implied preemption. Not surprisingly, the results were the same, and the New York PBR was ousted on that ground as well.

"Insofar as the PBR is intended to prescribe standards of airline safety," stated the per curiam opinion, it is impliedly preempted by the Federal Aviation Act ("FAA"). Id. at 224. The FAA is the seminal body of law passed by Congress a half-century ago to enable a uniform and exclusive system of federal regulation in the field of air safety, and centralize in a single administrative agency (the *other* FAA, the Federal Aviation Administration) the power to frame rules for the safe and efficient use of the nation's airspace. Id. at 224. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973); Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960). As a natural consequence, the federal government has used this authority to occupy virtually

the entire field of air safety, running the gamut from the very general to the intensely detailed. Id. at 224 (citations omitted). Most significantly, noted the panel, “[t]his power extends to grounded planes and airport runways.” Id. at 224 (citations omitted).

Finding all this centralization of air safety authority in the federal sphere and a comprehensive scheme of regulations designed to encompass all American airspace and facilities, the Second Circuit readily concluded that “Congress intended to occupy the entire field and thereby preempt state regulation of air safety.” Id. at 224-25 (citations omitted). And by occupying the field, Congress implicitly preempted any attempt by the States to compete or supplement with individual promulgations on subject. Id. at 225.

Finally, this tribunal would not countenance “unraveling the centralized federal framework for air travel” by allowing New York’s PBR to stand, no matter what public health concerns it addressed nor consumer benefits it was intended to instill. New York’s highest federal bench made clear its concern that condoning New York’s individual efforts to provide basic essentials to stranded passengers could open up the floodgates to the other States passing more excruciating demands upon airlines touching down on their soil, such as barring soda on flights, providing allergen-free food options, or any imagined number of restrictive and contradictory requirements under the rubric of “public health or safety.” Such individualistic enactments by the several States would at the least impinge, if not utterly destroy, the federal lawmakers’ implied intention to occupy the entire domain of air safety. Id. at 225.

Thus, for all these good reasons, the Second Circuit reversed the lower court's decision, and directed the district court on remand to award summary judgment to the airline industry, on the grounds that New York PBR was prohibited by the doctrines of express and implied preemption. As of this writing, it is unknown if there will be an appeal to the Supreme Court, let alone whether the Justices would grant certiorari.

As the title of this writing indicates, this is bad news for beleaguered air travelers. Already burdened by rising prices, poor service, and unprecedented delays, this invalidation of a law aimed at simply providing passengers with some basic necessities during oppressive flight delays could not have come at a worst time. Certainly, the airline industry will seize this victory to ensure that similar actions by other states are either voided or never come to pass. Likewise, industry forces will most likely seek to water down any Congressional attempts to incorporate such passenger-oriented protections into the overarching federal law.

But as much as we might bemoan the fate of weary travelers, including ourselves, in truth it cannot be argued that the Second Circuit erred in deciding ATAA. The Supremacy Clause is itself a plain and necessary proviso of our Constitution, and for the whole history of the Republic, it has proven vital to ensuring the uniformity of law throughout the several States on matters of national import. Equally so, the Supremacy Clause avoids a "crazy quilt" pattern of conflicting state regulation on matters of commercial interest that cross state lines. We need only look at the high Court's most

recent pronouncement in Rowe to appreciate its significance in a country that gets smaller every day.

Thus, we should applaud and not condemn the Second Circuit's rational application of the preemption doctrine, in the form of both of its fundamental prongs of express and then implied preemption. That the ADA contains an express preemption clause is self-evident, and the tribunal rightly called upon in making the only sensible decision it could. To ignore such a clear expression of a Congressional intent to bar contrary state lawmaking would have been pure folly.

In much the same way, we can acknowledge the correctness of the tribunal's holding with regard to the implied preemption branch of the doctrine. It would be difficult, if not impossible, to argue that for the last half-decade Congress intended to occupy the entire field of aviation safety; otherwise, why create the Federal Aviation Administration, give it vast powers, and permit it to promulgate what is now a well developed and vibrant body of air safety regulation? Indeed, it might be said that the success of the airline industry on that portion of its argument is due to the fact that the regulatory regime enacted by Congress fifty years ago is less implied and more express preemption than the Second Circuit gives it credit for. In any event, it is beyond argument that federal law occupies the field, and thus it is an easy step to find implied preemption, and the consequent ouster of state law.

In sum, the Second Circuit was correct in ATAA in holding that the New York air Passenger Bill of Rights was void for reason of express and implied preemption. Yet it remains to be seen what comfort that will provide us the next time we are stuck on a runway for hours without food or water, and what the federal government, its supremacy assured by this decision, does to lessen our troubles.

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