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Federal Preemption of State Law: The Example of Overbooking in the Airline Industry

The airline industry, like many industries, is extensively regulated by a federal agency and a corpus of federal law and is also subject to numerous state laws and regulations. When conflict between the two is clear, the supremacy clause of the United States Constitution ensures that the federal law or regulatory agency action, if valid, will preempt any inconsistent state law. When conflict is less clear, as where the federal and state laws are arguably consistent or where federal intent to preempt is manifested by mere congressional or agency inaction, the preemption issue thus raised becomes considerably more complex.

Such complexity is common in the airline context, both because the Federal Aviation Act (FAA) and the Civil Aeronautics Board (CAB) do not purport to regulate all aspects of the industry and because airline activities are so varied that they come within the reach of numerous state statutory and common-law rules. This Note will consider the power of the CAB to preempt state law and thereby to insulate airline activities from state-law liability. It will suggest a framework for analyzing the problems of preemption by focusing on airline concealment of overbooking practices. Section I explains airline overbooking and demonstrates that concealment of overbooking will often constitute common-law misrepresentation as that tort is usually defined. Section II, taking into account the most recent elaboration by the Supreme Court in Nader v. Allegheny Airlines, Inc., examines the CAB's general power under the Federal Aviation Act and establishes the tests used by the courts to determine whether state law is incompatible with the Act. It then considers what the CAB must do to make clear a specific intent to preempt state law. Section III applies the analysis of section II to determine whether the CAB can insulate airlines from misrepresentation liability for concealment of overbooking practices and seeks to ascertain whether the CAB has actually attempted to preempt state law in this area.

2. 44 U.S.L.W. 4803 (U.S. June 7, 1976) (No. 75-455). In Nader, the Court decided only that the CAB did not have "primary jurisdiction" over the issues raised by concealment of overbooking. Still, the decision, particularly its construction of various statutes dealing with the powers of the CAB, is pertinent to the subject matter of this Note.
I. OVERBOOKING AND MISREPRESENTATION

Overbooking, a practice common to all airlines,\(^3\) occurs when an airline accepts more reservations for a particular flight than there are seats on the airplane. Deliberate overbooking is a response to the problem of "no-shows,"\(^4\) persons who reserve airline space but neither use nor cancel their reservations. Past efforts to deal with this problem have included ticketing time limits, reconfirmation requirements,\(^5\) and the imposition of reservation service charges. These programs succeeded in reducing the number of no-shows, but customer ill will\(^6\) caused them to be abandoned in favor of the current, flexible system that allows airline customers to make reservations freely and to recover the full value of their fares if they do not use their reservations.

Studying a flight's no-show history allows air carriers to predict future reservation turnover and no-show incidence and to employ controlled overbooking as a means of reducing the chance that a fully booked airplane will depart with empty seats. Thus, overbooking enables the airlines to utilize effectively the flexible reservation system,\(^7\) permits passengers who would not otherwise be accommodated on the flight of their choice to make confirmed reservations, and helps carriers to increase their load factor.\(^8\)

However, deliberate overbooking inevitably results in instances in which more persons holding confirmed reservations appear for a flight than are predicted so that some must be denied boarding. Denial of boarding to individuals with confirmed reservations in such an "oversale" situation, commonly called "bumping," appears at first glance to be a statistically insignificant problem. There were 5.4 oversales per 10,000 enplanements in 1972 and 4.6 in 1973.\(^9\)

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3. Initial Decision, CAB Docket 26253, Emergency Reservation Practices Investigation, at 10 (June 10, 1974) [hereinafter CAB Initial Decision].

4. See Note, Court Usurpation of CAB Function: The Problem of the "Bumped" Passenger, 43 UMKC L. Rev. 112 (1974). See also CAB Initial Decision, supra note 3, at 2. In December 1972, the industry total of no-shows per flight in a sample survey was 21.2 per cent. In December 1973, the figure reached 24.7 per cent. The low for the year 1973 was 12 per cent in July. Id. appendix B, at 1.

5. CAB Initial Decision, supra note 3, at 2.

6. Id. at 2-3.

7. Id. at 8-9: "The successful growth and development of air transportation has been aided significantly by the flexibility of the industry's reservation practices and procedures which make airline services easily available to the public. The airline passenger has substantial freedom of choice to make reservations at carriers' offices or through agents and to cancel them by telephone or in person. Also, should a ticketed passenger have a change of plans, he is free in most situations to use his ticket on flights of other air carriers without endorsement."


absolute terms, however, the numbers are quite substantial—nearly 83,000 persons were bumped in 1972 and approximately 76,000 in 1973.\(^\text{10}\) In recognition of the inconvenience and hardship that can occur when persons who expect to board a flight are not allowed to do so, the CAB adopted rules that provide for compensation payments to individuals who are bumped.\(^\text{11}\) If accepted, this compensation constitutes liquidated damages for all injuries suffered by the passenger.\(^\text{12}\)

The CAB and the airline industry contend that overbooking is essential if the public is to enjoy flexibility in reservation practices.\(^\text{13}\) Justification of controlled overbooking on such policy grounds, however, still leaves open the question whether airlines can legitimately continue to conceal overbooking practices from the public. Currently, the printed statements disseminated (according to CAB regulations) to persons who have been bumped contain no mention of overbooking as a possible cause of the ticket oversale. The airlines themselves are more active in concealing the reasons why customers with reservations must occasionally be bumped. Thus, Eastern Airlines’ company manual instructs its employees never to use the word “oversale” in a conversation within hearing distance of anyone other than Eastern employees.\(^\text{15}\) Similarly, the American Airlines manual states that “[i]f a passenger asks reason for oversale, tell him that the reason will be known only after an investigation has been conducted and all the facts are revealed.”\(^\text{16}\)

The facts of a case just decided by the Supreme Court, \emph{Nader v. Allegheny Airlines, Inc.},\(^\text{17}\) illustrate the plight of the bumped passenger and provide a convenient framework for discussing the misrepresentation issues raised by airline concealment of overbooking. In April 1972, Ralph Nader agreed to make several appearances on behalf of the Connecticut Citizen Action Group (CCAG), a public interest corporation. His principal appearances, designed to attract contributions and other support for the CCAG, were scheduled for April 28, 1972, beginning at noontime in downtown Hartford. On April 25, Nader reserved a seat for April 28 on an Allegheny Airlines

\(^{10}\) Id.


\(^{12}\) 14 C.F.R. § 250.7 (1975).

\(^{13}\) See Proposed Priority Rules, supra note 8, at 460-61.

\(^{14}\) See 14 C.F.R. § 250.9 (1975).

\(^{15}\) Brief for Appellee at 30 n.13, \emph{Nader v. Allegheny Airlines, Inc.}, 512 F.2d 527 (D.C. Cir. 1975) [hereinafter Brief for Appellee].

\(^{16}\) Id.

flight from Washington to Hartford, and on April 28 he purchased his ticket from a travel agency and proceeded to the Washington Airport. Upon his arrival approximately five minutes before the flight's scheduled departure, Nader was informed by an Allegheny agent that it was full and that he could not be accommodated. As a result, Nader was unable to appear at the Hartford rally. At no time before the flight was he aware of the fact that Allegheny had intentionally overbooked his flight. Pursuant to CAB policy, Allegheny offered Nader denied-boarding compensation, but he rejected the offer as inadequate and, instead, filed suit against the airline in federal district court alleging, *inter alia*, fraudulent misrepresentation. 18

To establish a claim for fraudulent misrepresentation in most states, an individual must show (a) a false representation (b) in reference to a material fact (c) made with knowledge of its falsity (d) and with an intent to deceive (e) with action taken in reliance upon the representation. 19 Although the factual circumstances in

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18. The district court entered a judgment for Nader, awarding him a total of ten dollars in compensatory and 25,000 dollars in punitive damages. 44 U.S.L.W. at 4805. The Court of Appeals for the District of Columbia Circuit reversed, in what it considered an "application of the principles of primary jurisdiction, a doctrine whose purpose is the coordination of the workings of agency and court." 512 F.2d at 544. The court of appeals based its decision on a construction of section 411 of the Federal Aviation Act of 1958, 49 U.S.C. § 1381 (1970), which reads:

The Board may . . . investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist . . . .

The court construed this section to mean that, if the Board "properly finds that a practice is not deceptive, a common law action for misrepresentation must fail as a matter of law." 512 F.2d at 544. It concluded that whether concealment of overbooking could be characterized as tortious conduct was a matter to be determined, in the first instance, by the CAB. 512 F.2d at 544.

The Supreme Court reversed on the question of primary jurisdiction and remanded the case for consideration of the merits of the tort action. 44 U.S.L.W. at 4808-09. It held that "[n]o power to immunize [carriers against common-law liability] can be derived from the language of § 411," 44 U.S.L.W. at 4806, and that "a violation of § 411 . . . is not coextensive with a breach of duty under the common law." 44 U.S.L.W. at 4807. Thus, the Court affirmed its earlier construction of section 411 in American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79, 85 (1956) that CAB actions under this section are designed to protect the public interest rather than to punish wrongdoing or protect injured competitors. Since section 411 is "both broader and narrower than the remedies available at common law," 44 U.S.L.W. at 4807, a Board decision under that section would not be dispositive of common-law remedies. Moreover, since "[t]he standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful," the principle of primary jurisdiction was inappropriate. 44 U.S.L.W. at 4808. For a general discussion of primary jurisdiction, see K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.08 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 122-40 (1965).

each case of “bumping” might vary the result, a scrutiny of Nader shows that airline concealment of overbooking practices can satisfy these elements of misrepresentation.

A false representation may consist of a false or ambiguous statement, a statement that is literally true but that creates a false impression in the mind of the hearer, active concealment of the truth, nondisclosure where there exists a duty to disclose, a half-truth, or nondisclosure of subsequently gained information that renders false a statement that was true when made.20 Airline dealings with their customers concerning overbooking amount to false representations under several of these alternatives.

An actual false statement may be involved since airlines confirm reservations knowing that their customers might be denied boarding because of overbooking. In Nader, Allegheny argued that it never represented to the public that a confirmed reservation constituted an absolute guarantee to a seat on a particular flight.21 While he acknowledged that the possibility of weather and mechanical difficulties precludes airlines from making such a guarantee, Nader contended that Allegheny's confirmation in effect promised him that factors over which the carrier did have control, such as reservation practices, would not cause a boarding denial.22 This contention seems reasonable23 and could well persuade courts to identify the confirmation of a reservation without disclosure of overbooking as a false representation.

Such a reservation confirmation practice might also satisfy the false representation requirement as an example of “active concealment.” Evidence of mere nondisclosure of overbooking by an airline will not suffice to show active concealment; there must be some showing that the airline deliberately attempted to minimize the possibility that prospective customers would learn of the overbooking practice. In the Nader litigation, Allegheny's affirmative policy of instructing its employees to avoid mentioning the practice24 provided substantial evidence of just such active concealment.

Mere nondisclosure satisfies the requirement of a false representation if the defendant owes a duty to disclose to the plaintiff. The federal district court in Nader concluded that airlines were under a

22. Brief for Appellee, supra note 15, at 26 n.11.
23. See Brief for Appellant, supra note 21, appendix, at 44, 118-19.
duty to inform their potential passengers of overbooking practices, but the circuit court in effect vacated this decision by requiring that, in the first instance, the CAB must decide whether airline disclosure practices are fraudulent or deceptive. Since the CAB has not yet decided whether airlines owe a duty to their customers to explain overbooking and its implications, the circumstances of the airline-passenger relationship must be examined to determine whether such a duty can be inferred.

Even before the enactment of the Civil Aeronautics Act in 1938, airlines, as common carriers, had special duties of disclosure to the public. This special status was recently reaffirmed in Fleming v. Delta Airlines, in which the court held that airlines owe their passengers "the duty to share with them information indicating . . . serious weather disturbances, so they can choose for themselves whether they are physically and emotionally capable of undertaking the trip and wish to do so." Although it has been argued that this particular duty only arises in the unique case in which nondisclosure keeps an individual ignorant of possible physical peril, it can also be viewed as part of a generally greater duty to disclose that arises from the airline-passenger relationship. Granted, the relationship is not a fiduciary or confidential one for which courts demand "a standard of conduct above that of the ordinary marketplace where one is naturally more on his guard and less trusting of the other." Yet the airline-passenger relationship is certainly not an ordinary, arms-length, marketplace transaction; the public is encouraged to place its confidence in the heavily regulated airline industry and in the CAB, which was established for the protection of the public interest. Further, aside from the special duty of an airline that derives from its status as a regulated carrier, the duty to disclose might arise independently from the airline's status as a vendor. It is at least arguable

25. 365 F. Supp. at 132 ("a public duty and an especially large and high fiduciary obligation to make its policies known to all of its customers with regard to its intentional overbooking").
26. 512 F.2d at 544.
27. See Proposed Priority Rules, supra note 8.
30. 359 F. Supp. at 341.
32. See Note, Is the Duty to Disclose a Question of Fair Conduct, 2 Idaho L. Rev. 112, 116 & n.22 (1965); W. Prosser, supra note 19, § 106, at 697.
33. Note, supra note 4, at 116.
that the vendor-airline possesses knowledge of a material fact (overbooking)\textsuperscript{36} and knows that its customers both act on the supposition that overbooking does not take place and do not have the opportunity to discover the truth about the practice.\textsuperscript{37} It is worthwhile to note that in \textit{Nader}, Allegheny's president actually conceded that passengers are entitled to notice of overbooking and its attendant risk.\textsuperscript{38}

A final way in which airline dealings with customers can be identified as a false representation arises under an exception to the general rule that nondisclosure does not constitute fraud absent a duty to disclose. If after making a true statement a person acquires new information that makes the statement false or misleading, he must disclose that information to anyone who he knows is still acting on the basis of the original statement.\textsuperscript{39} Thus, an individual who makes a confirmed reservation is generally assured of a seat on the plane (assuming that the flight is not already overbooked). If the flight is subsequently overbooked, the airline knows that individuals with reservations are no longer assured of seats since they all are exposed to the risk of being bumped. Arguably, airlines are then under a duty to inform their passengers of this new development so that the assurance implicit in the reservation confirmation will not be false or misleading.

Once the existence of a false representation has been established under one of the available theories, the plaintiff must then show that the remaining four elements of the tort of fraudulent misrepresentation are present.\textsuperscript{40} As a general rule, a false representation is material if the fact falsely asserted or wrongfully suppressed would have influenced the plaintiff's judgment or decision had he known it.\textsuperscript{41} With the exception of the false representation requirement, this materiality element will likely be the most difficult for bumped airline customers to satisfy. Nader succeeded by maintaining that he would have changed his plans had he known of the risk of being bumped,\textsuperscript{42} testimony that seems quite plausible since the time of his arrival in Hartford was of the utmost importance. In other cases, a plaintiff might attempt to satisfy the materiality requirement by asserting that,

\textsuperscript{36}See text at notes 41-43 infra.
\textsuperscript{37}See testimony cited in note 24 supra.
\textsuperscript{38}Brief for Appellant, supra note 21, appendix, at 129.
\textsuperscript{40}See text at note 19 supra.
\textsuperscript{42}See Brief for Appellant, supra note 21, appendix, at 25.
had he known of the overbooking and possibility of bumping, he would have reserved space on more than one flight. Airlines might respond that the prospect of being bumped could be found material only if the plaintiff had also viewed the prospect of weather or mechanical difficulties as material and had made contingency plans for those possibilities. This argument had little chance of success in the Nader case. Allegheny had a policy, known to Nader, of informing its customers of mechanical difficulties in advance, and the Washington-Hartford route was a well-traveled one for which Allegheny had back-up planes. Moreover, Nader knew in advance of the flight that weather on the East Coast would likely pose no problems. Other plaintiffs, however, may have more difficulty countering this argument, particularly if their route is so infrequently traveled that back-up planes are unlikely, or if they were booked on a connecting or a long-distance flight and they made no advance check of the weather forecasts.

Most bumped passengers should, like Nader, find it an easy matter to demonstrate the third element of misrepresentation, the airline's knowledge of the falsity of its representation. Airline officials are aware of overbooking practices and, as the Eastern and American manuals demonstrate, also know that overbooking practices are being actively concealed. Indeed, it is unlikely that this issue will be contested.

Similarly, bumped passengers should easily be able to demonstrate that airlines intend to induce reliance upon the false statement or misleading omission. There is little question that airlines conceal overbooking to induce customers both to make reservations and to rely on the fact that they have reservations. In Nader, for example, Allegheny Airlines admitted that it hoped passengers would expect guaranteed seats when they were granted confirmed reservations.

Airline customers should have difficulty satisfying the final requirement, reliance upon the representation, only if they were aware of the airline's practice of overbooking before the bumping occurred. Reliance in the absence of such knowledge is not only reasonable but is expected by the airlines. The facts of Nader regarding the reliance issue were somewhat unusual. Nader had been bumped twice by other airlines (Eastern and American) during the six-month period preceding the Allegheny bumping and had received the printed statements concerning denied-boarding compensation required by the CAB regulations. These prior incidents, Allegheny contended,

43. See id. at 32.
44. See text at notes 15-16 supra.
45. See Brief for Appellant, supra note 21, appendix, at 119.
46. See, e.g., id.
47. See text at note 14 supra.
made Nader aware of the possibility of being bumped and thus precluded any reliance by Nader on his Allegheny reservation.48

Nader had three arguments with which to counter this contention, arguments that should suffice for many other plaintiffs as well. First, since denied boarding may have causes other than overbooking,49 such as requisition of space by the government or reservation errors, being bumped once does not give an individual notice of overbooking practices. Second, the airlines refer to overbooking neither in their printed statements nor in their on-the-ground explanations to passengers of the reasons for denied boarding. Finally, it cannot be presumed that an individual who knows that he has been bumped by one airline because of intentional overbooking practices also knows that other airlines engage in similar consumer abuses.50 As the Supreme Court has stated: "[T]here is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business."51 If overbooking is a dishonest consumer abuse, therefore, individuals in Nader's position should not be expected to impute dishonest overbooking practices to airlines other than those with which they have dealt in the past.

Thus, it appears likely that concealment of overbooking practices amounts to fraudulent misrepresentation under the tort law of many states. The remainder of the Note focuses on whether federal law and federal agency regulations can and actually do preempt state law in this area. Section II will determine general principles of preemption, in both the airline and a broader context, while section III will apply those principles to the overbooking practice.

II. CAB Power to Preempt State Law

Any inquiry into the preemption of state law by a federal agency such as the CAB must begin with a general examination of the powers delegated to the agency by Congress, since the parameters of an agency's preemptive capability are set by its enabling statute.52 As a general rule, delegated powers are broadly construed and "are not limited to those expressly granted by the statutes, but include, also, all

48. Brief for Appellant, supra note 21, at 20-21 ("Mr. Nader had no reasonable basis for believing that Allegheny's reservations practices with respect to overbooking would be any different than those of its two competitors with which he had so recently experienced being an oversale").
51. 302 U.S. at 116.
of the powers that may fairly be implied therefrom. Thus, the Supreme Court has asserted that “the width of administrative authority must be measured in part by the purposes for which it was conferred,” and has indicated that regulatory acts are to be given constructions that will enable the agencies to perform the duties required of them by Congress.

The CAB has been charged with the responsibility of promoting a number of public interest goals, including “the encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States,” and “the promotion of adequate, economical, and efficient service by air carriers at reasonable charges.” The regulatory and rule-making authority that the agency has received to achieve these goals extends to such areas as the issuance of certificates of public convenience and necessity, the granting of permits to foreign air carriers, the approval of rates for the carriage of persons and property, the approval of consolidations, mergers, and acquisitions of control of air carriers, inquiries into the management of air carriers, methods of competition, and loans and financial aid. An additional source of CAB power is section 411 of the FAA, which allows the Board to investigate possible unfair or deceptive practices in the airline industry and, if it finds such practices, to issue cease and desist orders. The remedies in section 411 are intended to supplement those contained in other applicable federal and state laws.

61. See note 18 supra.

Such an interpretation of section 411 is consistent with the language of section 1106 of the FAA, 49 U.S.C. § 1506 (1970): “Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” It must be noted, however, that section 1106 should not be read literally to preclude the CAB from preempting state remedies in any areas. In Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), the Supreme Court refused to accept such an interpretation for an identical clause in the Interstate Commerce Act: “This clause . . . cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act . . . [T]he act cannot be held to destroy itself.” 204 U.S. at 466.
It is clear in light of these broadly enumerated powers that the CAB has the capability to preempt virtually all state laws affecting the economic affairs of airlines and the airline-passenger relationship, so long as its action is consistent with the "public interest" of providing the public adequate transportation and allowing the airlines sufficient revenue, and is not violative of specific FAA limitations or any other federal law. This conclusion only begins the inquiry, however, for the more difficult determination is whether or not the CAB has, in fact, preempted a particular state law. The remainder of this section examines three considerations that bear on this determination: first, what general standards the Supreme Court has employed to determine whether federal actions preempt state law in the absence of an express intent of Congress or the CAB to preempt; second, how these standards have been applied in the area of airline regulation to delineate federal and state spheres; and, finally, what procedural mechanisms the CAB can employ to evidence specific intent to override state law.

In the absence of an express congressional or administrative agency intention to preempt state law, the courts have developed various approaches designed to determine the compatibility of state law with federal regulatory schemes. Basically, they have looked to the degree of conflict, actual and potential, between the federal and state laws and to "the peculiarities and special features of the federal regulatory scheme in question." 62

Logical reading, and one that comports with the Court's preemption decisions, is that the provision disclaims any congressional intent to occupy the whole field of airline regulation, but does not reduce either the supremacy of federal law or the power of the CAB specifically to preempt state law in the course of regulating the airline industry.

Another important provision of the FAA is section 414, which grants the CAB the power to exempt the airline industry in certain contexts from application of the federal antitrust laws. Federal Aviation Act of 1958 § 414, 49 U.S.C. § 1384 (1970). This is a necessary adjunct to the CAB's power to approve agreements among air carriers and common carriers that affect air transportation. See Federal Aviation Act of 1958 § 412, 49 U.S.C. § 1382 (1970); Breen Air Freight, Ltd. v. Air Cargo Inc., 470 F.2d 767, 770 (2d Cir. 1972).

Finally, section 404(b) of the FAA forbids air carriers from establishing discriminatory ratemaking and boarding policies. Federal Aviation Act of 1958 § 404(b), 49 U.S.C. § 1374(b) (1970). The provision also limits the CAB and is perhaps the most significant express constraint on the CAB's powers contained in the FAA. See Brief for Amicus Curiae, supra note 9, at 14. Section 404 has been construed to create a private cause of action in favor of individuals who are victimized by unreasonable preferences or unjust discrimination as defined in the provision. See Archibald v. Pan American World Airways, Inc., 460 F.2d 14 (9th Cir. 1972). See also Mortimer v. Delta Air Lines, 302 F. Supp. 276 (N.D. Ill. 1969); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961).

62. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973). Supreme Court decisions dealing with preemption are difficult to organize in a conceptually sound manner, for the facts of each case loom large and the intent of Congress rarely is so clear as to excuse the courts from weighing policy considerations. Generalizations, accordingly, are difficult to make, and the lessons of one area of substantive law are not easily transferred to other areas.
For many years after the Supreme Court's decision in *Hines v. Davidowitz*, the judiciary found a strong presumption in favor of federal, rather than state, interests and was willing to find preemption when the nature of the federal regulation seemed to call for it, despite the absence of clear congressional intent to occupy the field or of any actual conflict. The Court found preemption during this period whenever the congressional regulatory design allowed for such an inference or whenever the state law was in potential conflict with the federal legislation. In *Farmers Educational & Cooperative Union of America v. WDAY, Inc.*, the Court held that provisions of the Federal Communications Act prohibiting censorship of political broadcasters immunized broadcasters from state libel laws, despite the absence of evidence of legislative intent to occupy the field and the absence of serious conflict. According to the Court, factors extrinsic to the Act and considerations of fairness to broadcasters required invalidation of state law as applied to individuals embraced by the Act.

Since 1973, the Court has altered its standards for inferring congressional intent to occupy a field and has required that preemption be based on a more definite showing of inconsistency between federal and state provisions. In *New York State Department of Social Services v. Dublino*, the Court made a significant break with the solicitude for federal law manifested in *Hines* and its progeny: "It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." In dictum, the *Dublino* Court also rephrased the test for determining whether an apparent state-federal conflict will effect a preemption: "Conflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and
not merely trivial or insubstantial.\textsuperscript{72} In a similar departure from its previous approach, the Court in \textit{Goldstein v. California}\textsuperscript{73} (involving an alleged inconsistency between a California copyright statute and the copyright clause of the Constitution) announced that, in the absence of any actual conflict, federal law occupied a field and preempted state law only when the matter was "\textit{necessarily national in import}" and such that conflicts would be inevitable, not merely possible.\textsuperscript{74}

In the CAB context, then, the preemption standards of \textit{Goldstein} and \textit{Dublino} require a three-fold inquiry. The first determination is whether there exists a conflict of some substance between the state law at issue and some valid federal regulation. The second is whether the area regulated is of such national import and conflicts are so inevitable that the state law cannot be allowed to stand even though no present conflict exists. Neither of these determinations, of course, places significant reliance on express congressional or CAB intent. The third determination is whether the CAB has preempted the state law by manifesting a clear intent to do so. Of course, the CAB can preempt state law in this third manner only if its approval of the airline activity being regulated or prohibited by the state is consistent with the public interest.

Although the Supreme Court's preemption doctrine has changed recently, its prior decisions in the field of airline regulation remain indicative of the Court's view concerning the proper spheres of federal and state law. The cases indicate that, under either the \textit{Hines} or \textit{Dublino} standards, federal law overrides all state laws or regulations that affect the timing, scheduling, or patterns of flights. Moreover, federal law governs the contractual obligations of the airlines and the quality of the services that airlines must provide, subject to the condition that contractual terms approved by the CAB are in the public interest. Finally, the cases show that state law controls both the imposition of property taxes on the airlines and tort liability of airlines, except where overridden by a particular federal enactment or by a CAB regulation that furthers some substantial public interests.

The preemptive impact of the FAA in the sphere of regulating the scheduling and operations of flights was demonstrated in \textit{City of Burbank v. Lockheed Air Terminal, Inc.},\textsuperscript{75} in which the Court invalidated a municipal noise-control ordinance forbidding jet aircraft from taking off from a local airport during certain nighttime hours. The Court's decision drew upon ambiguous evidence that the FAA was intended to preempt state and local noise abatement measures, but

\begin{itemize}
  \item \textsuperscript{72} 413 U.S. at 423 n.29.
  \item \textsuperscript{73} 412 U.S. 546 (1973).
  \item \textsuperscript{74} 412 U.S. at 554 (emphasis original).
  \item \textsuperscript{75} 411 U.S. 624 (1973).
\end{itemize}
rested principally upon "the pervasive nature of the scheme of federal regulation of aircraft noise." The Federal Aviation Act, as amended by the Noise Control Act of 1972, vests the CAB with the power to promulgate noise regulations and controls, the power to modify, suspend, or revoke aircraft operators' certificates for violations of the provisions, and the power to regulate takeoff and landing procedures, which includes authority to impose local curfews. The Court intimated that the exercise of these powers requires a delicate balancing of the interests of those on ground and the need for safe and efficient airline service, a balancing that local governments cannot conduct properly. The effect of the local ordinance was to regulate the scheduling of air flights and to increase unsafe flight congestion in the hours immediately preceding the beginning of the daily curfew. This effect, the Court asserted, was inconsistent with the objectives of the federal statutory and regulatory scheme.

The importance of Burbank extends beyond its limited holding concerning local noise ordinances if it is read alongside section 1108 of the FAA, which makes clear that the navigable airways are part of the federal domain and subject to exclusive federal authority. The Court's emphasis on the effect of the Burbank ordinance on flights traveling in that airspace suggests that the exclusive federal power over the airways extends to ground activities that necessarily affect the scheduling and operation of flights. Although the Burbank decision deviates in language from the standards set forth in Goldstein and Dublino, its finding of preemption seems reasonably consistent with the results in those cases, since local ordinances of the type at issue will inevitably interfere with CAB flight scheduling efforts.

Lower court decisions suggest that the terms of the airline-passenger contract are also determined entirely by federal law. In Lichten v. Eastern Airlines, Inc., for example, a federal district court invalidated contract provisions that limited Eastern's liability for negligently lost or damaged baggage, despite implicit approval of the carrier's tariff by the CAB. The court of appeals reversed the district court and upheld the liability limitation on the ground that the CAB's aim of ensuring fair and uniform airline rates and services could be achieved only if the federal regulatory scheme, rather than state common law, governed the airline-passenger contract. Similarly,

76. 411 U.S. at 633.
80. 411 U.S. at 627.
82. 189 F.2d 939 (2d Cir. 1951).
83. 189 F.2d at 941.
in *Mack v. Eastern Air Lines, Inc.*, plaintiff passenger sought damages in tort and contract for the defendant airline's failure, caused by adverse weather conditions to transport him the full distance of his flight. The court dismissed the action on the ground that the state law remedies were preempted by the defendant's tariff, filed with the CAB, which limited the airline's liability in such instances.

The decisions involving the airline-passenger contract are not difficult to reconcile with the *Goldstein-Dublino* preemption standards. Air tariff regulation lies at the heart of the CAB's functions, and it is likely that inconsistencies and conflicts would arise if the states were free to regulate the airline-passenger contract. Contract provisions override state laws, of course, only when approved by the CAB and when the approval is consistent with the public interest.

It should not be thought, however, that Congress intended to preempt state law applicable to the airline industry simply by enacting the FAA and establishing the CAB, or that the courts have always found preemption to shield the airlines from state law. In two areas, personal property taxation and liability for violation of noncontractual duties, state law has governed.

The state power to impose personal property taxes on airline equipment was considered in a series of Supreme Court decisions subsequent to the enactment of the Civil Aeronautics Act. In *Northwest Airlines, Inc. v. Minnesota*, for example, the Court upheld a state tax imposed on an airline's planes that were based in the state and were within the state at least some time during the tax year, while in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, the Court upheld a state's power to tax all planes that had sufficient nexus with the state to satisfy due process requirements. These decisions are consistent with *Goldstein* and *Dublino*, since state taxes have an economic impact on airlines but do not in any way impinge on the timing, frequency or procedures of airline flights, on the CAB's power over the structure and operation of airline companies, or on the terms of the airline-passenger and airline-employee relationships. At some point, an economic burden will

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85. 87 F. Supp. at 115-16.
86. See note 61 supra.
87. 322 U.S. 292 (1944).
89. The prohibition against unreasonable burdens on interstate commerce has led the Court to invalidate state tax schemes where double taxation is likely. Compare *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973) (state can tax aircraft fuel stored in the state prior to use), *with Helson v. Kentucky*, 279 U.S. 245 (1929) (state cannot tax gasoline loaded on ferry in another state and consumed during trip through the taxing state).
frustrate the CAB’s power to control air fares, but that burden must be of some substance to trigger preemption.\textsuperscript{90}

State law also generally governs the liability of airlines both to passengers for violations of duties not stipulated directly in the airline-passenger contract and to individuals on the ground. Thus in \textit{Jackson Municipal Airport Authority v. Evans},\textsuperscript{91} the Mississippi supreme court concluded that owners of property contiguous to airports could recover under state law, notwithstanding the federal regulatory scheme, for property damage caused by low-flying aircraft. Similarly, it is well established that property owners can recover under state law for property damage caused by aircraft accidents,\textsuperscript{92} that airline passengers may bring suit under state law for injuries received during a flight,\textsuperscript{93} prior to flight while on board the aircraft,\textsuperscript{94} and while in the airport terminal,\textsuperscript{95} and, finally, that the federal regulatory scheme does not preclude state wrongful death actions.\textsuperscript{96}

In the tort area, the general tests of inconsistency and conflict between the Federal Aviation Act and state law will most often fail to justify a finding of preemption, particularly under the new standards that require more than a mere inference of conflict. In \textit{Burbank}, the Court found preemption where the FAA specifically provided for noise regulations and where acquiescence to the state scheme would

\textsuperscript{90} The CAB’s aims in controlling airfares are the regulation of airline competition and the promotion of efficient air transportation. See text at notes 56-58 supra. State regulations with some economic impact do not frustrate the first aim so long as they are applied to all airlines equally. In promoting efficient air service, the CAB must consider the validity of airline expenditures to ensure that airlines are not accorded a fair rate of return when they are in fact being managed inefficiently. State-imposed economic burdens that serve no valid state interests would frustrate the goal of efficient air transportation and could legitimately be overridden by the CAB. When such burdens do serve valid interests and are not so large or varying in amount that the CAB cannot establish reasonable air fares, they should be upheld even though they trigger some air fare increases. This conclusion is supported by Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc., 405 U.S. 707 (1972), in which the Court upheld the power of states and municipalities to impose a one dollar airport-user charge on enplaning passengers. Because the user charge was in addition to the air fare established by the CAB, it was held not to interfere with the CAB function of establishing efficient tariffs. Moreover, the charge was challenged only on the basis of an alleged repugnancy to the commerce clause, the equal protection clause, and the constitutional right to travel, and not on the ground of any CAB or FAA preemption. Yet the charge did increase the cost of air travel, and it would seem of little importance that the charge was in addition to the air fare rather than incorporated within it.

\textsuperscript{91} 191 S.2d 126 (1966).

\textsuperscript{92} D. BILLYOU, AIR LAW 87-90 (1964).


\textsuperscript{94} See sources cited in D. BILLYOU, supra note 92, at 99 n.6.

\textsuperscript{95} See, \textit{e.g.}, Garrett v. American Airlines, Inc., 332 F.2d 939 (5th Cir. 1964).

\textsuperscript{96} See, \textit{e.g.}, Southeastern Aviation, Inc. v. A.H. Hurd, 209 Tenn. 639, 645-48, 355 S.W.2d 436, 439-40 (1962).
have seriously interfered with the CAB's control over the timing, scheduling and patterns of flights. In *Lichten* and *Mack*, the courts invalidated state laws that attempted to override express contractual relations between the airlines and passengers, despite approval of the tariffs by the CAB. Air tariff regulation can reasonably be seen as lying at the heart of CAB functions. Airline immunity from all forms of tort liability, however, cannot easily be inferred from the purposes and provisions of the Federal Aviation Act. Vulnerability of the lines to liability under state law does not normally interfere with the CAB's regulatory functions in the crucial areas of flight operations and passenger-airline relations, although such liability can have an economic impact on the lines, as does imposition of the property tax.

To find preemption of state tort law, something more than an inference derived from reviewing the provisions of the FAA and the tort law is needed; there must be an affirmative showing that, pursuant to its various powers, the CAB has approved explicitly a particular liability-creating airline practice or has required the airlines to engage in that particular activity. 97 Any such action is clearly subject to challenge as inconsistent with the public interest, 98 but, if valid, the sanction can effectively insulate the practice from state tort law liability.

The CAB can approve airline practices either by accepting the terms of the airline-passenger contract found in the tariff or by promulgating rules and specifically approving managerial and organizational changes in the course of economic regulation. It is important to note, however, that even CAB requirements or approvals are often limited in the protection that they afford the airlines and thus should not be constructed to preempt all state regulation of the subject.

The fact that the CAB requires an airline to engage in an activity often does not protect the airline from liability for the activity. The operation of this principle is well illustrated outside the CAB context by the Supreme Court's decision in *Regents v. Carrol*. 99 The Federal Communications Commission had conditioned the issuance of a license on the applicant's dissaffirmance of a contract with a third party. The applicant did so unilaterally and was sued for breach of contract. On review, the Supreme Court concluded that, while the FCC was powerless to pass upon the validity of private contracts, the

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97. Section 1106 of the FAA seems to rebut the inference that Congress intended to preempt state law applicable to the airline industry simply by enacting the FAA and establishing the CAB. See note 61 supra.

98. In *Jackson Municipal Airport*, for example, the CAB lacked the power to authorize a taking of property without compensation. 191 S.2d at 126.

agency could impose such conditions on the issuance of licenses. However, the fact that the disaffirmance was required by the FCC, the Court emphasized, did not absolve the license applicant from breach of contract liability, for it was a fundamental rule of constitutional law that "the imposition of the conditions cannot directly affect the applicant's responsibilities (under state law) to a third party dealing with the applicant." In the CAB context, the Regents principle was demonstrated in *Jackson Municipal Airport*, in which the airline flight path that amounted to the "taking" of an easement over plaintiff's property had been prescribed by the CAB. The defendants, nonetheless, were forced to compensate for the "taking."

Similarly, CAB rulings that permit an airline to commit a particular act do not absolve the airline from liability for the manner in which the act is committed. In *Hughes v. Trans World Airlines, Inc.*, for example, the CAB had approved a corporate acquisition on the ground that it was essential to the public interest. The approval immunized the parent corporation from antitrust liability but did not shield the corporate officers and the corporation's majority shareholder from liability for breach of their fiduciary duties to the subsidiary and its minority shareholders.

Another limitation on the preemptive impact of CAB approvals of airline practices arises when the Board, under section 411 of the FAA, investigates an allegedly fraudulent and deceptive airline practice and finds that there is no need to issue a cease and desist order. Arguably, such a finding is tantamount to an approval and insulates the activity from state-law liability. Yet this conclusion is not consistent with the explicit language of section 1106 and the reluctance of the Supreme Court in recent years to find preemption. The purpose of section 411 was not to replace state-law remedies but rather to provide the CAB with an additional procedure for regulating the airlines and protecting the public. Since there is no necessary overlapping of CAB and state-law definitions of fraud and unfair practice, a decision not to enjoin a particular practice is dispositive only for the federal remedy, and is not necessarily an affirmative agency indication that the practice is in the public's best interest and merits immunity from state-law interference. Thus, the CAB may decide that a practice in general is not deceptive or

100. 338 U.S. at 600.
104. See note 61 supra.
fraudulent and yet still recognize that it may cause injury to individuals. For example, although the CAB has implicitly determined that overbooking is not fraudulent or deceptive under section 411, it has also recognized that individuals may be injured by overbooking and has thus offered bumped passengers either denied boarding compensation as liquidated damages or the right to sue for their state-law remedies. In short, the refusal of the CAB to issue a cease and desist order under 411 does not necessarily constitute the “clear manifestation of intention” required to find preemption in the absence of some actual conflict.

III. CAB PREEMPTION OF STATE-LAW MISREPRESENTATION

This section will determine whether state remedies for concealment of overbooking have been preempted by the FAA or by some CAB action. It seems clear that under the Goldstein-Dublino “conflict” standards of what constitutes preemption, the tort remedy of misrepresentation is not fundamentally inconsistent with the Federal Aviation Act. Lack of airline immunity will not undermine the purposes of the Act or interfere with the CAB’s supervision of flights and the airline-passenger relationship. Misrepresentation should be treated like other torts that are not automatically invalidated for inconsistency with the FAA. The focus of this section is therefore on whether the CAB has manifested a specific intent to preempt state remedies and on whether such preemptive intent is actually within the power of the CAB.

In recognition of the seriousness of the no-show problem for airlines, the CAB has reluctantly approved the practice of overbooking. In 1962, the CAB accepted the airlines’ proposed denied-boarding compensation tariff for bumped passengers but included a caveat that it did not condone deliberate oversales by air carriers. The Board also stated that the denied boarding compensation was only an alternative to the passengers’ right to damages under the common law. In 1964, the Board affirmed the policy but stated that

106. See Brief for Amicus Curiae, supra note 9, at 13-14; note 18 supra.
107. See text at notes 70-74 supra.
108. See text at notes 91-98 supra.
110. CAB Order No. E-18064, 35 CAB 881, 882 (March 1, 1962): “The Board's action in making provision for payment to oversold passengers should not be construed as an indication that the Board condones deliberate oversales on the part of the air carriers. On the contrary, the proposed plan is designed to provide a measure of relief for passengers who are the victims of inadvertencies. Instances of intentional oversales will be fully investigated . . . . Moreover, to the extent that the proposed tariff provision is designed to restrict a passenger from seeking damages to which he would otherwise be entitled under the common law, we find it to be adverse to the public interest.”
carriers “must continue to seek other solutions” to the no-show problem. A decade later, the CAB resumed hearings on airline reservation practices. While a final Board decision has not yet been handed down, the administrative-law judge presiding over the hearings concluded that the current scheme of overbooking, denied boarding compensation, and survival of state remedies was not deceptive within the meaning of section 411.

However, the CAB has never approved or condoned the airline practice of concealing overbooking from the public. The Board made this fact clear in an amicus brief filed in Nader in which it stated that it has yet to determine whether “confirmed reservation advertising coupled with nondisclosure of overbooking amounts to an unfair or deceptive practice . . . .” In 1967, it was proposed that airlines be required to inform passengers of an overbooking at least twelve hours before flight time. The CAB refused to require this type of notification only because it feared that the benefits of such notification would be outweighed by its administrative burdens and extreme cost. Refusal to require notification cannot reasonably be taken as evidence that the CAB approved of concealment.

Thus, the CAB has not manifested the type of specific intent to preempt state laws required by the Goldstein and Dublino decisions. The requirement of a specific approval of an industry practice was reiterated in Breen Air Freight, Ltd. v. Air Cargo, Inc., an action involving an alleged antitrust violation. As noted above, Congress has vested the CAB with the power to exempt the airline industry from application of the antitrust laws. Yet in Breen Air, the circuit court held that the district court should exercise its jurisdiction because the agreements allegedly in violation of the antitrust laws had never been specifically approved by the Board.

112. Id. at 3.
114. Brief as Amicus Curiae, supra note 9, at 34.
115. Proposed Priority Rules, supra note 8, at 460: “We (the CAB) propose to deal with the oversales problem by other means for the following reasons: (1) The proposed notice requirement would have necessitated substantial changes in the reservation practices and system of carriers, . . . a system which has, on the balance, worked reasonably well in the public interest . . . (3) finally, the Board believes the oversales problem can be substantially reduced by the proposals herein to require carriers (a) to make prompt, effective and adequate compensation to oversold passengers, (b) to establish priority rules for determining which passengers holding confirmed reserved space shall be denied boarding on oversold flights, and (c) to file reports of unaccommodated passengers.”
116. 470 F.2d 767 (2d Cir. 1972).
117. See note 61 supra.
118. As a jurisdictional matter, the court also concluded that the agreements at issue were not lawful or arguably lawful, and thus not within the primary jurisdiction
Furthermore, the fact that the CAB has implicitly approved airline overbooking in no way obviates the need for some showing of agency intent to insulate airlines from misrepresentation liability for concealment. Instructive analogy can be drawn to the instances in which agencies have issued permissive orders that allow regulated enterprises to commit a particular act or engage in a specific activity, but do not immunize those enterprises from liability for the manner in which they commit the act. These decisions suggest that CAB approval of overbooking, without more, would not shield airlines from liability for the manner in which they engage in overbooking.

Finally, it should be stressed that even an unambiguous expression of specific intent by the CAB to preempt state tort law would be meaningless if the Board actually lacks the capacity to approve intentional torts such as deliberate misrepresentation. As noted above, the Board has broad powers to regulate virtually all aspects of airline-passerger relations. The inability of the CAB to approve tortious conduct would derive from the requirement that its actions be in the public interest. Yet, the CAB determines in the first instance what actions are consistent with the public interest, and its orders are upheld on review by the courts of appeals so long as they are supported by substantial evidence.

Still, it is doubtful that the benefits to the public from concealment outweigh the harm caused by the practice. On the one hand, if the practice of overbooking were publicized, the no-show problem might be aggravated by potential customers who would ensure themselves against being bumped by making more reservations than they could use. On the other hand, overbooking can cause passengers considerable inconvenience and harm, as the Nader case demonstrates. And the possible availability of alternative reservation schemes to resolve the no-show problem makes resort to tortious conduct even more questionable. For example, a number of airlines have attempted to deal with no-shows and late cancellations by instituting a conditional reservation tariff on an experimental basis.

of the CAB. 470 F.2d at 773-74. For a good discussion of the arguably lawful test, see King, The Arguably Lawful Test of Primary Jurisdiction in Antitrust Litigation Involving Regulated Industries, 40 TENN. L. REV. 617 (1973).

119. See text at notes 101-102 supra.
120. See text at notes 56-61 supra.
122. See text at notes 5-6 supra.
123. Eastern Airlines has established a procedure whereby any passenger may obtain "leisure class" or conditional reservations as well as confirmed first class and coach reservations. The passenger with a conditional reservation for which regular coach fare has been paid is entitled to a preferred stand-by coach seat for his flight; if no such coach seat is available, he is given a first class seat; if no seats on his flight
although there is no evidence yet as to its effectiveness. It is unlikely that the shortcomings of these alternative approaches to the no-show problem are sufficiently great to justify the injury caused to individuals, and hence to the public interest, by airlines' intentional misrepresentation.124

are available the passenger may have a refund as well as a free seat on the next available flight.

124. In his concurring opinion in Nader, 44 U.S.L.W. at 4808, Justice White stated: "It may be that under its rulemaking authority the Board would have the authority to order airline overbooking and to preempt recoveries under state law for undisclosed overbooking or for overselling." This Note disagrees with that conclusion.