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Preemption Update: Enforceability of Local Labor Laws Impacting the Airline Industry

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The year 2015 saw the adjudication of several cases challenging local labor laws that affect the airline industry. These cases, driven primarily by preemption claims under federal labor law and/or the Airline Deregulation Act (ADA),[1] continue the general trend of courts upholding local laws deemed to be of "general application," but fail to resolve the inconsistent application of ADA preemption criteria to laws that are more specifically aimed at airline services.

Federal labor law challenges to local regulations are typically based on two preemption "doctrines" that have developed under the common law: *Machinists* and *Garmon*.[2] Under the *Machinists* doctrine, state regulation of labor-management conduct that Congress intended to be unregulated is prohibited. Labor-management relationships are generally governed by the National Labor Relations Act (NLRA)[3] and Railway Labor Act (RLA),[4] and certain areas of that relationship must be controlled by the free play of economic forces.[5] Under the *Garmon* doctrine, states or municipalities are prohibited from regulating activity that federal law protects or prohibits, or "arguably" protects or prohibits. *Garmon* preemption initially arose under the NLRA[6] but has since been applied in the RLA context as well.[7]

ADA preemption challenges are based on the statutory scheme's express preemption provision,[8] which prohibits the enforcement or enactment of a state or local regulation that is "related to" air carrier "prices," "routes," or "services."[9] Because the ADA was intended to promote "'efficiency, innovation, and low prices' in the airline industry through 'maximum reliance on competitive market forces,'"[10] it is established jurisprudence that ADA preemption must be interpreted and applied *broadly*.[11] This mandate, although typically recited by courts evaluating ADA preemption, is not always followed.

With the increasing number of local laws relating to "living wage," "labor peace," and other labor matters,[12] the issue of whether or how they may be preempted in an aviation context takes on special significance. This article examines some notable recent examples of such cases.

Filo Foods v. City of SeaTac

This Washington state case centered on a local ordinance requiring hospitality and transportation employers within the city of SeaTac to provide specified employees with a $15.00 hourly minimum wage, as well as sick leave, tip retention, and job retention rights.[13] In a 5–4 decision, the Washington Supreme Court held that the ordinance was enforceable as to airline service providers operating at the Sea-Tac Airport, but not to air carriers performing such services for themselves. In so holding, the state high court continued the trend of upholding general wage laws as applied to the airline industry in the face of preemption challenges.

The ordinance, stemming from a ballot proposition, was challenged by several employers, including Filo Foods LLC and Alaska Airlines Inc., on the grounds that it was preempted under state and federal law. The trial court generally upheld the ordinance but determined that (1) it was not enforceable as to employers at the Sea-Tac Airport because state law vested the Port of Seattle with exclusive jurisdiction over airport operations; and (2) certain of the ordinance's provisions relating to employee retaliation were preempted by the NLRA. Both sides appealed.

The Washington Supreme Court reversed the trial court on these two points. On the state law issue, it reasoned that the ordinance did not conflict with the Port of Seattle's exclusive control over the airport because the Port had failed to show how the ordinance would interfere with airport operations.[14] On the federal labor issue, however, the court reasoned that the ordinance as a whole was not preempted under *Machinists* because the establishment of a minimum wage "does not impermissibly intrude upon the collective-bargaining process."[15] It also reasoned that the ordinance's worker retention and anti-retaliation provisions were not preempted under *Garmon* either, because the former were merely "minimum labor standards" that did not interfere with labor negotiations and the latter were merely sanctions limited to a violation of the ordinance and did not extend to independent violations of the NLRA.[16]

The state high court also addressed an issue the trial court had not: whether the ordinance was preempted by the ADA (which, as noted, prohibits states from enacting or enforcing a law related to a price, route, or service of an air carrier).[17] Although the court reiterated the general rule that ADA preemption should be applied broadly, it noted that "the ADA does not preempt generally applicable laws that

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regulate how an airline behaves as an employer, even though the law indirectly affects the airline's prices and services."[18] Any other holding, reasoned the court, "'would effectively exempt airlines from state taxes, state lawsuits . . . , and perhaps most other state regulation of any consequence.'"[19] Because the court determined that the SeaTac ordinance established minimum wage and other employee protections without directly regulating airline prices and services, it held that the ordinance was not preempted by the ADA.[20]

Amerijet v. Miami-Dade County

This federal circuit case centered on a Miami-Dade County ordinance requiring certain airline service contractors within that county or which used the facilities of the Miami International Airport to pay a "living wage" to, and maintain certain records for, employees who perform "covered services."[23] Those services were defined to include typical airline ground handling services, aircraft fueling and cleaning services, and catering and cargo services. In a three-judge panel decision, the Eleventh Circuit held that the ordinance was not preempted by the ADA and thus was enforceable as to airline service providers as well as to airlines that perform such services for other airlines. The decision is notable for its contribution to a split of circuit authority over how to define a "covered service" under the ADA and for its suggestion that airline services undertaken by a third-party provider should be analyzed differently for preemption purposes than those undertaken by an airline itself.

The ordinance was one of the first "living wage ordinances" of its kind, originally passing in 1999. In 2010, plaintiff Amerijet was ordered to comply with the ordinance when it began offering ground cargo handling services to other carriers at the airport. In 2012, it brought suit against the county, arguing that the ADA preempted any requirement that it pay increased wages to those ground handler employees.

The Eleventh Circuit, affirming a district court decision but on alternate grounds, held that the ordinance was not preempted by the ADA. First, it reasoned the ordinance did not single out airlines and therefore resembled a law of "general application" rather than one targeted at the airline industry (even though the ordinance's definition of "covered services" appeared to be tailored to encompass typical airline services). Second, the court held that because the cargo services at issue were performed for *other* airlines, they were not part of the "bargained-for exchange . . . between an air carrier and *its* consumers" and hence were not services subject to ADA preemption.[24] The circuit court also rejected the ADA preemption arguments that the ordinance's recordkeeping requirements had a prohibited impact on the services of an air carrier and that any increase in an air carrier's cargo handling costs were a direct or significant result of the ordinance.

The Eleventh Circuit's holding that ADA preemption applies only to services bargained for between an air carrier and "its" consumers is a variation on the current circuit split on this issue, with a minority of circuits holding that the term "service" is limited to "the frequency and scheduling of transportation" and "the selection of markets to or from which transportation is provided,"[25] and the majority holding that the term encompasses "ticketing, boarding procedures, provision of food and drink, and baggage handling, . . . [and all matters] appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline."[26] Several courts have suggested that recent Supreme Court authority renders the latter interpretation the correct one.[27]

Airline Service Providers Ass'n v. Los Angeles World Airports

This federal district court case involved a challenge to a requirement that airline service providers at Los Angeles International Airport (LAX) enter into "labor peace agreements" (LPAs) with any labor organization requesting one.[28] In this case, the LPA requirement applied regardless of whether the airline service providers' employees had consented to representation by the requesting labor organization or had already been unionized. The district court determined that, as a matter of law, the LPA requirement was not preempted by federal labor law or the ADA.

The requirement, issued by the city of Los Angeles through the Los Angeles World Airports, applied only to airline service providers, and mandated LPAs with "no-strike" and mandatory arbitration provisions. Plaintiffs Airline Service Providers Association, representing airline service providers performing airline services at LAX, and Airlines for America, representing the airlines that evaluated and retained the service providers, challenged the requirement on the basis that it was preempted by the NLRA, RLA, and ADA.

The district court disagreed. First, it found that the LPA requirement did not impermissibly "tilt the playing field" between labor and management in violation of the NLRA or RLA because it contained a provision that it "shall [not] be construed as requiring [an airline service provider] . . . to change terms and conditions of employment for its employees [or] recognize a Labor Organization."[29] Second, the court found that requiring airline service providers to enter into an LPA with any labor organization requesting one, even where the provider's employees have not consented to being represented by that organization, was permissible, because the requirement did not apply to service provider employees, only to the "members" of the requesting labor organization.[30] Third, the court found that the LPA requirement was not preempted by the ADA because its effect on "prices, services and routes" was too remote.[31] The court made various other determinations relating to

injury and standing, finding that Airlines for America had no standing to claim preemption.[32]

The district court's decision is notable for its seemingly unqualified adoption of a labor peace requirement in the context of airline service providers and because it addressed a law applying only to airline service providers (which the plaintiffs argued is "related to" airline services for the purposes of ADA preemption). The decision is currently on appeal before the Ninth Circuit, where briefing was scheduled to be completed in February 2016.

Valencia v. SCIS Air Security Corp.

In this California state court case, an appellate court upheld a statewide meal-and-break law as applied to an airline service provider.[33] The defendant, SCIS, provided security services to airlines for their in-flight catering operations. The plaintiff, a former SCIS employee, filed a putative class action against SCIS, alleging failure to provide meal and rest periods, along with other wage and hour violations of California labor laws. The trial court held that the plaintiff's claims for missed meal and rest periods were preempted by the ADA.

The state court of appeal reversed, concluding it was "pure speculation and conjecture" that requiring SCIS to provide meal and rest breaks consistent with California labor and employment law would have any relation to airline prices, routes, or services.[34] The court distinguished *Northwest, Inc. v. Ginsberg*,[35] in which the Supreme Court recently held that the ADA preempted state contract law with respect to the plaintiff's claim that he was illegally removed from an airline frequent flyer program. Rather, the California appellate court relied on recent California Supreme Court and Ninth Circuit authority in which the challenged state laws were found to be "generally applicable background regulations that are several steps removed from prices, routes, or services":

> They apply to all industries, not just airlines. They concern—unlike the *Northwest* point of sale between a carrier and its customer—a carrier's *service provider* and the service provider's *employees*. Whether SCIS provides meal and rest breaks to its employees is independent of the price, route, or service that airlines provide to [their] customers.[36]

Conclusion

These preemption cases comport with the trend of courts upholding laws of general application in the context of airline industry challenges. Beyond that, the cases applying ADA preemption criteria to local laws specific to airline services (in some form or another) carry little predictive value due to their inconsistent application of these criteria,[37] notwithstanding the Supreme Court's identification in *Rowe* of four guiding principles under which ADA preemption should be evaluated.[38]

A substantive local law that is primarily applicable to or targeted at airline services—such as a law affecting only airline service providers or that is applicable only to such services—should be considered "related to" airline services and thus preempted per se, with no further judicial inquiry into the extent of that law's specific impact on prices, routes, or services. Such an approach would honor Supreme Court authority[39] and clarify the muddled jurisprudence attempting to "quantify" the effect of such plainly targeted laws. In contrast, local laws of general application—i.e., those applicable to all employees within a state or locality based on matters such as minimum wages, meal and rest breaks, or other labor standards—should be evaluated under the significant impact and other factors set forth in *Rowe*,[40] as they typically are now.

With the increasing number of local labor laws and the corresponding preemption challenges thereto, the future could bring needed judicial clarification on how preemption criteria should apply to airline-targeted laws versus laws of general application.

Endnotes

1. 49 U.S.C. §§ 40101 *et seq.*

2. Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n, 427 U.S. 132 (1976); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

3. 29 U.S.C. §§ 151 *et seq.*

4. 45 U.S.C. §§ 151 *et seq.*

5. *See* Golden State Transit Corp. v. City of L.A., 475 U.S. 608, 614 (1986) (recognizing that Congress was specific about outlawing certain "economic weapons," and its "decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance 'between the uncontrolled power of management and labor to further their respective interests'" (quoting *Machinists*, 427 U.S. at 143, 146)); Delgado v. Aerovias de Mexico, S.A. de C.V., No. 92-2668, 1994 WL 736328, at *11 (S.D. Fla. Sept. 13, 1994) (applying *Machinists* preemption in RLA context).

6. *Golden State*, 475 U.S. at 608, 613.

7. *See, e.g.*, Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 381 (1969); Bensel v. Allied Pilots Ass'n, 387 F.3d 298, 321 (3d Cir. 2004); Dunn v. Air Line Pilots Ass'n, 836 F. Supp. 1574, 1578–80 (S.D. Fla. 1993), *aff'd*, 193 F.3d 1185 (11th Cir. 1999).

8. 49 U.S.C. § 41713(b)(1).

9. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992).

10. Nw., Inc. v. Ginsberg, 134 S. Ct. 1422, 1428 (2014) (quoting 49 U.S.C. § 40101(a)(6), (12)(A)).

11. *Morales*, 504 U.S. at 383–84 (holding that the words "related to" in the preemption provisions of the ADA "express a broad pre-emptive purpose" and "expansive sweep"); *see also* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 225–26 (1995); *id.* at 235 (Stevens, J., concurring in part and dissenting in part); West v. Nw. Airlines, Inc., 995 F.2d 148, 153 (9th Cir. 1993) ("The *Morales* Court made clear that the 'relating to'

language is to have a very broad scope, encompassing within its reach statutes or actions 'having a connection with or reference to airline rates, routes, or services.'").

12. *See, e.g.*, U.S. Chamber of Commerce, Labor Peace Agreements: Local Government as Union Advocate (2013), https://www.uschamber.com/sites/default/files/documents/files/labor_peace_agreements_2013_09_12.pdf.

13. Filo Foods, LLC v. City of SeaTac, 357 P.3d 1040 (Wash. 2015).

14. *Id.* at 1047–52.

15. *Id.* at 1053.

16. *Id.* at 1055–56.

17. 49 U.S.C. § 41713(b)(1).

18. *Filo Foods*, 357 P.3d at 1058.

19. *Id.*

20. *Id.* at 1058–59. In addition to *Filo Foods*, another recent case similarly held that a local living wage ordinance was not preempted by the ADA or RLA. Calop Bus. Sys., Inc. v. City of L.A., 614 F. App'x 867 (9th Cir. 2015).

23. Amerijet Int'l, Inc. v. Miami-Dade Cnty., No. 14-11401, 2015 WL 5515343 (S.D. Fla. Sept. 21, 2015).

24. *Id.* at *4 (emphasis added). Presumably, the cargo services Amerijet performed for other airlines were being paid by customers of those other airlines. The Eleventh Circuit's determination that they nonetheless "fatally lack[]" the "bargained-for exchange . . . between an air carrier and its consumers," *id.*, appears to be an overly strict reading of prior circuit authority and suggests that services subject to preemption may hinge on whether an airline has subcontracted its bargained-for services to others, a questionable proposition.

25. *See* Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1265–66 (9th Cir. 1998).

26. *See* Hodges v. Delta Airlines, Inc., 44 F.3d 334, 336–38 (5th Cir. 1995).

27. The U.S. Supreme Court has issued two opinions that appear to embrace a broader definition of the term "services" as used in the ADA and the nearly identical preemption provisions of the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. §§ 14501 *et seq.* Nw., Inc. v. Ginsberg, 134 S. Ct. 1422, 1430–31 (2014) (holding that "services" include, among other things, flight upgrades and frequent flyer benefits on other airlines); Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 370–71 (2008) (holding that "services" include, among other things, recipient verification requirements and matters beyond actual transportation). Several cases suggest these decisions mean that *Charas* is no longer good law. *See* Bower v. Egyptian Airlines Co., 731 F.3d 85, 94 (1st Cir. 2013) (opining that "*Rowe* forecloses the *Charas* interpretation of 'service'"); Air Transp. Ass'n of Am., Inc. v. Cuomo, 520 F.3d 218, 223 (2d Cir. 2008) ("*Charas*'s approach . . . is inconsistent with the Supreme Court's recent decision in *Rowe* [which] necessarily defined 'service' to extend beyond prices, schedules, origins, and destinations."); Hanni v. Am. Airlines, Inc., No. C 08-00732, 2008 WL 1885794, at *5 (N.D. Cal. Apr. 25, 2008) (noting that *Rowe* superseded *Charas*). A recent Ninth Circuit case appears to uphold *Charas*, although its dissent dismisses the majority's *Charas* discussion as dicta. Nat'l Fed'n of the Blind v. United Airlines, Inc., No. 11-16240, 2016 WL 229979, at *4–7, *18–20 (9th Cir. Jan. 19, 2016).

28. Airline Serv. Providers Ass'n v. L.A. World Airports, No. 2:14-cv-08977 (C.D. Cal. Mar. 18, 2015). An LPA is generally an arrangement between a union or labor organization and an employer, under which one or both sides agree to waive certain rights under federal law with regard to union organizing and related activity, typically in exchange for concessions from the other side. *See* U.S. Chamber of Commerce, *supra* note 12.

29. *Airline Serv. Providers Ass'n*, No. 2:14-cv-08977, slip op. at 10–11 n.13.

30. *Id.* at 10–13.

31. *Id.* at 14–16.

32. *Id.* at 7–8, 12–13.

33. Valencia v. SCIS Air Sec. Corp., 193 Cal. Rptr. 3d 775 (Ct. App. 2015).

34. *Id.* at 777, 781–82.

35. 134 S. Ct. 1422 (2014).

36. *Valencia*, 193 Cal. Rptr. 3d at 781.

37. *See* Dilts v. Penske Logistics, LLC, 769 F.3d 637, 645 (9th Cir. 2014) (noting struggle with application of ADA preemption), *cert. denied*, 135 S. Ct. 2049 (2015).

38. Those principles are: (1) "'state enforcement actions having a connection with, or reference to,' carrier 'rates, routes, or services' are pre-empted"; (2) "such pre-emption may occur even if a state law's effect on rates, routes, or services 'is only indirect'"; (3) "it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulation"; and (4) "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 370–71 (2008) (alterations and emphasis omitted) (quoting the ADA analysis in *Morales*).

39. *See id.* at 370, 375–76 (finding that where ordinance takes aim solely at airline industry and not general public, "the connection . . . is not tenuous, remote, or peripheral," and holding that preemption is found where effect "is only indirect," such as from laws aimed at third parties but related to airline prices, routes, or services).

40. *See id.*