DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 399

[Docket No. OST–2003–15592]

RIN 2105–AA46

Preemption in Air Transportation; Policy Statement Amendment

AGENCY: Department of Transportation.

ACTION: Final rule.

SUMMARY: This action ends a rulemaking commenced by the Civil Aeronautics Board in 1979, in which it announced interim policies to implement provisions of the Airline Deregulation Act of 1978 dealing with federal preemption. The Department of Transportation, which succeeded to various Civil Aeronautics Board functions, has concluded that the interim policy statement is of limited current value. Its major issue—continued intrastate economic regulation of air carriers—has long since been resolved. Its remaining subjects continue to evolve and are more appropriately addressed on a case-by-case basis rather than by a statement of general policy. The interim final policy is accordingly removed. The Department of Transportation will continue to monitor developments and to offer the proper interpretation of the statute's preemption provision in appropriate fact-specific circumstances.

EFFECTIVE DATE: July 24, 2003.

FOR FURTHER INFORMATION CONTACT: Paul Samuel Smith, Office of the Assistant General Counsel for Litigation, or Samuel Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–9285 or 366–9342, respectively.

SUPPLEMENTARY INFORMATION: In February 1979, the former Civil Aeronautics Board (''CAB'' or ''Board'') adopted interim final policies devoted in the main to the authority of state and federal governments to regulate air carriers operating pursuant to federal authority. Policy Statement-83 (February 7, 1979) (''PS–83''); 44 FR 9951 (February 15, 1979); 14 CFR 399.110. The policy statement addressed questions arising about the preemption provision of the then-newly enacted Airline Deregulation Act of 1978 (Pub. L. 95–504, 92 Stat. 1707) (''ADA''), now codified at 49 U.S.C. 41713, and it asked for comment to aid in setting final policies. The major features of the interim preemption policy have been that states may not enact or enforce (1) any economic regulation of carriers having authority under Title IV of the Federal Aviation Act, including commuters and those registered as air taxis under 14 CFR Part 298; and (2) legal provisions governing such matters as air carrier capitalization, insurance, and bonding, in-flight amenities, and so forth. There has also been a short general statement concerning the authority of airport proprietors.

Comments were received in 1979 from the following parties: the Air Transport Association, the Airport Operators Council International, the Illinois Aeronautics Board, the Maryland Department of Transportation, the Massachusetts Port Authority, the Michigan Aeronautics Commission, the North Dakota Aeronautics Commission, the State of Oregon through its Public Utility Commissioner, the Texas Aeronautics Commission, the Nebraska Department of Aeronautics, the Delaware Transportation Authority, the New York Department of Transportation, and Chapparal Airlines.

The Air Transport Association and the Delaware Transportation Authority supported the interim policy statement. The remaining parties opposed all or parts of the statement. They contended that the policy either (1) unlawfully precluded state regulation of commuter air carriers and air taxis; (2) unlawfully curbed state oversight that did not amount to the regulation of airline rates, routes, and service precluded by the ADA; or (3) improperly restricted the rights of airport proprietors.

Most of the policy statement and many of the comments concern the first category above: the regulation of carriers that were governed by both the states and the federal government prior to passage of the ADA. This once-major issue has long since been resolved by courts and the passage of time. It is now well settled that carriers certificated by the federal government, as well as commuters and air taxis operating under federal authority, are not subject to economic regulation by the states. *See, e.g., Hughes Air Corporation* v. *Public Utility Commission*, 644 F.2d 2334 (9th Cir. 1981).

The second category above, indirect regulation of air transportation by states, is of a somewhat different nature. On the one hand, time and litigation have clarified to some extent the reach of federal preemption in this sphere. In 1979 the CAB declared that states ''could not interfere with the service that carriers offer in exchange for their rates and fares.'' PS–83 at 8. This included charges for headsets, excess baggage, and alcoholic beverages, as well as requirements for insurance coverage and capitalization. *Id.*; 14 CFR 399.110(d). Although some commenters considered this too restrictive of states' prerogatives, no court of which the Department is aware has held to the contrary with respect to interference with such matters. *See Hodges* v. *Delta Airlines*, 44 F.3d 334, 336 (5th Cir. 1995)(*en banc*) (airline ''service'' includes ticketing, the provision of food and drink, baggage handling, and boarding procedures). *Also generally Morales* v. *Trans World Airlines*, 503 U.S. 407 (1992) (preempting state-imposed fare advertising guidelines); *American Airlines* v. *Wolens*, 512 U.S. 1233 (1994) (preempting state-imposed restrictions on airline frequent flier programs). On the other hand, controversies about the application of the preemption provision have arisen about subjects and in contexts never even mentioned by the CAB. A prime example is the effect of the ADA on state tort law. *See Smith* v. *Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998) (state tort claim may be preempted as ''related to'' airline ''service''), and *Charas* v. *Trans World Airlines,* 160 F.3d 1259 (9th Cir. 2000) (airline ''service'' read narrowly so as not to preempt state tort claim).

The Department appreciates that it is not possible in a general policy statement to anticipate and address all relevant potential issues. Preemption is a dynamic area, in which questions will likely continue to arise with some regularity in circumstances that cannot now be anticipated. It would be extraordinarily ambitious, and in the end probably futile, to attempt to maintain a policy statement that provides contemporary and meaningful guidance across a full spectrum of situations. Rather, ad hoc administrative determinations, guidance, enforcement activities, and intervention in significant legal actions seem better suited to ensuring the proper implementation of this preemption provision.

The final subject included in the interim policy statement, the ADA's effect on the authority of airport proprietors, garnered only a small amount of the Board's attention. There is but one paragraph in the preamble and only a single very broad provision in the interim statement, to the effect that airport proprietors must exercise their authority in reasonable and nondiscriminatory fashion as necessary to accomplish legitimate objectives. PS–83 at 9; 14 CFR 399.110(f). The CAB also expressly acknowledged that the ''full scope'' of proprietary rights and duties had ''yet to be developed.'' PS–83 at 9.

Some commenters felt that the Board had an overly narrow view of airport proprietors' authority. We disagree. This part of the interim policy statement remains an accurate statement of a fundamental principle of law: Airport proprietors clearly have rights, but those rights are not unfettered or unconstrained. They must be exercised in a reasonable, nondiscriminatory manner, and designed to achieve legitimate objectives. *Arapahoe County Public Airport Authority* v. *FAA*, 242 F.3d 1213, 1223 (10th Cir. 2001); *American Airlines* v. *DOT*, 202 F.3d 788, 806–08 (5th Cir. 2000); *National Helicopter Corp.* v. *City of New York*, 137 F.3d 81, 89 (2nd Cir. 1998). It is also true that airport proprietors may not impede federal airspace management interests or unreasonably interfere with interstate or foreign commerce. But these statements are so basic and so broad that they are of limited utility in any particular setting; they can only frame the proper inquiry. Questions about the scope and exercise of proprietary rights, like preemption generally, are most often fact-specific. *Arapahoe County*, 242 F.3d at 1223. Thus, litigation and administrative proceedings will likely continue to refine the contours of this authority, and no single policy statement is apt to comprehend or anticipate its precise parameters.

In sum, the interim policy statement either discusses subjects that have been overtaken by events in the last twenty-five years since the ADA was enacted, or offers statements so general in nature that their value is limited where, as here, new issues continue to evolve. The policy statement has provided assistance in the past, but it has increasingly become less helpful as the industry has changed and evolved over the years. In these circumstances the Department has decided to remove the interim policy statement at 49 CFR 399.110 and end this proceeding. We intend to continue to monitor developments, and to take action to apply the ADA's preemption provision when that is appropriate in individual fact-specific situations. This approach has proven itself in guarding against state and local government actions that improperly interfere with the deregulation of the airline industry. *See Wolens and Arapahoe County*, both *supra*.

Regulatory Analyses and Notices

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866, and therefore it was not reviewed by the Office of Management and Budget. This rule is not considered significant under the Department's regulatory policies and procedures. The change is being made solely for the purposes of eliminating an obsolete statement.

The Department also has determined that this rule has no economic impact. This rule does not impose unfunded mandates or requirements that will have any impact on the quality of the human environment.

Executive Order 12612

The Department has analyzed this rule under the principles and criteria contained in Executive Order 12612 (''Federalism'') and has determined that the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

This action does not contain information collection requirements for purposes of the Paperwork Reduction Act of 1995.

Regulatory Flexibility Act

The Department has evaluated the effects of this rule on small entities. I certify this rule will not have a significant economic impact on a substantial number of small entities, because we are merely removing an obsolete policy statement.

List of Subjects in 14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Small business.

■ For the reasons set forth in the preamble, the Department amends 14 CFR part 399 as follows:

PART 399—STATEMENTS OF GENERAL POLICY

■ 1. The authority citation for part 399 continues to read as follows:

Authority: 49 U.S.C. 40101 *et seq.*

§ 399.110 [Removed]

■ 2. Part 399, subpart J is amended by removing § 399.110.

Issued in Washington, DC on June 13, 2003, under the authority of 49 CFR part 1.

Norman Y. Mineta,

Secretary of Transportation.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21, 36, and 91

[Docket Nos. FAA–2000–7587, FAA–2002–12771, and FAA–1999–6411]

RIN 2120–AI01

Disposition of Comments to Final Rules: Noise Certification Standards for Subsonic Jet and Subsonic Transport Category Large Airplanes; Transition to an All Stage 3 Fleet Operating in the 48 Contiguous United States and the District of Columbia; and, Equivalent Safety Provisions for Fuel Tank System Fault Tolerance Evaluations (SFAR 88)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rules; disposition of comments.

SUMMARY: The FAA is providing response to public comments on three immediately adopted rules. The effect of this action is to close these rulemaking actions. This action is part of our effort to address recommendations of the Government Accounting Office and the Management Advisory Council to reduce the number of items in the Regulatory Agenda, and to accurately reflect agency initiatives.

FOR FURTHER INFORMATION CONTACT: Alicia K. Douglas, Office of Rulemaking (ARM–204), Federal Aviation Administration, 800 Independence Avenue, SW., Washington DC 20591, (202) 267–9681, *alicia.k.douglas@faa.gov.*

SUPPLEMENTARY INFORMATION:

Noise Certification Standards for Subsonic Jet and Subsonic Transport Category Large Airplanes, RIN 2120–AH03

On July 8, 2002, the FAA published a final rule (67 FR 45193), entitled ''Noise Certification Standards for Subsonic Jet Airplanes and Subsonic Transport Category Large Airplanes''. This immediately adopted rule amended the noise certification standards for subsonic jet airplanes and subsonic transport category large airplanes. These changes were based on the joint effort of the FAA, the European Joint Aviation Authorities (JAA), and the Aviation Rulemaking Advisory Committee. The intent of the change was to harmonize the U.S. noise certification regulations and the European Joint Aviation Requirements for subsonic jet airplanes and subsonic transport category large airplanes to