

**TESTIMONY OF THE
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.
BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON AVIATION
“Aviation Consumer Issues”**

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Testimony of the American Society of Travel Agents

The American Society of Travel Agents (ASTA) offers this testimony on the Subcommittee's deliberations on the treatment of air travel consumers by airlines. ASTA and its members very much appreciate the opportunity to present ideas once again on this troublesome subject.

Since the major airlines adopted the twelve so-called "voluntary" passenger service commitments in 1999, there have been two reports by Department of Transportation (DOT) Inspectors General regarding the airlines' compliance with those commitments. The first report was discouraging in that it indicated there was little progress among the adopting airlines for actually fulfilling the commitments they had made. The second report, just this past November, 1/ portrays widespread non-performance, neglect and abandonment of solemn promises made to the government and to the traveling public --and it covered only four of the twelve commitments. Here are a few of the findings:

1. "Quality assurance and performance measurement systems are being implemented at just five of the ATA airlines [through which 14 adhered to the commitments]."2/
2. "Information being provided about delays and cancellations in boarding areas was not timely or adequate"3/
3. "Only 5 of the 16 airlines ... make on-time performance data available on their Internet sites."4/
4. "Twelve of the 15 airlines and their contractor personnel who interact with passengers with disabilities were not complying with the training requirements of [governing regulations] or with their own policies."5/
5. "Nine airlines were not adhering to their own policies for compensating passengers who voluntarily gave up their seats."6/

A third report has now been requested by the Secretary of Transportation and history suggests it will closely resemble the prior reports.

And so we, who represent the people who account for a substantial majority of the consumers who buy airline services, come here to say: enough is enough. It is time, it seems to us -- after eight years of futility -- to achieve closure with these problems. Looking at the incidents that have recently attracted many headlines, we say unequivocally that, as a matter of fundamental principle, absent an unforeseen but clear present threat to safety, passengers should not be

1 Follow-Up Review: Performance of U.S. Airlines in Implementing Selected Provisions of the Airline Customer Service Commitment, Department of Transportation, Report No. AV-2007-012, November 21, 2006.

2 *Id.* at 4.

3 *Id.* at 4.

4 *Id.* at 5.

5 *Id.* at 5.

6 *Id.* at 7.

forced to remain on aircraft without adequate food, water and toilet facilities for periods such as six, eight or even more hours while waiting to take off.^{7/}

ASTA also rejects the argument that tarmac detentions are too infrequent, affect too few passengers, and are too unpredictable to warrant more than apologies and perhaps a coupon for a future discount. There are elements of unpredictability, to be sure, but at the same time it is highly predictable that there will be severe snowstorms every winter and severe disruptive thunderstorms every summer that will affect one or more major airports. It is time to stop looking for reasons not to deal with these problems and act decisively with a program reasonably calculated to alter the present culture of denial and resistance to change.

Nor should airlines be able to avoid responsibility by claiming that these incidents are too costly to cure on an assured basis. The cost of respect for customers is an inherent part of doing business. Firms that cannot do it should exit the market.

Finally, there is the issue of the "market forces solution," supported by the airlines, preferred by the Department of Transportation (DOT) and advocated even by some customer groups. The problems with relying on the marketplace to fix these problems are: (1) the airlines typically do not compete on the basis of customer service, even though, unlike price, there are aspects of customer service that cannot easily or quickly be replicated by competitors, (2) as a result, marketplace forces did not resolve the problems even after the ATA carriers pledged to the twelve service commitments, and (3) no airline followed Jet Blue's lead into enhanced customer rights commitments following the debacles of this past winter.

In short, there is no reason to withhold decisive action to address these issues. The question is: what action?

It is essential to recognize that a single-minded focus on tarmac detentions could eventually defeat everyone's good intentions. The problems of customer service in the airline industry extend well beyond the snowstorm incidents, as powerfully shown by the November 2006 report of DOT Inspector General Scovel. We should not let our mutual frustration with the airlines and these seemingly intransigent problems lead us to quick and easy solutions that fail to address the fundamental problems and that may have consequences many air travelers will come to regret.

A meaningful solution to passenger treatment issues should address all of the elements of the airlines' unfulfilled commitments.

It is easy, of course, to be against things. Much of the debate about passenger rights has centered on negative ideas. Everyone is against strandings, involuntary detentions and inadequate provisions as well as being opposed to unintended consequences, excessive regulation and unnecessary costs. Agreement on those negative ideas has not, however, advanced the debate toward solutions.

⁷ The recent incidents involving American Airlines and Jet Blue are well known and we will not duplicate here the many accounts of those nightmarish situations.

ASTA seeks to move the debate forward by suggesting a reasonable path to a solution that embraces some elements of what all parties appear to be seeking. If something like this path were to be followed in a timely and aggressive manner, much could be accomplished to reduce the likelihood of future detention incidents as well as their impact when they do happen. And along the way we would resolve many of the lingering concerns about the other elements of the passenger service commitments.

What is called for is not a quick legislative strike at the incidents that attracted the headlines, but a fundamental and principled solution, combining legislative, regulatory and, yes, perhaps some self-help by the airlines. We need an approach that accounts for the roots of the problems as well as the symptoms, a solution that stands a chance to actually change airline performance in the areas of customer service in question. And, of course, the solutions should apply to all airlines, not just those who happen to be members of the Air Transport Association (ATA).

The Path Forward -- Congressional Action Now

ASTA believes there are three steps Congress could take right away that would have potentially huge benefits in the area of customer treatment by airlines.

First, enact a limitation on the scope of statutory preemption of state consumer protection laws.

This single step would correct the excessively broad interpretation of 49 USC sec. 41713 of the Federal Aviation Act that has effectively deprived many air travelers of legal remedies at the state level. The heart of that section provides that

“a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier....”

We have attached to this testimony as Exhibit A an analysis of the preemption issue entitled “One Nation Divided By Law,” which shows the confusion and loss of consumer rights that court interpretations of state law preemption have engendered.^{8/}

Empowering the states to act against abuses of air travelers’ consumer interests in the same way that they can act against other industries would, in one simple step, effect a drastic change in airline attitudes and performance. Based on past experience the airlines, faced with a restriction in the scope of state law preemption, likely will predict the end of aviation as we know it, but other multi-state and inter-state industries have learned to live with state consumer protection laws and we are confident that they too can do so.

It is highly likely, for example, that airline funding would significantly increase for training of employees who are often left to fend for themselves with angry air travelers facing massive delays and cancellations of their travel plans. Communications between and among elements of each airline would also likely improve so that employees managing delay, diversion,

⁸ The paper was produced in 2001 but nothing has happened since then to change its major conclusions. See also “Statement of the American Society of Travel Agents” before the Senate Committee on Commerce, Science and Transportation, Hearing on Airline Customer Service, June 28, 2000, attached to this testimony as Exhibit B.

detention and cancellation situations would have to say “I have no information” a lot less frequently.

Second, Congress should appropriate funds sufficient to equip DOT’s enforcement staff with the resources needed to fulfill their statutory mission of compelling airline compliance under section 41712 of the Federal Aviation Act (the former section 411) that forbids unfair and deceptive practices. The 2006 Inspector General’s report details the funding issue and explains how it has impaired DOT’s ability to act decisively and has left it without resources to follow up with compliance audits on such enforcement actions as it does take. The appropriation should require specific reports to the DOT Inspector General and/or this Subcommittee showing how the money is spent.

Third, Congress should mandate that all elements of the airlines’ service commitments be made part of their contracts of carriage. This would mean that provable violations of those portions of the commitments that are real promises and not aspirational “best efforts to do better” would be actionable in state courts as breaches of contract. This step would make clear that a promise is a promise.

Action by Congress is not, however, sufficient to solve the problems of customer treatment in air transportation. The Department of Transportation has an obligation, we suggest, to play a critical role in refining the actual service issues – either for regulatory intervention, industry action or, if necessary, for further Congressional action.

The Path Forward – Department of Transportation

The DOT can and should play a pivotal role in bringing together the parties necessary to an informed and viable regime that assures, to the maximum extent practical, that airline customers will be treated as they deserve to be treated.

The most valuable service that DOT can perform in the short term is to establish and manage a joint fact-finding process.⁹ Joint fact-finding is critical to achieving a number of goals in the present debate. Among them are discovering the real facts and developing trust in the good faith of all parties. Being informed by the country’s experience with security measures after the 9/11 attacks, ASTA believes everyone interested in these issues must be sensitive to the problem of unintended consequences that can arise from regulatory strictures imposed on a very complex and highly networked system.

By way of illustration only, the current leading solution to the tarmac detention problem appears to be a law that would require, with the usual safety caveat, that aircraft return to the terminal gates after three hours, unless actual take-off is believed to be imminent (30 minutes).

Such a law may well be necessary, but the airlines say that there could be serious unintended consequences from such a rigid law. Many passengers might see the situation differently if they believed that returning to the terminal would defeat their vacation plans or prevent them from keeping an important business appointment that more “patience” might yet save. The ATA says that any mandatory return rule should be accompanied by a Federal Aviation Administration (FAA) guarantee of the aircraft’s place in line.

⁹ This discussion is based on the “Mutual Gains Framework” developed by the MIT-Harvard Public Disputes Program for parties who are, as we are, dealing with an angry public, usually in situations where a catastrophic event has occurred.

Again just looking at this one narrow problem, despite the horrific nature of very long tarmac detentions, the issue of unintended consequences is one that deserves to be thoroughly examined before adopting a hard and fast rule to govern all these situations. Does it matter, for example, whether the flight in question is a domestic two hour trip or a 12 hour international trip? Is a "position in line guarantee" feasible? What is required if all the gates are occupied by other aircraft when the deadline arrives? Under current FAA rules and airline operating procedures, who makes the decisions regarding return to the gate: the pilot? Company managers at the airport? Company managers not at the airport? The FAA? What is the influence of FAA and airline work rules on flight delays, detentions and cancellations? Should rules governing responses to flight delays have a principle of proportionality related to the length of the next flight stage? Is it possible to do simulations that would assist in evaluating the consequences of various approaches?

These are only examples of areas where joint fact finding could develop both understanding and innovative approaches to solving the problem of tarmac detentions.

What does joint fact finding mean in this context? It means that a workable number of representatives of legitimately interested and responsible parties should be convened under DOT auspices in this case to develop a factual understanding of what has happened and why it has happened. Joint fact finding in this context does not require that the airlines give up any power they currently have, nor does it require that consumers be subjected to unilateral outcomes dictated by the airlines. It does mean, however, that the process should not be limited to insiders such as the airlines and the government.

To achieve legitimacy among all constituencies and to assure that all relevant issues are addressed, joint fact finding managed by DOT must include representatives of: consumers and travel agents, along with the airlines, airports and the FAA. This task will be materially assisted, of course, by the work of the independent Inspector General but there will almost certainly be questions that are not covered by the report. Those questions should be the subject of joint fact-finding in which the airlines participate fully with the other interested parties.^{10/}

ASTA believes that the only real chance of a long-term and mutually acceptable resolution of the passenger service issues lies in a process such as we have described. We have a situation now where the airlines are resisting compulsion, promising, as they did before, to do better, while DOT is inclined, so far, to prefer marketplace solutions that have no history of success, and the public frustration with repeated instances of mistreatment must surely be at or near an all-time high. Hurling counter-proposals for various kinds of legislative or regulatory solutions at each other may lead to some rules, but it is unlikely at the end of the day that they will deal comprehensively with the entire array of problems because those problems are not fully understood.

DOT's role in this process is to expeditiously select representatives for the industry discussions we have outlined and begin, on an expedited basis, to drive those discussions to conclusion.

¹⁰ ATA has repeatedly declined ASTA's offers to meet and discuss solutions to these issues. We doubt they would refuse an offer from DOT. What is critical is that all the parties be together in the discussions. This has been done before with success on issues such as reporting of on-time performance, so we are confident it can work here.

Here are some additional issues raised by the airlines 12-point passenger service commitments that need to be addressed:

“1. Offer the lowest fare available

Each airline will offer the lowest fare available for which the customer is eligible on the airline's telephone reservation system for the date, flight and class of service requested.”

ASTA Comment: This is simply no longer accurate. In November, 2004, DOT issued a notice to airlines observing, among other things, that prices were then often higher on services booked by telephone as opposed to through the Internet, because airlines were routinely surcharging the telephone bookings.¹¹/ That practice continues today for at least some airlines.

“2. Notify customers of known delays, cancellations and diversions

Each airline will notify customers at the airport and on board an affected aircraft, in a timely manner, of the best available information regarding known delays, cancellations and diversions. In addition, each airline will establish and implement policies for accommodating passengers delayed overnight. A clear and concise statement of airlines' policies in these respects will also be made available to customers.”

ASTA Comment: In 1999 ASTA regarded this as one of the most important commitments, because it is in the terminal that passengers have the best, and perhaps only, chance to make alternative plans. We noted then, and now, that this commitment is hedged – it does not include an unqualified obligation to truthfully explain the reasons for delays, yet we believe this is the main customer grievance – failure to tell the whole truth about what is going on so consumers can make informed decisions. And it does not require any airline to do anything substantive for any passenger even if the delay is chargeable to the airline.

Each airline should be prepared to make necessary investments that will assure communication between the airline components responsible for rational decision-making and execution in crisis situations, as well as airports and other ancillary support services that could be called into play in an emergency.

“3. On-time baggage delivery

Each airline will make every reasonable effort to return checked bags within 24 hours and will attempt to contact any customer whose unclaimed, checked luggage contains a name and address or telephone number.”

ASTA Comment: There is no commitment to return checked baggage when the aircraft arrives at its destination. That is what passengers expect. Even the 24 hour return promise is hedged by “every reasonable effort.”

.....

¹¹ See Notice: Disclosure of Higher Prices for Airfares Purchased Over the Telephone Via Airline Telephone Reservation Centers of at Airline Ticket Counters, and Surcharges That May Be Listed Separately in Fare Advertisements,” Department of Transportation, Assistant General Counsel for Aviation Enforcement and Proceedings, November 5, 2004.

“7. Properly accommodate disabled and special-needs passengers

Each airline will disclose its policies and procedures for handling special-needs passengers, such as unaccompanied minors, and for accommodating the disabled in an appropriate manner.”

ASTA Comment: The issue here is not disclosure; the issue is performance, as indicated in the Inspector General's 2006 report.

“8. Meet customers' essential needs during long on-aircraft delays

The airlines will make every reasonable effort to provide food, water, restroom facilities and access to medical treatment for passengers aboard an aircraft that is on the ground for an extended period of time without access to the terminal, as consistent with passenger and employee safety and security concerns. Each carrier will prepare contingency plans to address such circumstances and will work with other carriers and the airport to share facilities and make gates available in an emergency.”

ASTA Comment: This is the crux of the current crisis in confidence. When this commitment was adopted in 1999, ASTA thought it was nothing more than a restatement of existing policy. Later events have shown that the airlines have failed to live up to this commitment. Interestingly, following the recent high-profile detentions, there has been no disclosure of the existence of such contingency plans and sharing arrangements.

What contingency plans do exist? How can sharing of facilities be facilitated?

“9. Handle "bumped" passengers with fairness and consistency

Each airline will disclose to a passenger, upon request, whether the flight on which the passenger is ticketed is overbooked, if, within the usual and ordinary scope of such employee's work, the information is available to the airline employee to whom the request is directed. Each airline will also establish and disclose to the customer policies and procedures, including any applicable requirements (such as check-in deadlines), for managing the inability to board all passengers with confirmed reservations.”

ASTA Comment: Why should the passenger have to inquire about overbooking in order to be told? This is a trap for the unwary. And there is no actual commitment here. Who in fact has this information? Can an airline comply by providing no information to its selling staff? If the airline reservationists don't have it, the concept means little or nothing. What steps can reasonably be taken to assure that airline employees, in the usual and ordinary scope of their work, have access to this information?

....

“11. Ensure good customer service from code-share partners

Each airline will ensure that domestic code-share partners make a commitment to provide comparable consumer plans and policies.”

ASTA Comment: Alliance partners have been claiming “seamlessness” as one of the benefits of alliances from the beginning. But why does this obligation not extend to international alliance partners where the risk to the passenger is the highest?

“12. Be more responsive to customer complaints

Each airline will assign a Customer Service Representative responsible for handling passenger complaints and ensuring that all written complaints are responded to within 60 days. Each airline will develop and implement a Customer Service Plan for meeting its obligations under the Airline Customer Service Commitment. Customer Service Plans will be completed and published within 90 days and will be fully implemented within 6 months. Airline implementation will include training for airline reservation, customer service and sales personnel to enhance awareness of the responsibilities involved in implementation of the Customer Service Commitment and Plans. The Airlines will publish and make available their Customer Service Plans: (i) on airline Internet Web sites; (ii) at airports and ticket offices (upon request); and, (iii) to travel and reservation agents.”

ASTA Comment: This “commitment” refers only to response, not to resolution. It can be satisfied by a postcard or e-mail saying “we have received your complaint and will be in touch soon.”

CONCLUSION

The time for so-called “voluntary” passenger service commitments has passed. Congress and DOT should now act expeditiously to change the legal framework within which consumer rights issues are resolved by (1) limiting the scope of federal preemption of state consumer protection laws, (2) requiring that passenger service policies be integrated into the airlines’ contracts of carriage, (3) adequately funding DOT enforcement budgets and (4) promptly convening a meeting of relevant and responsible interests, including ASTA and representatives of consumer interests, airlines, airports, the FAA and the DOT Inspector General, to discuss and development a plan for resolving, through legislation, regulation or self-help, the many issues outstanding in connection with airline treatment of air travel consumers, as set forth in the above testimony.

Respectfully submitted,

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One Nation Divided By Law:

Position of the American Society of Travel Agents On Clarification Of Federal Preemption Under The Airline Deregulation Act (February 2001)

- ***Airline accountability to passengers should not depend on where in the Country they live.***
- ***Interpretation of the present Federal preemption provision has led to widely differing views and results among judges.***
- ***An overly broad application of preemption has denied consumers and small businesses a fair day in court against airlines, who have used preemption to become a virtual law unto themselves. Preemption has become civil immunity, service suffers, the public is frustrated.***
- ***Congress must fix this, the Supreme Court can't or won't. Over the objections of the Chief Justice and Justices O' Connor and Thomas the Supreme Court has declined to review lower court decisions holding the two conflicting analyses of the preemption provision. They can't both be right.***
- ***ASTA supports language that balances airlines' need to be free of state economic regulation with the rights of consumers and small businesses to take airlines to court when necessary.***

Mistreatment of passengers and small businesses with commercial disputes by denial of their fair day in court¹, together with criticism by leading jurists of overly broad judicial interpretations of the Federal protection given the airlines, leads the American Society of Travel Agents ("ASTA")² to conclude that immediate, remedial congressional action is needed.

¹ No one knows for sure how many instances there are of passengers and small businesses being denied their day in court on account of Federal preemption under the Airline Deregulation Act. ASTA does not attempt to document them all here. Our purpose is to show the lack of uniformity throughout the Federal appellate circuits into which the Country is divided, and how your rights now depend on where you live. Certainly, there are dozens if not hundreds, of these cases reported at the Federal trial court level, that never make it to the appellate courts. And for every case that does make it to court, it is likely that many consumer and small business complaints never do because of the expense, difficulty, and discouragement resulting from the present uncertainty in the law. Clearly, the number of such instances can only increase every day.

² ASTA was established in 1931 and is the largest professional travel trade organization in the world. It represents all facets of the travel industry, including travel agencies and travel service suppliers. ASTA has appeared in numerous legal proceedings and provided testimony before various legislative bodies. It is generally recognized as responsibly representing the interests of its members and the travel agency industry. See e.g. Investigation into the Competitive Marketing of Air Transportation, C.A.B. Docket 36595, aff'd; Republic Airlines, Inc. v. C.A.B., 756 F.2d 1304 (8th Cir. 1985); In re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297, 61 USLW 2610, 1993-1 Trade Cas.(CCH) ¶70,165 (N.D.Ga., 1993); U.S. v. Airline Tariff Publishing Co., 1993-1 Trade Cas. (CCH) ¶70,191 (D.D.C., 1993);

When Congress deregulated the airline industry by passage of the Airline Deregulation Act of 1978 ("ADA"), it prohibited the States from "enact[ing] or enforc[ing] any law *** relating to rates, routes, or services." 49 U.S.C. App. § 1305(a)(1). Obviously, such a provision was necessary to prevent the States from subjecting to their regulation that which Congress had just removed from Federal regulation. That Federal preemption provision, meant to shield airlines from state regulation, has now been turned by the airlines into a sword. They wield it to bar the general public and small businesses from holding them accountable under the same state laws that applies to virtually every other industry in the Country.

One result is that the airlines have become a veritable law unto themselves, immune from state-law suits seeking to hold them responsible for harm to passengers as well as their obligations to small businesses. Once a court decides that a party's state law claims are preempted, he is frequently left without any avenue of relief at all. The Department of Transportation "has neither the authority nor the apparatus required to superintend a contract dispute resolution regime."³ Clearly, DoT would also be unable to adjudicate tort claims. At the same time, the airlines remain free to call upon, and do call upon, these same state law principles against other parties when their own interests are served.

Fifth Circuit

The difficulties and lack of consensus experienced by judges struggling to define the scope of the ADA's preemption provision is illustrated by the case of *Hodges v. Delta Airlines, Inc.*, twice before the U.S. Court of Appeals for the Fifth Circuit.

Frances Hodges was injured on a flight from the Caribbean to Miami, when a fellow passenger opened the overhead compartment directly above her seat, dislodging and spilling a case containing several bottles of rum. The box fell on Ms. Hodges, lacerating her left arm and wrist.

Bound by previous precedent, *Baugh v. Trans World Airlines, Inc.*, 915 F.2d 693 (5th Cir.1990), a Fifth Circuit panel held that Federal preemption barred Ms. Hodges' suit against the airline. It quickly added, however, that it believed this result to be wrong, and urged that all of the Circuit's judges re-hear the case, *en banc*.⁴

On rehearing, the Fifth Circuit overruled its prior decision in *Baugh*. Even then, however, separate opinions reflect at least three different views held among Fifth Circuit judges as to the scope of preemption *Hodges v. Delta Airlines, Inc.*, 24 *Avi.* 18,361 (1995).

The *en banc* Fifth Circuit held that Federal preemption did not displace state tort actions for personal, physical injuries or property damage caused by the operation and maintenance of aircraft. The majority noted that statements of the Civil Aeronautics Board implementing airline deregulation strongly support the view that the Airline Deregulation Act was concerned solely with economic deregulation, not with displacing state tort law. Two judges disagreed, holding that the scope of Federal preemption was broader and barred Ms. Hodges' suit.

Spiro v. Delmar Travel Bureau, Inc., 591 N.Y.S.2d 237 (A.D. 3 Dept. 1992); and *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996).

³ *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) at 232.

⁴ *Hodges v. Delta Airlines, Inc.*, 24 *Avi.* 17,722 (1993).

On the other hand, Judge Jolly, concurring in the result, observed that the very fact that the court divided only on the application of the principle (that a claim is preempted only if it relates to services not a part of the maintenance or operation of an aircraft) reveals that such a rule promises uncertain and inconsistent results.

In Judge Jolly's view, suits involving efforts by private individuals under state common law tort rules are not instances of a state imposing its own substantive standards with respect to rates, routes, or services, which is what the ADA was meant to preempt.

Ninth Circuit

No less than the Fifth, the Ninth Circuit has struggled mightily with the scope of preemption under the ADA, taking at various times no less than four distinct positions. Initially, in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir.1993) and *Lathigra v. British Airways PLC*, 41 F.3d 535, 540 (9th Cir.1994), the Ninth Circuit held that the ADA did not preempt state tort claims that did not undermine the goals of airline deregulation or were too tenuously connected to it.

One year later, however, the court took a different approach. In *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir.1995) it held that the ADA preempted a tort suit against American Airlines for continuing to serve alcohol to an intoxicated passenger. Over Judge Norris's dissent, the court concluded that serving drinks "relate[d] to [a] service" that the airline rendered, thereby falling within the scope of the federal preemption.

That approach lasted only two years, when in *Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir.1997), the court expressed doubts about the validity of its *Harris* analysis. In an attempt to mitigate the impact of *Harris*, the Ninth Circuit expressly adopted the *en banc* Fifth Circuit's "service" versus "operations and maintenance" test.⁵ Claims related to an airline's "operations and maintenance" were not preempted, but claims related to an airline's "service" were.

That interpretation too only survived a year. In *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir.1998), consolidated with four other cases, an *en banc* Ninth Circuit *sua sponte* expressly overruled its rationale in *Harris* and *Gee*. It held that Congress used the word "service" in the phrase "rates, routes, or service" in the ADA's preemption clause to refer only to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail. "Service" was not intended to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.

Disavowing the Fifth Circuit test as elusive and unworkable, the Ninth noted Judge O'Scannlain's observation in *Gee*: "the operations-versus-service dichotomy invites nonsensical, inequitable, and inconsistent results, and in any event has nothing to do with the purpose of airline deregulation."⁶

The *Charas* court concluded that when Congress enacted federal economic deregulation of the airlines, it intended to insulate the industry from possible state economic regulation and encourage the forces of competition. It did not intend to immunize the airlines from liability for personal injuries caused by their tortious conduct.

⁵ 110 F.3d at 1407.

⁶ 110 F.3d at 1410.

Seventh Circuit

The U.S. Court of Appeals for the Seventh Circuit follows the Fifth Circuit's Hodges definition of airline "services" as including not only transportation, but also ticketing and all other elements of the air carrier bargain. *Travel All Over The World, Inc. v. Kingdom of Saudi Arabia*, 73 F. 3d 1423, 1433 (7th Cir. 1996).

This, of course, contrasts sharply with the Ninth Circuit's conclusion that the preemption clause's word "service" in the phrase "rates, routes, or service" refer only to the prices, schedules, origins and destinations of point-to-point transportation and was not intended to include in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.

The results in the Seventh Circuit's case are as follows: claims by a travel agency against an airline for failure to honor confirmed reservations were not preempted to the extent they sought compensatory damages, but were preempted to the extent they sought punitive damages; defamation claims against the airline for false statements asserting the agency's dishonesty and failure to book seats were not preempted because they did not refer to, or have, a forbidden significant economic effect on airline rates, routes or services; claims of tortious interference, intentional infliction of emotional distress, and fraud, based on the airline's refusal to transport passengers who had booked their flights through the travel agency, were preempted, while those based on the airline's defamatory comments were not.

These conclusions as a good example of the "nonsensical, inequitable, and inconsistent results" Judge O'Scannlain suggested would follow from the operations-versus-service approach to Airline Deregulation Act preemption.⁷

Fourth Circuit

The Fourth Circuit follows the Fifth Circuit analysis. Although observing that the treatment to which a passenger had been subjected was "unquestionably rude and unprofessional," in *Smith v. Comair, Inc.*, 134 F.3d 254 (1998), it held that Federal preemption barred the passenger from suing an airline for breaching its contract to fly him to Minneapolis.

First Circuit

Apparently, the First Circuit follows the 'operations versus service' analysis. In *Chukwu v. Board of Directors British Airways*, 101 F.3d 106 (1996) it affirmed, without opinion, the decision of the U.S. District Court for Massachusetts, that whether tort claims were preempted depended upon whether they "relate to" a "service."⁸

Eleventh Circuit

The U.S. Court of Appeals for the Eleventh Circuit, in *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463 (1998), held that a former airline employee's state law age discrimination claim was not barred by preemption, but cited, apparently approvingly, the Seventh Circuit's *Travel All* decision in doing so.

⁷ Fn. 6 *supra*.

⁸ *Chukwu v. Board of Directors British Airways*, 889 F.Supp. 12 (1995).

Sixth Circuit

In *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493 (1999), the majority of a Sixth Circuit panel held that a former airline employee's state statutory race discrimination and related common law tort claims bore only the most tenuous relation to airline rates, routes, or services, and therefore were not barred by preemption. Judge Krupansky, however, dissented on the grounds that "all employment-related activities undertaken by a regulated airline are 'related to' its provision of 'services' to its patrons" and, therefore, preempted.⁹

Third Circuit

Noting that the rulings in the post- *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), appellate case law have not been consistent, as the Courts of Appeals struggle with the ADA's "ambiguous preemption terminology," the Third Circuit casts its lot with the Ninth, and in opposition to the Fourth, Fifth, Seventh, and possibly First Circuits. In *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186 (3rd Cir.1998), the court held that a travel agency's defamation claim could go forward against an airline that distributed letters advising a number of the agency's clients that their tickets were considered to be stolen. The proper inquiry, the court said, is "whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation."

Supreme Court

The present state of uncertainty and confusion exists despite the fact that the ADA's preemption provision has already been before the U.S. Supreme Court for interpretation on two separate occasions, once in *Morales* and again in *Wolens* .

Speaking as well for the Chief Justice and Justice Blackmun, Justice Stevens has written:

the presumption against preemption of traditional state regulation counsels that we not interpret §105(a) to pre-empt every traditional state regulation that might have some indirect connection with, or relationship to, airline rates, routes, or services unless there is some indication that Congress intended that result. To determine whether Congress had such an intent, I believe that a consideration of the history and structure of the ADA is more illuminating than a narrow focus on the words "relating to." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) at 421 (Stevens, J., dissenting).

Recently, The Chief Justice and Justices O' Connor and Thomas took the unusual step of dissenting from the Supreme Court's denial of a writ of certiorari to express their dissatisfaction with the current state of the law of preemption under the ADA.

The case, on petition, from the Ninth Circuit, presented the " important issue that has divided the Courts of Appeals: the meaning of the term 'service' in the portion of the Airline Deregulation Act of 1978 that preempts any state law 'related to a price, route, or service of an air carrier.' 49 U. S. C. §41713(b)(1). I would grant the petition to resolve this issue and bring needed certainty to this area of the law," Justice O' Connor wrote.¹⁰

⁹ 165 F.3d 496.

¹⁰ *Northwest Airlines v. Duncan*, 531 U.S. (2000).

But, it does not end there. Having refused to review the Ninth Circuit's state economic regulation approach, the Supreme Court has also denied review in a case applying the Seventh Circuit's service versus operations approach.¹¹

In the case in which review had been sought, *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000), United sued Mesa for a declaratory judgment that changes it made in the parties' code share arrangement were permitted. It also sought damages from Mesa for breach of contract. Mesa counter sued for breach of contract, tortious interference with contractual relations, breach of fiduciary duty, and fraud.

Holding that Mesa's tortious interference, breach of fiduciary duty, and fraud claims were preempted, the Seventh Circuit reaffirmed its view that a claim was preempted if either the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have a significant economic effect upon them. "Nothing any other circuit has said about the subject persuades us to alter course," the Seventh Circuit said.¹²

Differences of interpretation in the scope of the ADA's Federal preemption, not only among the Federal judicial circuits, and even among judges on the same circuit, but among the Justices of the Supreme Court, as well as instances of members of the public and small businesses being denied a forum for their claims, clearly demonstrate that legislative clarification of this troublesome provision is essential.

It is past time for the Congress to clarify what the courts have termed "ambiguous."¹³ The preemption law has for more than 20 years defied the federal judiciary's analytic powers and led to the application of different law in different parts of the Country. Congress should once and for all make clear that the scope of Federal preemption of state law under the Airline Deregulation Act is limited to state economic regulation that would have the effect of re-regulating the airlines.

ASTA supports statutory language it believes strikes the appropriate balance between the airlines' need to be free of state economic re-regulation of fares and routes, and the rights of consumers and others to have redress against airlines for their failures to abide by the same state law standards of conduct all others must observe.

That language amends 49 U.S.C. Section 41713(b) by providing:

This subsection shall not bar any cause of action brought against an air carrier by one or more private parties seeking to enforce any right under the common law of any State or under any State statute, other than a statute purporting to directly prescribe fares, routes, or levels of air transportation service.

This language (or language to the same effect) currently appears as Section 5 in S. 200, the *Air Travelers Fair Treatment Act*, Section 3 in H.R. 332, the *Aviation Consumer Right To Know Act* and Section 3 in H.R. 384, the *Airline Passenger Fair Treatment Act*. This language is suitable for inclusion in other legislation.

¹¹ *Mesa Airlines, Inc. v. United Airlines*, U.S. (Decided Dec. 4, 2000).

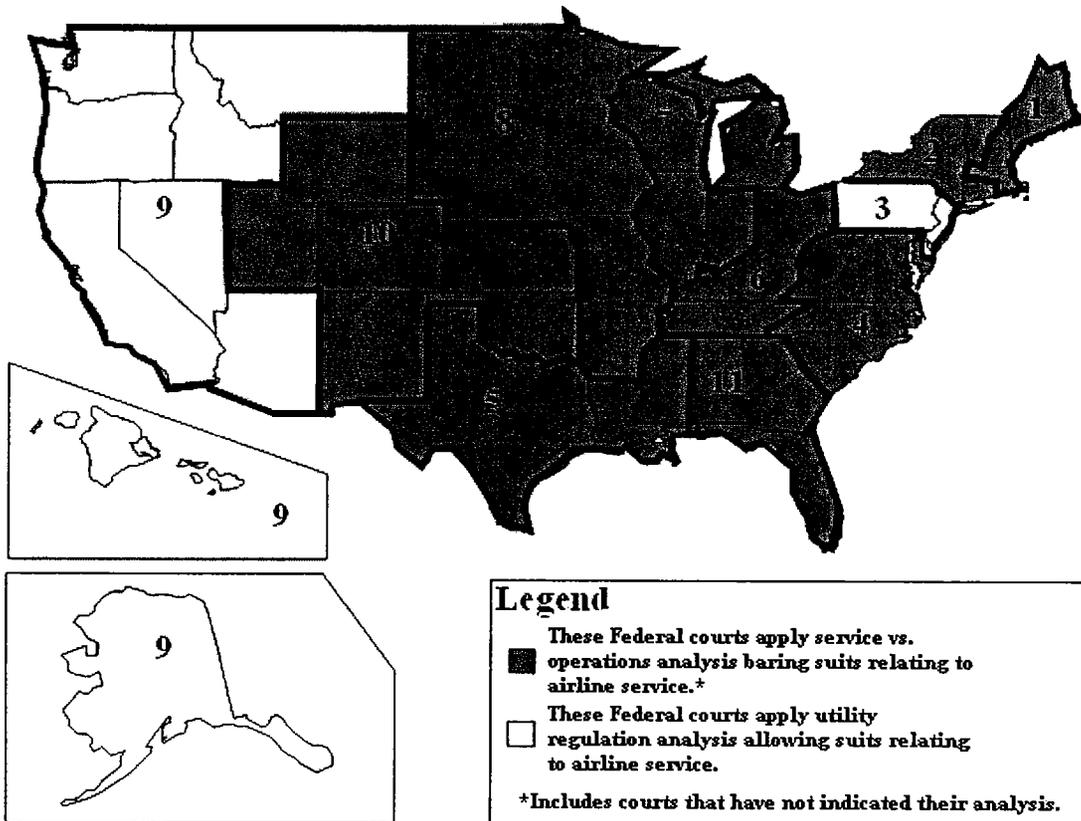
¹² 209 F.3d 609.

¹³ 164 F.3d 194.

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Circuit	Service/Operations Analysis: "Service" means in-flight beverages, personal assistance to passengers, the handling of luggage, etc.	Economic Regulation Analysis: "Service" means utility service, the places the airline serves
First	X	
Third		X
Fourth	X	
Fifth	X Divided Court	
Sixth	? Divided Court	? Divided Court
Seventh	X	
Ninth		X
Eleventh	?	?

**Federal Courts Apply Two Different Standards of Preemption Under ADA:
Is Your State In the Red Zone?**



**Statement of the American Society of Travel Agents
Senate Committee on Commerce, Science and Transportation**

**Hearing on Airline Customer Service
June 28, 2000**

The American Society of Travel Agents (ASTA)¹² applauds Senator McCain's endeavors to monitor the airline industry's voluntary commitment to improve passenger rights and services as evident by the June 28, 2000 Senate Commerce hearing on Airline Customer Service. ASTA submits the following statement for the hearing record.

It comes as no surprise to travel agents that the voluntary plans put forth by the airlines have not yielded satisfactory results. Passenger complaints to the DOT more than doubled between 1998 and 1999 from 7,980 to 17,381. What's more, since the airline plans took effect, complaints from passengers climbed another 74 percent. ASTA renews its call for swift passage of an Air Travelers Bill of Rights and is pressing for the introduction of a Senate version of HR 2200, legislation that would establish a national policy of fair treatment for airline passengers and travel agents.

ASTA, the world's largest travel trade association, also calls for a halt to government consideration of approval for any airline merger or alliance until customers can fly with the respect, courtesy, convenience and reliability to which they, as the ultimate owners of the air space, are entitled. What is needed is a national policy of passenger rights and that policy can be found in the provisions of HR 2200, the *Omnibus Airline Passenger Fair Treatment Act*. This legislation ensures that consumers of air travel will be treated with respect and dignity, will be afforded full access to fare and schedule information, and will have access to the travel distribution channel of their choice.

As a first step in correcting the inequities, there is one huge gap that Congress must address and that is the right of air passengers and travel agents to resolve disputes with airlines under state law. That action alone would give air consumers the same rights that consumers of any other product have, the right to sue under state law.

In some cases, the Airline Deregulation Act has been misinterpreted as preventing air travelers and other businesses with claims against airlines from exercising their basic right--to resolve a dispute in court. There are currently three bills that address the preemption issue--HR 272, the *Airline Competition and*

¹² The mission of the American Society of Travel Agents is to enhance the professionalism and profitability of members worldwide through effective representation in industry and government affairs, education and training, and by identifying and meeting the needs of the traveling public. The Society, the world's largest and most influential travel trade association, and its affiliates represent over 26,000 members in more than 170 countries.

Lower Fares Act, introduced by Rep. Louise Slaughter (D-NY); HR 2200, the *Omnibus Airline Passenger Fair Treatment Act*, introduced by Rep. John E. Sweeney (R-NY); and S 477, the *Airline Competition Act of 1999*, introduced by Sen. Charles Schumer (D-NY).

Clarification of the preemption language is supported by the National Association of Consumer Agency Administrators (NACAA). They, like ASTA, believe that the public must be able to access state consumer laws to resolve disputes with the airlines. Federal preemption provisions embodied in the Airline Deregulation Act were intended as a shield primarily to protect the airline industry from random re-regulation by the states. The airlines, however, have turned it into a sword with which they deflect small business and consumers who seek to hold them legally accountable.

ASTA's call for a moratorium on all mergers and joint ventures until the issue of passenger rights has been adequately addressed was supported by the Inspector General's report which read: "In the long run if the number of actual *or potential* competitors in the air markets declines, there is likely to be less competitive pressure on the remaining air carriers to offer improved service amenities or introduce additional ones."

Approving another large merger and further reducing competition in the industry only serves to compound the customer service and passenger rights problem, ASTA's message is this: No more mergers, no more alliances and no more airline joint ventures should be permitted as long as passengers are screaming for relief from airline arrogance and indifference resulting from this ever-growing oligopoly in the skies. As the rightful owners of the airways and airport facilities, the public has a right to respect, fair dealing and truthfulness. Deliver that first and then the government can consider the rest.

ASTA has been at the forefront of the air travelers rights issue. Two years ago, ASTA unveiled the Air Traveler's Bill of Rights, asking that the airlines voluntarily adopt the program. When that effort was rejected by the airlines, ASTA turned to lobbying efforts on Capitol Hill. The passenger rights movement has gained significant support from several Congressional leaders. Sen. Ron Wyden (D-OR) has been a particularly staunch supporter of the movement and was successful in amending the DOT Appropriations Bill last session to fund the DOT IG investigation. Other efforts have been made by Sen. Richard Shelby (R-AL) and Reps. Peter A. DeFazio (D-OR), John D. Dingell (D-MI), Bud Shuster (R-PA), Sweeney (R-NY) and Edolphus Towns (D-NY).

The *Omnibus Airline Passenger Fair Treatment Act* HR 2200, introduced by Rep. John Sweeney (R-NY), includes the following rights:

- Full access to fares regardless of the method a consumer uses to purchase the ticket; travel agent; direct-call and Internet users would have access to the same price.
- Accurate and timely explanation of flight delays and related problems.
- Right to use all or part of any ticket purchased if doing so saves the consumer money.
- Access to state consumer laws to resolve disputes with airlines.
- Right to deplane a delayed aircraft parked at the terminal ramp.
- Access to reasonable in-flight emergency medical care.

ASTA has received the backing of a number of other travel organizations and consumer advocacy organizations such as the National Tour Association and the Coalition for Travel Industry Parity.

ASTA's renewed call for a legislated solution comes in the wake of the Interim Report on Airline Customer Service Commitment issued by Kenneth Mead, Inspector General of the Department of Transportation. Mead's testimony before the Committee on Commerce, Science and Transportation hearing on the apparent lack of progress made by the airlines in their voluntary customer service commitments, as well as problems with overbooking and consumer access to low fares

The Inspector General noted that despite the Airlines' publication of their "commitments by Sept. 15, 1999, not all plans had been fully implemented a full three months later. He further reported that the airlines' commitment for better customer service was essentially a recommitment to place substantially greater emphasis on existing law," not a significant move toward new and higher standards of customer care. Though optimistic in certain respects, the Report was fundamentally and broadly critical of the airlines' compliance with their "voluntary" customer service commitment plans.

Key findings included:

- The airlines' customer service commitment "**does not directly address the underlying reasons for customer dissatisfaction**, such as extensive flight delays, baggage not showing up on arrival, long check-in lines and high fares in certain markets ... until these areas also are effectively addressed by the airlines, FAA and others there will continue to be discontent among air travelers."
- "**Less than half (the airlines) had comprehensive customer service contingency plans** in place for handling extended delays on-board aircraft at all the airports they served. The provision(s) use general terms such as *food, every reasonable effort, for an extended period of time* or *emergency*. These terms are not clearly defined and do not provide the passenger with a clear understanding of what to expect."
- The commitment and the airlines' plans "while conveying promises of customer service standards do not necessarily translate into legally enforceable passenger rights.... The enforceable contract between the airlines and their passengers may be less advantageous to the passengers than the provisions found in the airlines plans."
- (There is) "major room for improvement in the accuracy, reliability and timeliness of the Airlines' communications to customers about the status of flights."
- "**Information being provided about known delays and cancellations at airport check-in counters and in the boarding areas was frequently inaccurate, incomplete or unreliable.** ... Simply communicating is not sufficient if the information is not accurate."
- There were a "sufficient number of cases in which the lowest fare was not offered to warrant that the airlines pay special attention to this area."
- With respect to low price guarantees, "when a ticket purchase was required, **we typically were not told by the reservation agents that we could receive a full refund** if the reservation was canceled within 24 hours."