The Empire State's New Airline Passenger "Bill of Rights"—Gone in a New York Minute?

by Kenneth S. Nankin

October 2007

Introduction

In response to the highly-publicized on-board aircraft ground delays that occurred at John F. Kennedy International Airport (JFK) in February and March 2007, the New York State Legislature enacted the "Consumer Bill of Rights Regarding Airline Passengers," which Governor Eliot Spitzer signed into law on August 1, 2007. The "Bill of Rights," which takes effect on January 1, 2008, requires that airlines provide passengers on aircraft delayed more than three hours with electricity for fresh air and lighting, food, water, and clean lavatories; creates a new "Office of the Airline Consumer Advocate;" and gives state authorities the power to seek substantial civil penalties against airlines for violations.

Faced with the possibility of multiple states having airline passenger "bills of rights," each differing in various respects, Air Transport Association officials have suggested that 49 U.S.C. § 41713(b)(1), the preemption provision of the Airline Deregulation Act of 1978 (the ADA),1 preempts New York's Bill of Rights, and have indicated that a court challenge could be forthcoming. A strong case for preemption could be made. The preemption provi-
sion, which prohibits a state from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier," has been interpreted very broadly by many courts. However, even a court that interprets the provision narrowly could reasonably conclude that New York's Bill of Rights significantly affects airlines' provision of their "service" and thus is preempted.

The Airline Deregulation Act

Before the ADA was enacted, the Civil Aeronautics Board (CAB) tightly controlled virtually every aspect of an airline's economic existence, from the fares it could charge and the routes it could operate, to "stipulations about the minimum quality of meals and maximum charges for headsets."² Through the ADA, Congress dismantled the CAB's longstanding regulatory headlock on the airlines. "To ensure that the States would not undo federal deregulation with regulation of their own,"³ Congress included the following provision in the ADA:

[N]o State or political subdivision thereof and no inter-state agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act.⁴

Congress has modified the preemption provision over the years, but its scope remains essentially the same. The current version, which is codified at 49 U.S.C. § 41713(b)(1), provides as follows:

[A] State, political subdivision of a State, or political authority of at least 2 States 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 that may provide air transportation under this subpart.

A state statute may be preempted even if it does not specifically address the airline industry. Morales, 504 U.S. at 386. In addition to state statutes and regulations, section 41713(b)(1) preempts state common law causes of action because "[s]tates can impose their own substantive standards through the common law as well as through statutory enactments." Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1435 (7th Cir. 1996). The preemption provision applies to both U.S. and foreign

The scope of the ADA's preemption provision has been the subject of two U.S. Supreme Court cases, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). In *Morales*, the Court, noting that the words of the provision "express a broad pre-emptive purpose" (504 U.S. at 383), held that certain state advertising guidelines were preempted because they related to airlines' "rates." In *Wolens*, the Court held that claims under a state deceptive business practices statute against an airline for making retroactive changes to its frequent flyer program were preempted because such claims related to the airline's "rates" and "services."

The ADA does not define the term "service," and the Court did not define that term in *Morales* or *Wolens*. Since *Wolens*, conflicts have developed among certain U.S. Circuit Courts of Appeals as to how that term is defined, as discussed below. In 2000, the Court bypassed an opportunity to define the term "service" by denying a certiorari petition to the Ninth Circuit in *Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000). Chief Justice Rehnquist and Justices O'Connor and Thomas dissented from the denial of certiorari, expressing their desire to resolve the conflicts that had arisen among the Circuits.

**The New York Legislation**

The New York State Assembly offered the following justification for the Bill of Rights:

Several incidents that occurred during the winter of 2007 involved airline passengers who were detained on the runway for many hours. On Valentine's Day, passengers were held aboard a JetBlue flight at JFK for 10 hours without food, water, fresh air, or the ability to use the rest room. Several other JetBlue flights were similarly stalled on the runway. Subsequently, on St. Patrick's Day, at JFK passengers were stuck on board a Royal Air Maroc flight at JFK for more than 14 hours. People on a Swiss Air flight to Zurich were trapped on board for eight hours, a Virgin Atlantic flight to London left 9 hours late, and a Cathay Pacific flight to Vancouver was finally canceled after more than nine hours of waiting at JFK. Passengers were also stuck for seven hours at JFK on board a Korea-bound Asiana Airlines flight.
These episodes demonstrate the need for statutory changes to protect airline consumers from this type of treatment. In spite of carriers' voluntary commitments that these episodes will not recur, passengers continue to be subject to lengthy detentions on aircraft without basic services. New York is home to some of the world's busiest airports, and so should take the lead in adopting common sense measures that empower consumers and prevent outrageous incidents like these from recurring. The bill of rights and the creation of an independent advocate for airline passengers will provide a needed measure of consumer protection in New York's airports.5

The Bill of Rights provides in part as follows:

Whenever airline passengers have boarded an aircraft and are delayed more than three hours on the aircraft prior to takeoff, the carrier shall ensure that passengers are provided as needed with:

(a) electric generation service to provide temporary power for fresh air and lights;

(b) waste removal service in order to service the holding tanks for on-board restrooms; and

(c) adequate food and drinking water and other refreshments.

N.Y. Gen. Bus. Law § 251-g.; 4 Av. L. REP. (CCH) ¶ 75,519.

The Bill of Rights also establishes an "Office of the Airline Consumer Advocate," which has the power to investigate complaints, issue subpoenas for documents, and refer complaints to New York's Attorney General. The Bill of Rights authorizes the Attorney General to recover civil penalties of up to $1,000 per passenger for a violation, as well as attorneys' fees and costs from airlines that violate the law. N.Y. Gen. Bus. Law § 251-h; 4 Av. L. REP. (CCH) ¶ 75,520. The Bill of Rights requires that airlines give passengers "clear and conspicuous" notice regarding the functions of, and contact information for, the Office of the Airline Consumer Advocate, as well as "explanations of the rights of airline passengers." N.Y. Gen. Bus. Law § 251-g; 4 Av. L. REP. (CCH) ¶ 75,519.

The Bill of Rights defines a "carrier" as "any partnership, corporation or other business entity regulated by the Federal Aviation Administration that conducts scheduled passenger air transpor-
tation." N.Y. Gen. Bus. Law § 251-f; 4 Av. L. Rep. (CCH) ¶ 75,518. This means that the Bill of Rights applies to both U.S. and foreign airlines.

**Bill of Rights, Meet the ADA**

The sponsor of New York’s Bill of Rights clearly foresaw the possibility of challenges to the legislation on preemption grounds. In response, he expressed the following position while the bill was pending: "While federal law places restrictions on what individual states can do when it comes to legislation relating to air travel, federal courts have held that the provision of 'amenities' for air travelers is one area that states can legitimately address." Senate Passes Bill to Create "Airline Passengers' Bill of Rights," www.senate.state.ny.us (June 19, 2007 press release).

The sponsor did not randomly choose to use the word "amenities" in his statement. That word was used by the Ninth Circuit in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (1998), a decision in which the court interpreted the word "service" in the ADA’s preemption provision in a very limited, passenger-friendly manner.

*Charas* consisted of five consolidated cases, all of which involved passengers alleging personal injury state law tort claims against airlines. One case involved a passenger’s claim that a flight attendant hit him with a service cart, one involved a passenger’s claim that another passenger opened an overhead bin and a piece of luggage fell on her head, one involved a passenger’s claim that she tripped over luggage left in the aisle by a flight attendant, one involved a passenger’s claim that she fell while disembarking, and the fifth case involved a passenger’s claim that she fell while boarding a shuttle bus. The airline defendants in these cases had contended that the passengers’ claims were preempted by the ADA.

The court in *Charas* ruled in favor of the passengers; it stated that, while Congress intended to "insulate the industry from possible state economic regulation" in order "to encourage the forces of competition," Congress "did not intend to immunize the airlines from liability for personal injuries caused by their tortious conduct." Accordingly, the court held as follows:

>[We hold that Congress used the word "service" in the phrase "rates, routes, or service" in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail. In the context in which it was used in the Act, "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.


In contrast to Charas, the Fifth Circuit and three other Courts of Appeals have adopted a much broader definition of the term "service." The Fifth Circuit defined "service" as follows:

"Services" generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as "services" and broadly to protect from state regulation.


If the Second Circuit were to adopt the broader view of the term "service" in a case challenging New York's Bill of Rights, it is very likely that the court would hold the Bill of Rights to be preempted. However, even if the Second Circuit were to define "service" narrowly, as the Ninth Circuit did in Charas, it might still hold the Bill of Rights to be preempted. The Ninth Circuit in Charas held that passengers could use state tort common law causes of action against airlines that do not use due care in the physical boarding, in-flight transportation, and disembarking of passengers. However, state negligence causes of action, and other state common law tort causes of action, do not impose any specific and positive requirements on the airlines; they simply impose a general standard
of due care. State negligence causes of action do not require that
airlines conduct their "service" in any particular manner.

By contrast, New York's Bill of Rights seeks to impose upon the
airlines specific and positive requirements that would significantly
affect their provision of "service" at New York's airports. The
statute's prominent use of the word "service" is telling. For example,
the statute requires that airlines perform "waste removal
service in order to service the holding tanks for on-board
restrooms." Performance of this "service" would require that an
aircraft return to the gate. Lavatories cannot be serviced on an
active taxiway because an aircraft cannot move during such servic-
ing, and an aircraft must be able to move, if necessary, on an active
taxiway. The statute also requires that airlines provide "electric
generation service." Provision of this "service" away from a gate,
which often has ground electric service, would require that an
aircraft use its own auxiliary power unit (APU) to provide electricity,
and extended APU operations would require that an aircraft be
refueled before takeoff. Refueling an aircraft with passengers
onboard requires that a door be open in case an evacuation is
necessary. This would require, of course, that stairs be positioned at
the open door.

Clearly, the Bill of Rights goes far beyond imposing a general
due care requirement on the airlines, as the court in effect did in
Charas. That is why the Bill of Rights is likely to be considered
preempted by any court, even one that defines the term "service"
narrowly.

In essence, the Bill of Rights mandates that airlines provide
specific forms of "service" in order to make passengers safe and
comfortable. At least two federal courts have held that the ADA
preempts any state law-based general duty to provide safe and
comfortable "service." *Anderson v. USAir, Inc.*, 818 F.2d 49, 56-57
(D.C. Cir. 1987); *Cannava v. USAir, Inc.*, 1993 WL 565341 at *6
(D. Mass.) ("[T]he heart of plaintiff's claim for breach of contract is
that the defendant failed to provide the services required' and
failed to provide 'safe and comfortable services.' [Plaintiff] alleges
that USAir violated an implied contractual duty to treat passengers
courteously. Here the plaintiff's claims lie, even more clearly, at
the heart of airline 'services' and must be preempted by section
[41713(b)(1)]."). If courts hold that state law-based general
duties to provide safe and comfortable services are preempted by the
ADA, then courts are very likely to hold that state law-based
specific duties to provide safe and comfortable services are also
preempted by the ADA.
The Bill of Rights provides that it is not to be "construed as requiring any carrier, airport or other entity to take any action in contravention of any written directive of the federal aviation administration or other federal agency having jurisdiction over such entity." N.Y. Gen. Bus. Law §251-i.; 4 Av. L. REP. (CCH) ¶ 75,521. That provision would not save the Bill of Rights from a preemption ruling; its likely effect on airlines' "service" at New York airports is too far-reaching.

If Legislation Is Needed, Only Congress Should Act

No one can dispute that New York State's legislators were addressing a valid concern in enacting the Bill of Rights. No one wants to sit, hot and hungry, for ten hours on a motionless aircraft with overflowing lavatories—and no one should have to endure such conditions. However, given industry operational trends, the stage may be set for more ground delays at JFK. According to the Federal Aviation Administration (FAA), while total airport operations in the U.S. have decreased by 11 percent since 2000, commercial operations at JFK have increased 27 percent since 2000 and 44 percent since 2004. "Hearing on Airline Delays and Consumer Service" at 2, U.S. House of Representatives, Committee on Transportation and Infrastructure, Subcommittee on Aviation Staff (Sept. 25, 2007). And, according to the Department of Transportation's (DOT) Bureau of Transportation Statistics (BTS), there were almost 30 percent more scheduled departures at JFK for the 12-month period ending July 2007 than during the 12-month period ending July 2006. RITA BTS Airline Data, 2007 Airport Fact Sheet.

Other U.S. airports also could face more ground delays. According to the BTS, U.S. airlines transported 72.2 million scheduled domestic and international passengers in July 2007, the most ever for a single month and over two percent more than the 70.6 million passengers carried in July 2005, the prior record. "July 2007 Airline Traffic Data: U.S. Airlines Carried Record Number of Passengers in July," Bureau of Transportation Statistics (Oct. 15, 2007). Not surprisingly, the load factors in July 2007 were the highest ever, reaching 86.0 percent for combined domestic and international flights. Id.

But none of the recent ground delays or the aforementioned statistics mean that individual states should be trying to solve the ground delay problem on their own. A given aircraft might operate in several different states during the course of a single day. How could American Airlines be expected to ensure that its 600 plus aircraft are properly stocked and serviced each day to meet the
various food, beverage, and other state airline passenger bill of rights requirements that such aircraft might encounter while operating from state to state?

The proliferation of state airline passenger bills of rights is not a theoretical concern. According to one report, a state legislator is considering introducing airline passenger bill of rights legislation in New Jersey. "Legislator Calls for an Airline Passenger 'Bill of Rights,' N.Y. TIMES, Sept. 2, 2007." "I saw that New York passed a similar bill and thought that we should have the same consumer protections here in New Jersey,' [Assemblyman Samuel D.] Thompson, a Republican from Monmouth County, said." Id. Legislators in other states will not be far behind.

In September 2007, DOT's Inspector General issued a report, entitled "Actions Needed to Minimize Long, On-Board Flight Delays," that contains eight "best practices" for dealing with long on-board delays. Office of the Secretary of Transportation, Report No. AV-2007-077 at 14-15 (Sept. 25, 2007). The Inspector General also suggested in the report that, because "a more comprehensive national plan of action is needed" on the ground delay issue, a national task force composed of airline, airport, FAA, and DOT representatives "should be established to develop and coordinate contingency plans to deal with lengthy delays." Id. at 15.

If collaborative efforts are not adequate and ground delay legislation is needed, only Congress should act because it is the only legislature that could impose uniform requirements on the airlines, airports, and other interested parties. Passenger bill of rights legislation is now before Congress; the Airline Passenger Bill of Rights Act of 2007 is pending in the Senate (as S. 678) and the House of Representatives (as H.R. 1303).

Kenneth S. Nankin is a partner with Nankin & Verma PLLC, which has offices in the District of Columbia and Maryland. Mr. Nankin has been representing airlines since starting practice in 1988. He litigates against travel agents in cases involving unreported and underreported sales, unauthorized reservations and sales, refund and exchange fraud, commission disputes, abusive ticketing practices, stolen tickets, and frequent flyer mileage and award brokering. He also litigates contract claims for airlines in cases involving vendors, leasing companies, freight forwarders, and other entities, pursues airline claims for aircraft hull damage repair costs and lost revenues arising from ground incidents, and defends airlines against passenger injury, delay, baggage, and refund claims. Mr. Nankin analyzes airline industry legal developments on his blog, The NV Flyer, which is located at www.nvflyer.com.
Mr. Nankin is a member of the Bars of the District of Columbia, Maryland, New York, and Virginia. He graduated in 1988 from Harvard Law School and received his undergraduate degree from Washington and Lee University in 1985.

Endnotes

5 *http://assembly.state.ny.us/leg/?bn=A08406*.
6 As the dissenters noted in *Northwest*, "[b]ecause airline companies operate across state lines," they are particularly vulnerable to "inconsistent state regulations." 531 U.S. at 1058.

[The next page is 22,001.]