



**U.S. Department of
Transportation**

Office of the Secretary

General Counsel

October 10, 2007

1200 New Jersey Ave. S.E.
Washington, D.C. 20590

Michael Grief, Assistant General Counsel
Office of the General Counsel
Florida Department of Health
4052 Ball Cyprus Way, A-02
Tallahassee, Florida 32399

Dear Mr. Grief:

Re: Florida Air Ambulance Laws and Regulations

This is in response to your oral request for U. S. Department of Transportation guidance as to whether Federal law preempts Florida's statutory requirement that air ambulances seeking to operate within the State must first obtain a State certificate of public convenience and necessity. This issue has arisen in connection with an attempt by Rocky Mountain Holdings, LLC, which is owned and operated by Air Methods Corporation, to initiate air ambulance service in Florida. Air Methods argues to the State that, under a provision of the United States Code, 49 USC § 41713, it is exempt from any Florida determination of public need with regard to its proposed air ambulance operation.¹

Section 41713 states in relevant part:

(b) PREEMPTION -- ... a State, [or] political subdivision of 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 that may provide air transportation under this subpart.

First, I can confirm that Air Methods operates as an "air carrier that may provide air transportation under this subpart." Air Methods holds appropriate safety and economic authority issued by the U.S. Department of Transportation/Federal Aviation Administration (FAA) under Parts 135 and 298 of our regulations. 14 CFR Parts 135 and 298; see also 49 USC §§41101, 44702 and 44705. Further, Air Methods holds FAA operating specifications as an air ambulance. 14 CFR §§119.43 and .49.

That being the case, the issue devolves to whether Florida has enacted or is seeking to enforce a provision or provisions of law that relate to Air Methods' "prices, routes, or services." In this regard, we note that Florida statutes require that an air ambulance first obtain a certificate of public convenience and necessity (PC&N) from each county within the State in which it intends to operate. Florida Statutes 2007 § 401.25(2)(d). In determining whether to issue a

¹ See letter dated June 27, 2007 from John M. Ingrassia, counsel for Air Methods, to John Bixler, State EMS Director, Florida Department of Health.

PC&N certificate to an air ambulance applicant, each county must consider State guidelines, as well as the recommendations of local or regional trauma agencies and the recommendations of municipalities within its jurisdiction. Florida Statutes 2007 § 401.25 (6). It appears that counties are free to reject applications if they determine, for example, that the necessary services are already provided, that there is insufficient local support, that there would be adverse effects on existing providers, or that perceived costs are not commensurate with benefits.

The language of section 41713, as well as the legislative intent behind that provision and the legal precedents on point, all lead to a conclusion that Florida's PC&N requirements are ones that relate to the routes and services of an air carrier, and as such are preempted.

Section 41713 was enacted as part of the Airline Deregulation Act of 1978 (ADA), a primary objective of which was to place maximum reliance on competitive market forces and on actual and potential competition to provide needed air transportation. See section 4 of the ADA, Pub. L. No. 95-504 (October 24, 1978). A key purpose of the ADA was to ensure that the services offered by air carriers are ones dictated by the competitive market and not dictated (or foreclosed) by any regulatory body.

Over the years, we have had a number of occasions to construe section 41713 in connection with State-imposed requirements that air ambulances obtain PC&Ns² from States or State instrumentalities before initiating service. In 1986, DOT's then-General Counsel advised Arizona that a State law authorizing it to issue PC&Ns to air ambulance operators, and otherwise to regulate such carriers' operating and response times, bases of operations, etc., was preempted by the section.³ Earlier this year, DOT's then-Acting General Counsel advised both an air carrier and the State of Hawaii that section 41713 preempted elements of that State's Certificate of Need program, as they had been applied to air ambulances. Under Hawaii's program, the State Department of Health required an air ambulance to first obtain a CON before it could begin any operations, and that any failure to do so would subject it to State penalties.⁴ And, also this year, we informally advised the Texas Department of State Health Services that various State requirements for air ambulances were preempted by section 41713. While that opinion did not directly address PC&Ns or CONs, we discussed and found preempted less intrusive forms of State regulation, including provisions requiring accreditation by an outside body, and setting minimum insurance requirements. Copies of our various advisory letters are enclosed.⁵

We are also aware of case precedent specifically on the question of control of entry into air ambulance service, which supports DOT's opinion on this subject. In *Hiawatha Aviation of Rochester, Inc. v. Minnesota Department of Health*, 389 N.W. 2d 507 (1986), the Supreme

² Or equivalent "certificates of need" ("CONs").

³ This letter apparently prompted the Arizona Attorney General to shortly thereafter issue his own opinion finding state statutes to be preempted by section 41713 (see copy attached to the Bixler letter).

⁴ In reaching her conclusion, the Acting General Counsel relied in part on the fact that State lawyers, upon their own recent review of the matter, had themselves concluded that the CON requirement was preempted by section 41713.

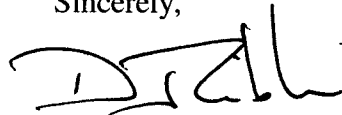
⁵ Those letters also make clear that Florida's requirements for "adequate insurance coverage" or "adequate self-insurance" (Florida Statutes 2007 § 401.25(2)(c)) would likely be preempted.

Court of Minnesota upheld a lower court ruling that a State licensing provision that effectively controlled entry into air ambulance service was preempted by section 41713, and so invalidated a decision by the State health commissioner to deny a license to the respondent air carrier. Similarly, the court in *Rocky Mountain Holdings v. Cates*, No. 97-1465 (W.D. Mo. Sept. 3, 1997) ruled that Missouri law requiring a certificate of PC&N of air ambulance operators was preempted.

On the facts presented, given the legal precedents discussed above, we can readily conclude that Florida's requirement that air carriers such as Air Methods obtain a certificate of public convenience and necessity before they may operate within the State is preempted by section 41713. Such a requirement subjects to State control the very essence of any carrier's services: the ability to even operate within the State. It also effectively regulates the routes a carrier may fly, by limiting them to within whatever counties choose to approve them (and admitting to a result that, indeed, *no* routes whatsoever may be flown). With the enactment of the ADA and section 41713 in particular, Congress explicitly eliminated Federal requirements, and safeguarded against any State regulation, that would permit administrative decisions to substitute for marketplace forces in determining the presence as well as the number of air carriers appropriate to satisfy the needs of the public. The Florida PC&N certificate, which would determine and ultimately limit air carriers allowed to operate in the State, is virtually identical to that which was deregulated at the Federal level by the ADA. In our view, the Florida requirement directly encroaches on the pro-competitive Federal scheme mandated by Congress and is prohibited by section 41713.

I trust this advice will be helpful to you and the State of Florida. If we can assist on any further issues in the matter, please feel free to contact us.

Sincerely,



D.J. Gribbin
General Counsel

Enclosures

cc:
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