U.S. Department
of Transportation
Office of the Secretary
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

APR 23 2007

Gregory S. Walden
Counsel for Pacific Wings, L.L.C.
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037-1350

Dear Mr. Walden:

Re: Hawaii Certificate of Need Program Requirements for Air Ambulance Operators

This responds to your request for our opinion on whether Hawaii's Certificate of Need Program, as applied by that State to air ambulances, is preempted by Federal law. You relate that Pacific Wings, a DOT certificated air carrier, was informed by the Hawaii Department of Health that it must first obtain a State Certificate of Need before it could begin any air ambulance operations within the State and that any violation would subject it to State penalties. You add that State hospitals and other health care providers informed Pacific Wings that they could do no business with Pacific Wings until it obtained such a State certificate and a State license. You question whether such State requirements are preempted by Federal law, citing specifically the Federal preemption provision at 49 U.S.C. § 41713.

You point out that, under Hawaiian State law, a State Certificate of Need is required before any air ambulance can begin operations, citing section 323D-43(a) of the Hawaii Revised Statutes (HRS) and sections 11-186-6(a) and 11-186-15(a)(1) of the Hawaii Administrative Rules (HAR). You further advise that a State license is mandated, with liability insurance as well as essential equipment requirements and fees (HAR §§ 11-72-45, -46 and -47).

At our invitation, the State (by John F. Molay, Deputy Attorney General, Health & Human Services Division, as approved by Attorney General Mark J. Bennett) offered its analysis and views on the matter, in a letter dated August 2, 2006. The Hawaii letter points out that, while the State statutes and State administrative rules do require an air ambulance operator within the State to first obtain a State certificate (a "CON", or Certificate of Need) and license, Hawaii has, upon its own recent review of the matter, decided that its CON requirement is preempted by section 41713. Mr. Molay states that Hawaii will no longer require air carriers to obtain a CON prior to conducting air ambulance operations within

the State and has so informed relevant parties, with a letter to Pacific Wings. However, Mr. Molay states that Hawaii will continue to maintain its licensing requirement for State air ambulance operators insofar as those requirements concern matters of patient care, having concluded that the Federal government does not regulate this subject. Hawaii believes that a DOT Opinion letter is not needed in light of its decision to not require air ambulances to obtain a CON.

Pacific Wings has subsequently indicated that it remains concerned about future State enforcement of the CON program in that the requirements remain as active State statutes, that the extent of State regulation of air ambulance services in the area of medical care is unclear, and that ultimately the State might use medical care regulation to indirectly regulate preempted economic aspects of air ambulance operations.

We have reviewed the facts presented, the positions of the parties, previous Department holdings on the issues, and the Department interests involved, and have decided to issue this General Counsel opinion to assist the parties in understanding the impact of Federal law on these matters.

First, we find it clear, as Mr. Molay concedes, that Hawaii's CON program involves economic regulation of air carriers operating an air ambulance service in a manner that is indeed preempted by the express Federal preemption provision, 49 U.S.C. § 41713. To the extent that the State statutes require, as they do, any air ambulance operator to obtain a State operating certificate dependent on the State's determination of the "public need" for it, the "reasonableness" of the "cost of the ... service," and other criteria including "quality, accessibility, availability and acceptability," (see subsections 323D-12(b)(5), -43(a) and -43(b) of the Hawaii Revised Statutes), they are preempted by the Federal criteria prohibiting State regulation "related to" an air ambulance's "price, route, or service." 49 U.S.C. §41713(b)(1).[1]

However, as you note, the State of Hawaii's air ambulance requirements extend beyond the CON program and its economic regulations to encompass medical requirements for air ambulance operators, which the State defends as within its authority to regulate and not in conflict with any Federal regulations. The State has set forth a comprehensive list of essential equipment and requirements for air ambulance medical services, such as: a requirement that there be a medical attendant assigned to each patient, minimum flow rates for a patient's oxygen supply, reporting requirements as to a patient's condition, and liability insurance requirements.

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[1] In this regard, note that the Federal preemption provision was enacted as a section of the Airline Deregulation Act of 1978 (ADA), a primary objective of which was to place a 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. See also our June 16, 1986 opinion letter to the Arizona Assistant Attorney General, Chip Wagoner, finding that Arizona's State program of economic regulation of air ambulances, which included airline certification, regulation of rates, operating response times, base of operations, bonding requirements, and required accounting and report systems, was preempted by Federal law.

In reviewing the State's provisions concerning liability insurance requirements, we noted a reference in HAR §11-72-45 (a) to a document entitled "Essential Equipment and Requirements for Air Ambulance Services," which requires adherence by all air ambulance operators, and specifies numerous medical and medical personnel requirements for such operators. The document also specifies (at paragraph A.8) that each air ambulance operator maintain "liability insurance" in an amount of at least $300,000 (with a minimum of $75,000 per seat) over and above its "normal" amount.

The Department of Transportation administers a comprehensive regime addressing aircraft accident liability insurance requirements for air carriers, as authorized by 49 U.S.C. § 41112. In particular, extensive requirements for aircraft accident liability insurance are set out at 14 CFR Part 205. These extend to air ambulances under the exemption authority granted such operators at 14 CFR Part 298 (see in particular 14 CFR §§ 298.21(c)(2) and 205.5(c)), and we consider such regulation to be pervasive, fully occupying this field. While the State informally advised us that it merely checks for aircraft insurance in an amount equal to the amount required by DOT, it nonetheless maintains a redundant regulatory regime with independent enforcement capabilities in this area. In our view, Congress' enactment of section 41112, resulting in the broad requirements set out by DOT in implementing regulations, leaves no room for State efforts to "supplement" in this manner the Federal accident liability insurance regime. See, e.g., *Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88, 98 (1992).

We also note in the State's "Essential Equipment and Requirements for Air Ambulance Services" document a provision, listed as an operating requirement, that any air ambulance service "shall be operative 24 hours daily" with a 24-hour telephone answering capability as well as a 24-hour availability for pilot, medical crew, and a physician. While such full service features for an emergency air service may be desirable from a State policy perspective, we believe the requirement for an air carrier to be able to operate 24 hours a day is preempted on at least two grounds.

First, Hawaii's 24 hours a day service requirement for air ambulance operators runs afoul of the Federal express preemption provision, 49 U.S.C. 41713(b). Just as the State may not impose any entry criteria on air carriers through its CON program, neither may it prescribe particular hours or times of operation, for in both cases such requirements "relate to" air carrier "service" within the meaning of the statute. A key purpose of the Airline Deregulation Act was to ensure that the services offered by air carriers are ones dictated by the competitive market and not by any regulatory body.

Secondly, Hawaii's 24-hour requirement intrudes on regulations and operations specifications for aircraft and crew operations, which are within the plenary authority of the Federal Aviation Administration (FAA). As you may know, acting pursuant to various statutory authorities,[2] FAA has developed and administers an extensive system of aviation

[2] See, e.g., 49 U.S.C. § 44701 [FAA to prescribe minimum standards for the design, material, construction, quality of work, performance, inspection and overhaul of aircraft, aircraft engines, and propellers]; § 44704 (a) [FAA to issue type certificates for aircraft, aircraft engines, and aircraft appliances]; § 44704(d) [FAA to issue airworthiness certificates for particular aircraft after they are inspected for safe operation]; § 44705

safety certification and regulation, which extends to air ambulances. Accordingly, an operator of aircraft seeking to do business as an air ambulance must obtain an air carrier certificate pursuant to 14 CFR Part 135, which certificate cannot be granted unless the person is found to be properly and adequately equipped to operate safely and the aircraft is found able to operate under the conditions foreseen. Such operators would also apply to FAA for grant of operating specifications under 14 CFR Part 119, which detail the kinds of operations that are authorized, the category and class of aircraft that may be used, and any applicable exemptions.[3]

It is the Department's firm view that matters concerning aviation safety, including aircraft equipment, operation, and pilot qualifications, are under the exclusive jurisdiction of the FAA and, therefore, are preempted by Federal law. To the extent that Hawaii's 24-hour operability requirement would require equipment and flight crew capabilities that are different from those needed for FAA approvals, that requirement, and any similar requirements, would improperly encroach on the Federal regulatory scheme, be preempted, and should be repealed.[4]

The FAA also regulates the safety aspects of medical equipment installation and storage aboard aircraft (for example, to prevent shifting of heavy equipment in flight causing an abrupt and dangerous change in the center of gravity on the aircraft), and does have requirements as to medical personnel (*qua* flight crew) training. See FAA Ops Inspectors handbook (Order 8400.10, chapter 39, chapter 5, section 1, para. 1336 and 1337, chapter 5, section 4) and FAA advisory circulars (AC 135-14A and 135-15A). However, upon review of the Hawaii medical requirements specifically at issue here, which involve such

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[FAA to issue operating certificate to person desiring to operate an air carrier if person found equipped and able to operate safely]; § 44703 [FAA to issue certificates to airmen who are found qualified and physically able to perform]; § 44711 [Failure to operate aircraft in accordance with FAA requirements is prohibited; FAA may grant exemptions]; § 44717 [FAA to prescribe regulations for ensure continuing airworthiness of aircraft]; §44722 [FAA to prescribe regulations to improve safety of aircraft operations in winter conditions]; etc.

[3] For a fuller description of both FAA's statutory authorities and the regulatory programs in the context of air ambulance activities, see the November 26, 2006 Statement of Interest of the United States in *Air Evac EMS, Inc., d/b/a Air Evac Lifeteam v. Robinson and Tennessee Board of EMS*, Case No. 3:06-0239 (E.D. Tenn. Nashville Div). In this case, an air ambulance applied for and was granted FAA authority to operate under visual flight rules. Thereafter, the State of Tennessee notified Air Evac that it lacked certain equipment – two very high frequency omnidirectional ranging receivers, a nondirectional beacon receiver, and a glide slope receiver – that were required under its rules for operating in the State. In its Statement of Interest, the United States took the position that the avionics equipment mandated by Tennessee acted as an entry requirement for air ambulance operators, and hence was preempted by express statutory language (49 USC § 41713). It also urged that the broad statutory authorities in the area of aircraft certification and safety Congress granted to FAA, and the pervasive regulatory regime that FAA administers pursuant to those authorities, leave no room for State regulation in this field, and that competing State requirements stand as obstacles to Federal regulation of aviation safety and so cannot stand.

[4] Of course, a full 24 hour service commitment among State air ambulance operators may be pursued by non-regulatory means, e.g., through economic incentives rather than regulatory actions. For example, the State or a local government entity, as a customer of air ambulance services, could opt to contract with or use the services of only those who offer a 24 hour service. Such a position by the State or local government *as a customer* is distinguishable from action by the State or local government as a *regulator*.

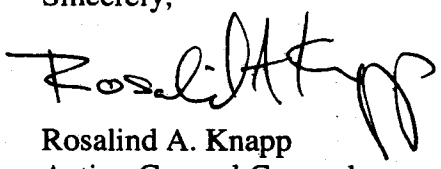
items as patient oxygen masks, litters, blankets, sheets, and trauma supplies, FAA has advised that they are outside the scope of their regulation and does not find them preempted. Hawaii may choose to prescribe such medical supplies and equipment for air ambulance operators, so long as FAA requirements are met regarding how those items are safely installed and carried aboard any aircraft.

Of course, it is possible that a State medical program, ostensibly dealing with only medical equipment/supplies aboard aircraft, could be so pervasive or so constructed as to be indirectly regulating in the preempted economic area of air ambulance prices, routes, or services. While that has not been shown here, the parties are reminded of the breadth of the Federal express preemption provision, which extends to prohibit any State provision having the force and effect of law *related to* a price, route or service ...." (emphasis added) 49 U.S.C. §41713(b)(1).

We are forwarding a copy of our letter here to Attorney General Bennett for his information, and for his use in advising the State Legislature of the inconsistency of the subject provisions in the HRS and HAR with Federal requirements.

I trust that this opinion will be helpful to you and to the State of Hawaii.

Sincerely,



Rosalind A. Knapp
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cc:
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