

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 41

BOARD OF AERONAUTICS - Regulation of certain air carriers preempted by federal law;
CONSTITUTIONAL LAW - Commerce Clause, United States Constitution;
CONSTITUTIONAL LAW - Tenth Amendment, United States Constitution;
FEDERAL PREEMPTION - Regulation of air carriers authorized for interstate transportation under federal law;
MONTANA CODE ANNOTATED - Section 67-3-421;
UNITED STATES CODE - Sections 1305, 1371 to 87.

HELD: Federal law preempts the Board of Aeronautics' authority to regulate the intrastate rates, routes or services of air carriers that are either specifically exempted or certified by the Civil Aeronautics Board.

8 December 1981

James Gillett
Acting Legislative Auditor
State Capitol
Helena, Montana 59620

Dear Mr. Gillett:

You requested an opinion concerning whether federal law preempts the Board of Aeronautics' authority to regulate the intrastate rates, routes or services of air carriers that are either specifically exempted or certified by the Civil Aeronautics Board. The applicable federal preemption statute is Title 49 U.S.C. § 1305, which states in pertinent part:

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(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate 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 subchapter IV of this chapter to provide interstate air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

Subchapter IV to which the above statute refers, is Title 49 U.S.C. §§ 1371 to 87. Section 1371 of that title requires all air carriers to be certified by the Civil Aeronautics Board. Section 1386 authorizes exemptions of certain carriers from certification.

Section 1305 has been construed by the federal courts, most recently in the ninth circuit. In Hughes Air Corp. v. Public Utilities Commission, 644 F.2d 1334 (9th Cir. 1981), the court held that the preemption provision in 49 U.S.C. § 1305 precludes states from regulating intrastate activities of any air carrier having authority under subchapter IV to provide interstate transportation. The court also held that carriers exempted from Civil Aeronautics Board certification under subchapter IV are still within the scope of the preemption provision and are thus precluded from state regulation. The court went on to consider the constitutionality of this broad application of federal preemption and concluded that such preemption is a valid exercise of Congress' power under the Commerce Clause and does not violate the Tenth Amendment of the United States Constitution. See also San Diego Unified Port District v. Gianturco, 651 F.2d 1306, 1310, 1313 (9th Cir. 1981).

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It is significant to note that the Montana statute that prescribes the regulatory powers of the Board of Aeronautics, § 67-3-421, MCA, was enacted in 1967 and last amended in 1974; the federal preemption statute, 49 U.S.C. § 1305, was enacted in 1978. Thus the Montana statute as it presently stands does not reflect contemplation by the Montana Legislature of this broad federal preemption.

The holding of the court in Hughes Air Corp. clearly applies to the question at hand.

THEREFORE, IT IS MY OPINION:

Federal law preempts the Board of Aeronautics' authority to regulate the intrastate rates, routes or services of air carriers that are either specifically exempted or certified by the Civil Aeronautics Board.

Very truly yours,

MIKE GREELY
Attorney General