

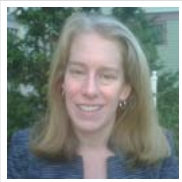
1st Circuit considers whether aviation law pre-empts state tips law

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Locke Lord Bissell & Liddell's Michael Vance Powell



Lichten & Liss-Riordan's Shannon Liss-Riordan

The U.S. Court of Appeals for the 1st Circuit recently heard arguments about whether the federal Airline Deregulation Act pre-empts Massachusetts' tip law as applied to an airline's curbside baggage check-in process.

At a Dec. 10 hearing in *DiFiore v. American Airlines Inc.*, a 1st Circuit panel considered the airline's appeal of a \$325,000 jury award to nine Boston skycaps — luggage handlers — who claimed American's \$2 per bag curbside check-in fee at Logan Airport violated Massachusetts' tips

statute. The jury found that American Airlines violated the tips law because it was collecting a service charge that it did not pass on to the skycaps.

The skycaps, including Don DiFiore, are cross-appealing the district court's refusal to triple the jury's damages award under a 2008 Massachusetts state law change calling for [mandatory trebling of court damages](#) for Massachusetts wage law violations.

The trial court ultimately [awarded \\$333,464 to the skycaps](#) plus \$310,752 for attorney fees.

The procedurally complex case involved an order for a second trial on the issue of liability for skycaps who technically worked for an American Airlines subcontractor.

The district court later vacated this order after asking the Supreme Judicial Court of Massachusetts to rule on a state law issue. In August 2009, the Massachusetts high court ruled that [the state tips law applies to contract employers](#).

Judges Michael Boudin, Jeffrey Howard and Kermit Lipez sat on the 1st Circuit panel.

American Airlines' lawyer, Michael Vance Powell, a Dallas partner at Locke Lord Bissell & Liddell, argued that the DiFiore case should be decided based on a 1992 Supreme Court case, *Morales v. Trans World Airlines Inc.* The *Morales* Court held that the airline deregulation law pre-empts enforcement of the National Association of Attorneys General fare advertising guidelines through a state's general consumer protection laws. The ruling also concluded that the deregulation law pre-empts state enforcement actions connected to airline "rates, routes, or services."

"The questions are whether logically you would perhaps have to change a nationwide way of doing business to comply with a state law," Powell said.

The skycaps' lawyer, Shannon Liss-Riordan of Boston's Lichten & Liss-Riordan, focused on the applicability of another Supreme Court case, *Rowe v. New Hampshire Motor Transport Association*, from 2008.

The *Rowe* ruling upheld the 1st Circuit's determination that the Federal Aviation Administration Authorization Act of 1994 pre-empted provisions of a Maine state law that regulated tobacco delivery in the state. Rowe also concluded that the deregulation and aviation laws do not generally pre-empt state public health regulation. It further reiterated statements from *Morales* that said that federal law does not pre-empt state laws if they affect rates, routes or services in "too tenuous, remote, or peripheral a manner."

At the argument, Liss-Riordan argued that the Massachusetts tips law does not require airlines to undergo specific state-mandated procedures that could be pre-empted by federal law. "It is a ban on primary conduct," Liss-Riordan said.

She later argued that the plaintiffs didn't challenge anything that would affect American Airlines' ability to continue offering curbside baggage services. Rather, the totality of American Airlines' practices gave customers the impression that the skycaps were getting tips, she said. This included the signs used by the airlines and the cash-only policy for the \$2 fee even though the airlines allowed credit cards for other charges, such as overweight luggage. Also, the skycaps collected and pocketed the cash without using a register, she said.

Lipez asked Liss-Riordan if changes beyond clarifying signage related to the company's business practices weren't more significant for the company.

Liss-Riordan said the suggestions were hypothetical, but the issue is that "there's an amalgam of factors that made this look like tips."

"Any one of these would have alleviated or eliminated confusion," Liss-Riordan said.

Boudin said to Liss-Riordan, "Here the concern is that you're regulating advertising of a rate or service that affects airline travel."

"Not in a significant way," Liss-Riordan replied.

Lipez asked Liss-Riordan to address American Airlines' argument that it's a nationwide carrier that shouldn't be subject to a patchwork of state regulations.

Liss-Riordan pointed out that the skycaps also won on their common law claim of tortious interference with advantageous relations. The argument was that the new policy interfered with the skycaps' relationships with passengers, by charging a fee that looked like a service fee, but not allowing the skycaps to keep the money. The airline implemented the \$2 curbside charge in September 2005. The skycaps claimed that many passengers viewed the charge as a tip.

"It was a diversion of money intended for certain parties," Liss-Riordan said.

Liss-Riordan also said the district court certified a related case based on the tortious interference claim, *Overka v. American Airlines Inc.*, as a class action

Only one district court judge — Judge George O'Toole Jr. of the District of Massachusetts — has ruled that federal law pre-empts state law in a similar tips case, *Travers v. JetBlue Airways Corp.*, said Liss-Riordan.

In September, Judge Nancy Gertner of that court vacated an earlier order dismissing another similar case, *Brown v. United Air Lines Inc.* In that opinion, Gertner wrote that she agreed with Judge William Young that whether the deregulation law pre-empts the state law tips claim "is a fact-bound analysis, which cannot be dealt with at the motion to dismiss stage."

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