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Honorable David Cain
Chair
Committee on Transportation
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 93-112

Re: Whether regulations of the Texas Railroad Commission promulgated under article 911b, V.T.C.S., are preempted by federal law (RQ-632)

Dear Representative Cain:

You ask whether title 49 of the United States Code, section 1305(a)(1) which forms part of the Airline Deregulation Act, preempts the Texas Railroad Commission from economically regulating intrastate ground transportation of packages by Federal Express and other carriers who operate integrated air-ground delivery services under the authority of article 911b, V.T.C.S. Based upon the holding in *Federal Express Corp. v. California Pub. Util. Comm'n*, 936 F.2d 1075 (9th Cir. 1991) *cert denied*, 112 S.Ct. 2956 (1992)("*CPUC*"), the broad reading of the Airline Deregulation Act given by the United States Supreme Court in *Morales v. Trans World Airlines*, -- U.S.--, 112 S.Ct. 2031 (1992) ("*TWA*"), and the policy of the Airline Deregulation Act, we conclude that the Airline Deregulation Act does preempt state economic regulation of intrastate ground transportation of packages by an integrated air-ground express delivery service such as Federal Express.

The precise question of preemption of state economic regulation was litigated in *Federal Express v. CPUC*. In that case, Judge Noonan, writing for the United States Court of Appeals for the Ninth Circuit, held that part of the intent of the Airline Deregulation Act was "the encouragement and development of an expedited all-cargo air-service system" and "the encouragement and development of an integrated transportation system." 936 F.2d at 1079. The panel further found that:

> Federal Express is exactly the kind of an expedited all-cargo service that Congress specified and the kind of integrated transportation system that was federally desired. Because it is an integrated system, it is a hybrid, an air carrier employing trucks. Those trucks do not destroy its status as an air carrier. They are an essential part of the all-cargo air service that Federal Express innovatively developed to meet the demands of an increasingly interlinked nation. Congress has freed it

> from the constrictive grasp of economic regulation by the states.

Id.

Of course the Ninth Circuit decision does not bind federal courts in the Fifth Circuit; accordingly, *Federal Express v. CPUC* does not by itself resolve this question. However, we are persuaded that the Fifth Circuit and the Supreme Court of the United States would follow this precedent, in light of the expansive reading given by the Supreme Court to the Airline Deregulation Act's preemption provisions in *TWA*.

In *TWA*, the Supreme Court ruled that states could not enforce their deceptive trade practice laws against airline advertising practices because such regulation was prohibited by title 49 of the United States Code, section 1305(a)(1). The relevant statutory language forbids states from "enact[ing] or enforc[ing] 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 . . . ." In *TWA*, the Court was concerned with the "relating to" language, which it read broadly, holding that "[S]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services' are preempted under title 49 of the United States Code, section 1305(a)(1)." 112 S. Ct. at 2037.

In the instant case, it is not the "relating to" language, but rather the "air carrier" language of the preemption provision which must be read broadly. However, we believe that the Fifth Circuit and the Supreme Court would read that language broadly as well. As Federal Express points out in its letter brief, certiorari was denied by the Supreme Court in the *CPUC* case one week after *TWA* was handed down. This suggests, although it does not demonstrate, the Court's view on this issue.

We believe that the Fifth Circuit and the Supreme Court would come to this conclusion based on the policy of the Airline Deregulation Act as well, as the Ninth Circuit did. *CPUC*, 936 F.2d at 1078. The trucking operations at issue here, as in *CPUC*, are an integral part of Federal Express's air carrier operation. As such, it is the intent of the Airline Deregulation Act to free them from state or local economic regulation.

Accordingly, we believe that title 49 of the United States Code, section 1305(a)(1) preempts the Texas Railroad Commission from adopting rules for the economic regulation of the intrastate trucking activities of an integrated air-ground delivery service such as Federal Express.

SUMMARY

Title 49 section 1305(a)(1) of the United States Code, preempts the Texas Railroad Commission from adopting rules for the economic regulation of the intrastate trucking activities of an integrated air-ground delivery service such as Federal Express.

Yours very truly,

Dan Morales
Attorney General of Texas