Hawaii's Freight Inspection Fee and Avoiding Preemption

By Shelley A. Ewalt

The State of Hawaii recently was required to abandon its effort to charge a freight inspection fee on the interstate air transportation of goods when the U.S. Department of Transportation (DOT) issued a declaratory order that the fee was preempted by federal law, specifically the Airline Deregulation Act (ADA)[1] and the Anti-Head Tax Act (AHTA).[2] Hawaii inspects cargo carried by air and marine carriers even though the federal government also inspects cargo and passengers. Hawaii's unique and sensitive ecosystem compels it to inspect cargo even though DOT's ruling prevents it from assessing an inspection fee for the transportation of goods by air. Congress enacted the ADA and AHTA in part to prevent states and local jurisdictions from applying a patchwork of fees and taxes in addition to those already imposed by the federal government. The ADA and AHTA, however, both contain a limited exception allowing for the imposition of such taxes and charges under certain conditions. Hawaii's unique role as an airport operator and its well-documented ecological vulnerabilities distinguish it from other states and local municipalities. This and other key differences would enable Hawaii to structure its inspection and related fee program to fit within the ADA and AHTA exceptions.

This article discusses Hawaii's attempt to impose a freight inspection fee on air cargo and the DOT proceeding that ensued, describes the federal government's role in pest inspection, and reviews the ADA and AHTA and their respective exceptions. The article concludes that Hawaii's freight inspection fee could be modified to avoid ADA and AHTA preemption.

Hawaii Inspection Fee Proceeding

In 2008, the State of Hawaii imposed a freight inspection fee to recoup the expense of inspecting incoming air and marine freight for invasive pests.[3] Hawaii had long conducted its own inspection program, but prior to 2008 did not charge for inspections, the cost of which was covered by general state revenues. The freight inspection fee was to be paid by the shipper, but Hawaii required air and marine carriers to charge, collect, and remit a fee of $.75 per 1,000 pounds of freight to the Hawaii Department of Agriculture (HDOA).[4] In 2010, Hawaii made carriers subject to a penalty for failure to collect and remit the applicable fees.

Shortly after the penalty became effective, Airlines for America (A4A), the U.S. airline industry trade association, petitioned DOT for a declaratory ruling and filed suit in the U.S. District Court in Hawaii on the basis that the fee was preempted by the ADA and AHTA.[5] DOT initiated a declaratory order proceeding on September 30, 2010.[6] After considering filings and comments from A4A, the State of Hawaii, and other interested parties, DOT issued its decision 16 months later, on January 23, 2012, finding that the fee was preempted by both the ADA and AHTA.[7] Subsequently, Hawaii settled with A4A and refunded the fees that it had collected from air carriers.

The Federal Government's Role

The federal government, through the U.S. Department of Agriculture (USDA), U.S. Customs and Border Protection (CBP), and other agencies, inspects cargo and passengers arriving from international points of origin in order to prevent the introduction of harmful and invasive pests into the United States, including Hawaii. CBP maintains an inspection station at the Honolulu International Airport and has other offices throughout the state. In particular, the federal government inspects international passengers and freight for, *inter alia*, prohibited animals, agricultural items, and plants, through a USDA division known as Animal and Plant Health Inspection Service (APHIS).[8]

Hawaii believes that its tourism and agriculturally based economy is significantly harmed by invasive pests and that federal inspection programs are inadequate to protect its "fragile island ecosystems [that are] constantly at risk from insects, disease-bearing organisms, snakes, weeds, and other invasive pests."[9] Hawaii maintains that gaps exist in federal inspection and oversight programs.[10] APHIS and CBP inspect only a portion of passengers and inbound international cargo, and large numbers of pests are unwittingly introduced via uninspected passengers and cargo. In addition, federal quarantine laws do not prohibit certain pests that already exist on the U.S. mainland and could reach Hawaii via domestic interstate transportation. Further,

Shelley A. Ewalt (sewalt@mklawnyc.com) is of counsel with McBreen & Kopko and is based in Princeton, New Jersey.

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international trade agreements increase the risk of importation of certain pests that Hawaii would otherwise prohibit.

In light of these limitations in the federal inspection programs and Hawaii's particular vulnerability to the threat of invasive pests, Hawaii has opted not to rely exclusively for its protection on the federal government's services and funding. Rather, the state contends that it must conduct its own separate inspection programs, which expand and supplement the coverage of the federal government's programs.[11] The federal government funds only approximately 40 percent of Hawaii's overall invasive pest programs.[12]

The Fee Is Preempted by the ADA and AHTA

DOT's Inspection Fee Proceeding considered whether Hawaii's freight inspection fee was preempted by the ADA and AHTA. Federal preemption of aviation originated with the Federal Aviation Act of 1958[13] and was strengthened by the enactment of the ADA in 1978.[14] The ADA's express preemption provision prohibits states from enacting or enforcing "a law, regulation, or other provision . . . related to a price, route, or service of an air carrier[.]"[15] DOT ruled that Hawaii's freight inspection fee related to both price and service. First, DOT found that it related to service by requiring air carriers to "conform their service of shipping freight by air transportation in ways not dictated by the market to bill, collect, and remit fees on behalf of its shipper customers."[16] Second, DOT found that it related to price because carriers were likely to recover the fee in the way that they priced air transportation services to Hawaii.[17]

Federal preemption of aviation was also reinforced when the AHTA was enacted in 1973[18] in response to a Supreme Court decision that permitted a local airport authority in Indiana to assess a per-passenger charge.[19] Absent the AHTA, states and municipalities could independently assess charges and fees, resulting in duplication and overlapping of federal and state/local taxes.

Under the AHTA's express preemption provision, a "State . . . may not levy or collect a tax, fee, head charge, or other charge on . . . the sale of air transportation[.]"[20] Congress defined the sale of air transportation as including the transportation of property.[21] DOT found that the freight inspection fee was a direct tax charged to the shipper, was directly related to the sale of air transportation, and therefore was preempted by the plain language of the AHTA.[22]

DOT found support for its decision in the numerous Supreme Court and lower court decisions interpreting the ADA and AHTA.[23] Its decision that the freight inspection fee was preempted by the ADA and AHTA was unsurprising given the extent of Supreme Court jurisprudence upholding federal preemption with respect to aviation. The clear outcome of DOT's decision in the Hawaii Fee Inspection Proceeding is that, in order for a state or local jurisdiction to successfully assess a specific tax or charge on aviation, the tax or charge must be structured to survive the preemption provisions of both the ADA and the AHTA.

Exceptions to ADA and AHTA Preemption

Although the scope of ADA and AHTA preemption is broad, each statute includes a narrow exception for permissible state or local taxes and charges. Hawaii's freight inspection fee did not fit within these exceptions, but DOT's decision suggested that Hawaii's program could be structured differently so as to be exempt from ADA and AHTA preemption.[24]

Preemption under the ADA generally prohibits states or municipalities from enacting or enforcing "a law, regulation, or other provision . . . related to a price, route or service of an air carrier[.]"[25] The statute, however, contains an exception allowing states or municipalities to carry out "proprietary powers and rights."[26] Neither the statute nor case law has provided a generally applicable interpretation of the term "proprietary powers and rights"; rather, courts have preferred to apply the term on a case-by-case basis.[27] The proprietary powers exception has been interpreted to allow an airport proprietor to "promulgate reasonable, non-arbitrary and non-discriminatory regulations" in the course of operating an airport.[28] Most importantly, the exception authorizes the imposition of reasonable fees in exchange for use of an airport.[29] Courts have struck down fees that were discriminatory on the basis that they are not a valid exercise of proprietary powers.[30] In order for a fee such as Hawaii's freight inspection fee to be permissible under the ADA proprietary powers exception, it must be (1) promulgated by the airport proprietor; (2) related to airport services; and (3) reasonable, nonarbitrary, and nondiscriminatory.[31]

A tax or charge must also fit within the narrow AHTA exception. Whereas the AHTA preempts a state or local jurisdiction from assessing a tax or charge on "(1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce; (3) the sale of air transportation; or (4) the gross receipts from that air commerce or transportation[,]"[32] airport operators may avail themselves of a narrow exception or savings clause, which permits "property taxes, net income taxes, franchise taxes, or sale or use taxes on the sale of goods and services . . . and reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities[.]"[33]

This exception allows an airport operator to assess reasonable taxes and landing fees on carriers that take off or land at the airport.[34] States and local jurisdictions that are not the airport operator are precluded from assessing taxes and fees even if part of the

airport lies within their borders.[35]

In order for a tax or charge to be permitted under the AHTA exception, it must be (1) imposed by the airport operator; (2) wholly used for airport or aeronautical purposes;[36] and (3) reasonable, nondiscriminatory, and not unreasonably burdensome to interstate commerce.[37] A reasonable fee has been interpreted to be (1) based on a fair approximation of the use of the facilities, (2) not excessive compared to the benefits, and (3) not discriminatory against interstate commerce.[38] In addition, airport operators may not assess more fees than are needed for capital or operating costs; in other words, the fees charged must match the costs required for operation.[39]

Structuring an Acceptable Fee

Although Hawaii did not explicitly argue that its fee was permissible under the ADA's proprietary powers exception or the AHTA exception, DOT considered this question *sua sponte*. DOT concluded that the inspection of air and marine carriers carried out by the HDOA was an exercise in police powers not related to airport services.[40] The HDOA pest inspection program was not for the purpose of managing airports; it was to prevent the introduction of pests by air and marine carriers. This purpose did not sufficiently relate to airport services. DOT ultimately concluded that by implementing and enforcing a pest inspection program that was unrelated to airport services, Hawaii was not acting as the proprietor of an airport. Therefore, as structured, Hawaii's freight inspection fee did not qualify under the ADA's limited proprietary powers exception.[41] Having decided that Hawaii was not acting as the airport proprietor and that the fee was unrelated to airport services, DOT did not consider whether the fee was reasonable under the ADA. As to the AHTA exception, DOT undertook a limited analysis and found that the inspection fee and associated penalties were not "usual and unobjectionable sales or use taxes" allowed by the statute.[42]

Modifying the Fee to Survive ADA and AHTA Preemption

The State of Hawaii is unique in that it is an airport proprietor that manages the state's major commercial airports through its Department of Transportation Division of Airports.[43] As an airport proprietor, the ADA and AHTA exceptions permit Hawaii to assess reasonable fees for use of its airport facilities as long as certain conditions are met.

Hawaii must show that its pest inspections are necessary and related to airport operations. Hawaii's extensive history and documentation establish that its ecosystem is susceptible to damage caused by invasive pests introduced via air cargo. Therefore, Hawaii could argue that air cargo pest inspection is a function that must be managed and performed by its airports. This could provide a basis to justify performing and charging for air cargo pest inspections. In order to distinguish these airport inspections from the state's general police powers, Hawaii should implement an airport-specific program that operates entirely separate from a marine cargo inspection program.

Hawaii's fee must also be reasonable, which means that the amount of the fee must be calculated based on actual airport-specific labor and infrastructure costs, so as not to exceed the costs of performing the inspections. Hawaii could establish the fee's reasonableness by documenting the infrastructure and labor costs necessary for pest inspection only at its airports. The fee would qualify as being wholly used for aeronautical purposes as long as revenue collected from the program is spent only for airport-specific infrastructure and labor. Hawaii must also show that the costs are not excessive compared to the benefits. This can be done by establishing that the benefit is the right of carriers to carry cargo to Hawaii and that costs are limited to necessary labor and infrastructure expenses.

Finally, the fee must be nondiscriminatory. A nondiscriminatory approach is established by the use of a consistent methodology applied equally to similarly situated carriers. For instance, Hawaii should utilize a methodology for its calculation of charges for pest inspections and then apply the corresponding charge to all carriers carrying cargo, not just those in international transportation. With these changes to the structure, implementation, and management of the program, Hawaii's fee could survive federal preemption under the ADA and AHTA.

Most states are not similarly situated to Hawaii because they do not qualify as airport proprietors and therefore are preempted from imposing taxes and charges. Local jurisdictions that are airport proprietors face a different challenge: they must qualify a tax or charge as being related to and a function of managing airport operations as well as reasonable, nonarbitrary, and nondiscriminatory. A few uniquely situated airports withstand this qualification. For example, Miami International Airport (MIA) handles the most international freight of all U.S. airports. Invasive pests and diseases in food and plants are a major concern. MIA is owned and operated by a local jurisdiction—the Miami-Dade County government and the Miami-Dade Aviation Department. Federal government agencies, including CBP, APHIS, and the U.S. Fish & Wildlife Service, inspect cargo and passengers at MIA. Although MIA does not perform the inspections itself, it has constructed extensive and specialized cargo handling facilities where the inspections are performed and it includes the infrastructure expenses of its cargo inspection facilities in its landing rates and other facility fees. If MIA were to separate out the infrastructure charge for cargo inspection facilities, it would likely withstand an ADA and AHTA preemption challenge due to its unique circumstances

as a high-volume air cargo airport and its specialized air cargo facilities. By including the fee in its rates and charges, it avoids the close scrutiny that a separate charge would invite. Where an airport proprietor, such as the Miami-Dade County, can show that a particular charge is directly related to and necessary for airport operations, the most successful approach would be to incorporate it into the calculation of the airport's landing rates, or general rates and charges.[44]

Conclusion

Hawaii's comprehensive statewide air and marine pest freight inspection fee was preempted by the ADA and AHTA. As DOT's decision suggested, Hawaii's fee could survive preemption if the program were structured differently. By restructuring to narrow the scope of the inspection program and limit the fee to fit within the ADA and AHTA exceptions, Hawaii could recover the expenses of its pest inspection program. To accomplish this, its program would have to be limited to inspections necessary at the airport and carried out by airport-assigned staff. Charges to carriers would have to be nondiscriminatory, limited to an amount necessary to cover the actual and reasonable costs of infrastructure and labor, and with revenue to be used only for airport purposes.

Hawaii's unique status as an airport proprietor distinguishes it from other states whose airports are owned and operated at a local jurisdictional level. Other states would be prevented from imposing a fee such as Hawaii's freight inspection fee because they fail the airport proprietor threshold test. Local jurisdictions that are airport operators must also confront the challenge that the tax or charge is necessary to airport operations and a function of managing the airport. The State of Hawaii is uniquely positioned to establish such a charge and survive ADA and AHTA preemption.

Endnotes

1. Airline Deregulation Act (ADA), Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending § 105(a) of the Federal Aviation Act of 1958), revised by Pub. L. No. 103-272, 108 Stat. 745 (1994) (codified as amended at 49 U.S.C. § 41713).

2. Anti-Head Tax Act (AHTA), Pub. L. No. 93-44, 87 Stat. 88 (1973), amended by Pub. L. No. 103-272, 108 Stat. 1111 (1994) (codified at 49 U.S.C. § 40116).

3. Hawaii Plant Quarantine Law, as amended, Haw. Rev. Stat. § 150A (Act 173).

4. The Hawaii statute defines "freight" as "nonpassenger goods, cargo, or lading, transported for pay." Haw. Rev. Stat. § 150A-2. Hawaii later clarified that U.S. mail was not subject to the inspection fee. The fee was initially set at 50 cents per 1,000 pounds of freight and was increased to 75 cents when Chapter 150A of the Hawaii Plant Quarantine Law, as amended by Act 173, S.B. No. 2523 (2010), became effective on July 1, 2010. Haw. Rev. Stat. § 150A-5.3. Hawaii Inspection Fee Proceeding, Declaratory Order 2012-1-18, Docket OST-2010-0243 (Jan. 23, 2012).

5. Hawaii Inspection Fee Proceeding, Petition for Declaratory Order, DOT-OST-2010-0243 (July 28, 2010). A4A also filed suit in U.S. District Court in Hawaii; the district court stayed its proceeding pending the outcome of DOT's proceeding. Air Transp. Ass'n v. Abercrombie (D. Haw. No. 10-00444).

6. Hawaii Inspection Fee Proceeding, Order Instituting Proceeding 2010-9-29, DOT-OST-2010-0243 (Sept. 30, 2010).

7. Hawaii Inspection Fee Declaratory Order 2012-1-18, *supra* note 4.

8. APHIS originally also performed passenger inspections, but, in 2003, passenger inspections were transferred to CBP as part of the formation of the Department of Homeland Security. The authority to assess a passenger and aircraft inspection fee remains with APHIS, which reimburses CBP on an interagency basis.

9. Hawaii Inspection Fee Proceeding, Comments of Hawaii Dep't of Agric., Docket DOT-OST-2010-0243 (Oct. 29, 2010).

10. *Id.*

11. *Id.*; *see also* E. Ikuma, D. Sugano & J. Kadooka Mardfin, Legislative Reference Bureau, Report No. 1, Filling the Gaps in the Fight Against Invasive Species 32–33 (2002), http://www.state.hi.us/lrb/rpts02/gaps.pdf.

12. Div. of Forestry & Wildlife, Haw. Dep't of Land & Natural Res., *Budgetary and Other Issues Regarding Invasive Species*, 2008, 2009, and 2010, http://dlnr.hawaii.gov/reports/.

13. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C. § 40103).

14. Airline Deregulation Act (ADA), Pub. L. No. 95-504, 92 Stat. 1705 (1978).

15. 49 U.S.C. § 41713(b)(1).

16. Hawaii Inspection Fee Declaratory Order 2012-1-18, *supra* note 4, at 2.

17. *Id.*

18. Anti-Head Tax Act (AHTA), Pub. L. No. 93-44, 87 Stat. 88 (1973).

19. Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972).

20. 49 U.S.C. § 40116(b).

21. *Id.* §§ 40116(b)(3), 40102(a)(5), (25).

22. Hawaii Inspection Fee Declaratory Order 2012-1-18, *supra* note 4, at 17 n.15.

23. Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992); Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008); Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995); United Parcel Serv., Inc. v. Flores-Galarza, 318 F.3d 323 (1st Cir. 2003); Air Transp. Ass'n of Am., Inc. v. Cuomo, 520 F.3d 219 (2d Cir. 2008); Hodges v. Delta Airlines, 44 F.3d 334 (5th Cir. 1995).

24. Hawaii Inspection Fee Declaratory Order 2012-1-18, *supra* note 4, at 2 ("We take no position on other ways Hawaii may structure its inspection program that may not be preempted under the ADA or AHTA.").

25. 49 U.S.C. § 41713(b).

26. *Id.* § 41713(b)(3).

27. Am. Airlines, Inc. v. U.S. Dep't of Transp., 202 F.3d 788, 804 (5th Cir. 2000).

28. Nat'l Helicopter Corp. of Am. v. City of New York, 137 F.3d 81, 89 (2d Cir. 1998).

29. Air Transp. Ass'n of Am. v. U.S. Dep't of Transp., 613 F.3d 206, 211 (D.C. Cir. 2010).

30. New England Legal Found. v. Mass. Port Auth., 833 F.2d 157, 169 (1st Cir. 1989).

31. 49 U.S.C. § 47107(a)(1); *Nat'l Helicopter Corp. of Am.*, 137 F.3d at 89.

32. 49 U.S.C. § 40116(b)(1)–(4).

33. *Id.* § 40116(e)(1), (2).

34. *Id.* § 40116(c) ("A State . . . may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State . . . as part of the flight.").

35. Tinicum Twp. Privilege Fee Proceeding, Declaratory Order 2008-3-18, Docket DOT-OST-2007-29341 (Mar. 24, 2008).

36. 49 U.S.C. § 40116(d)(2)(A)(iv); *see also* Tinicum Twp. Privilege Fee Declaratory Order 2008-3-18, *supra* note 35, *aff'd*, Twp. of Tinicum v. United States, 582 F.3d 482 (3d Cir. 2009).

37. 49 U.S.C. § 47107(a)(1); Air Transp. Ass'n of Am., Inc., v. Dep't of Transp., 613 F.3d 206, 210 (D.C. Cir. 2010).

38. 49 U.S.C. § 40116(d)(2)(A); Nw. Airlines, Inc. v. Cnty. of Kent, Mich., 510 U.S. 355, 369 (1994). For limited guidance on "reasonable fees," see 1996 Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31,994 (June 21, 1996), *vacated in part*, Air Transp. Ass'n of Am. v. Dep't of Transp., 119 F.3d 38 (D.C. Cir. 1997), *as amended*, Air Transp. Ass'n of Am. v. Dep't of Transp., 129 F.3d 625 (D.C. Cir. 1997).

39. *Nw. Airlines, Inc.*, 510 U.S. at 372; Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 687 (codified at 49 U.S.C. § 47107(b)).

40. In a case considering preemption under the Federal Aviation Act of 1958, the Supreme Court differentiated between "proprietary powers," which are allowed, and "police powers," which it rejected. City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633 (1973).

41. Hawaii Inspection Fee Declaratory Order 2012-1-18, *supra* note 4, at 16.

42. 49 U.S.C. § 40116(e)(1), (2); Hawaii Inspection Fee Declaratory Order 2012-1-18, *supra* note 4, at 16.

43. Haw. Rev. Stat. §§ 261 *et seq*. *See also* Airports Div., Hawaii Dep't of Transp., http://hawaii.gov/dot/airports. More typically, commercial airports are owned and managed by a smaller, local jurisdiction, such as a county or a local airport authority.

44. *See* Air Canada, *et al*. v. Dep't of Transp., 148 F.3d 1142 (D.C. Cir. 1998) (upholding DOT's determination that MIA's charges were reasonable).