

SB

261

Revision Date: _____ Dept. Affected: Community & Regional Affairs
 Title: *An Act relating to municipal sales and use taxes involving air carriers: . . .* BRU: _____
 Sponsor: Senator Sharp Component: _____
 Requestor: _____ COMPONENT SERIAL NO. _____

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current (FY94) impact \$ none

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Kimond Henderson Director Phone: 465-4708
 Division: Administrative Services Date: 1/31/94
 Approved by Commissioner: [Signature] Deputy Commissioner Date: 1/31/94
 Agency: Community & Regional Affairs

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January 21, 1994

Mr. Edgar R. Locke
Beaty, Draeger & Locke, P.C.
3900 Arctic Boulevard, Suite 101
Anchorage, Alaska 99503

Re: City of St. Mary's Sales Tax

Dear Mr. Locke:

We represent Northern Air Cargo and Alaska Airlines. Each of them recently received a letter from the City demanding that they provide the City with a "full account of tax reserves subject to the [City's] tax" and payment of all tax asserted to be due by a stated deadline. I called you earlier last week on behalf of Northern Air Cargo in response to that letter. You courteously agreed that the time for response to the letter could be extended to today.

As the City is aware, the air carriers have serious doubts as to the validity of the City's ordinance. These doubts were expressed in Mr. Hallford's letter to the City Manager dated June 11, 1993. There are several independent reasons why the City's attempt to tax the carriers' operations in this manner is illegal. These are summarized briefly in the following paragraphs of this letter.

1. The tax is preempted by 49 U.S.C. App. § 1305(a). This broad preemption provision was enacted as a part of the 1978 Airline Deregulation Act, which extensively amended the original 1958 Federal Aviation Act, as amended. It prohibits any state or local law "relating to rates, routes or services of any air carrier having authority [under the Act] to provide air transportation." In Morales v. Trans World Airlines, 112 S. Ct. 2031, 119 L.Ed. 2d 157 (1992), the U.S. Supreme Court confirmed that this preemption provision was intended by Congress to have a very broad effect. It prohibits all local laws "having a connection with or reference to" rates, routes or services. This

R. Locka

May 11, 1994

Page 2

broad preemption statute leaves the states and their political subdivisions with very little authority. Local laws having only a "tenuous, remote or peripheral" effect upon the airlines' rates, routes and services are still allowed; but all other local laws are flatly preempted.

Even local laws which have a lesser effect upon air carriers than the City's tax ordinance have been held to be preempted by the federal statute. See, e.g., Morales v. Trans World Airlines; Mattox v. Trans World Airlines, 897 F.2d 772 (5th Cir. 1990). These cases involved attempts to regulate advertising practices. On the continuum ranging from substantial and direct effects upon "rates, routes and services" to effects that are only "tenuous, remote or peripheral," the local laws rejected in Morales and Mattox clearly exerted a more tenuous or peripheral effect upon rates than the tax levied directly upon the sale of transportation and the customer that the City is attempting to impose, yet they were ruled to be preempted.

2. The limited savings provision found in the Anti-Head Tax statute, 49 U.S.C. App. § 1511, does not authorize this tax. The savings provision allows certain forms of taxation of the sale of services other than air transportation itself. The cases of Wardair Canada v. Florida Dept. of Revenue, 477 U.S. 1 (1986), and Air Jamaica, Ltd. v. State Dept. of Revenue, 374 So.2d 575 (Fla. App. 1974), are of no help to the City. They upheld the imposition of a local sales tax on jet fuel and on pre-packaged meals. In each instance, the object of the local tax was not the provision of air transportation, but was the provision of goods and services supplied in connection with, or incidental to, airline operations.

3. Superior Court Judge Link's recent decision in the Homer Air case is inapposite. Homer Air is a non-certificated air taxi operator. Hence, the preemption provision (49 U.S.C. App. § 1305(a)) does not under § 1305(b) apply to Homer Air because it is not a federally-certificated carrier. Northern Air Cargo and Alaska Airlines both hold certificates of public convenience and necessity issued by the U.S. Department of Transportation under Section 401 of the Federal Aviation Act. State and local laws relating to their rates, routes and services are prohibited by federal law.

4. A carrier operating pursuant to a certificate of public convenience and necessity, carrying U.S. Mail (by definition "air transportation") and carrying freight in interstate commerce, is not subject to state regulation or state taxation with respect to any of the traffic carried, regardless of whether the origin and destination of the journey are entirely within the same state. See, Federal Express Corp. v. California

BOGLE & GATES

Mr. Edgar R. Locke
 January 21, 1994
 Page 3

Public Utilities Commission, 716 F.Supp. 1299 (N.D. California, 1989), and Pioneer v. City of Kearney, 256 N.W.2d 324 (Nebraska 1977). Northern Air Cargo and Alaska Airlines are in this exempt category.

5. Even if federal statutes left states and political subdivisions free to tax carriage of goods that travel strictly in intrastate commerce, we believe that most if not all of the air carriage activities of Northern Air Cargo and Alaska Airlines are nontaxable because they constitute interstate or foreign commerce. In determining whether transportation between two points in a state is intrastate or interstate in nature, the crucial consideration is the shipper's intent at the time of shipment. Robarta v. Levine, 921 F.2d 804, 812 (8th Cir. 1990). It would be impractical and unworkable for the City to force the air carriers to guess about each of its shipper's intentions with respect to each shipment.

Northern Air Cargo and Alaska Airlines both received form letters ("Dear Business Owner") from the City Manager requesting that they complete a "Consumer's Sales Tax" report form. The payments made by their shippers in respect of aircraft operations originating or terminating in the City of St. Mary's are exempt from taxation, for the reasons discussed earlier in this letter. Therefore, we believe that there is no legal justification or practical reason for the City to require them to file a "Consumer's Sales Tax" report form. If the City disagrees with this view, please notify us. In that event, we would be interested in knowing the City's position about which provision of the ordinance requires the filing of this form and what consequences might ensue in the event of a failure to file.

As is probably clear from the tone of this letter, Northern Air Cargo and Alaska Airlines are confident of their legal position in this matter and are strongly committed to defending their rights to be free of local government taxation efforts that Congress has seen fit to prohibit. Northern Air Cargo has consulted on this matter with its lawyer in Washington, D.C. with whom it has worked for many years on regulatory matters. The lawyer, Mr. Theodore Seamon, has concentrated his practice in federal airline regulation matters for more than forty years and has been actively representing Northern Air Cargo and other Alaska clients on these matters since before statehood. Mr. Seamon and I are available to confer with you at your convenience regarding this matter and to provide a more detailed discussion of the legal principles mentioned in this letter should you desire. In fact, we would encourage such a meeting.

Northern Air Cargo and Alaska Airlines have always honored their legal obligations, and they certainly intend to do

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Mr. Edgar R. Locke
January 21, 1994
Page 4

so in this instance. At the same time, the City cannot expect them to penalize their customers by collecting and remitting to the City a tax that is clearly prohibited by federal law.

Very truly yours,

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James N. Reeves

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[§ 1572] STATE TAXATION OF AIR
COMMERCE

Sec. 1113 [49 App. U. S. Code 1513] (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except as provided in subsection (e) except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sale or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, or other service charges from aircraft operators for the use of airport facilities.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans, the provisions of subsection (a) shall not apply to such authority until December 31, 1973.

(d)(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection—

(A) "assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a state used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber

↓ [the rest is not relevant]

Alaska State Legislature

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BERT SHARP

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Senate

SPONSOR STATEMENT

SB 261 - "An Act relating to municipal sales and use taxes involving air carriers; and providing for an effective date."

SB 261 reinforces the Federal Preemption Provision of the Federal Aviation Act of 1958 which reserves to the federal government the power to regulate and tax air carriers engaged in air transportation or air commerce. The law explicitly states that no state or political subdivision may enact laws that affect the rates, routes or services of an air carrier engaged in air transportation. Despite the provision, several communities in Alaska have proposed sales and use taxes of this sort. Allowing such provincial taxing authority could soon strangle even the most effective transportation networks. Substantial case law demonstrates that this practice violates the Act, but communities, believing they have found yet another loophole in the law, periodically test the waters with a new tax. This has resulted in confrontation and costly litigation between the aviation community and the municipalities. **SB 261** eliminates the illusions on which past efforts have been based and restates federal intent in the preemption provision.



REPRESENTING
GOLDEN HEART
OF ALASKA

FISCAL NOTE

Revision Date:
Title: No Municipal Sales Taxes on Air Carriers

Department Affected: DOT&PF
BRU:

Sponsor: Sharp
Requestor:

Component:
Component Serial Number:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING:	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

1002 FEDERAL RECEIPTS	0	0	0	0	0	0
1003 GF MATCH	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/PROGRAM RECEIPTS	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL FUNDING:	0	0	0	0	0	0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY94) impact: \$ _____

ANALYSIS: (Attach a separate page if necessary)

This bill will not directly affect any state programs; however, it will result in transportation cost savings in that an additional potential tax would be clearly prohibited.

Prepared by: Jonathan A. Widdis, Director

Phone: 266-1460

Division: Statewide Aviation

Date: February 3, 1994

Approved by Commissioner:  B.A. Campbell

Phone: 465-3901

Agency: Department of Transportation and Public Facilities

Date: February 8, 1994