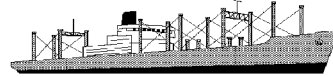




# Rollin' On <sup>®</sup>



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## FEDERAL PREEMPTION:

***Still alive and well,  
excluding HH goods.***

It has been over 13 years since Congress, through passage of the Federal Aviation Administration Authorization Act in 1994 (FAAAA, aka F4A), eliminated most state economic regulation of transportation by motor vehicle. And it has been over 12 years since Congress did away with the Interstate Commerce Commission through the ICC Termination Act of 1995.

Prior to the passage of these two landmark pieces of legislation, a motor carrier with federal authority could pick up a load of steel in Portland, drive down I-5 and salute the PUC building in Salem (albeit from a distance) on its way to Sacramento, since the PUC could not regulate that interstate transportation. However, the same motor carrier without Oregon PUC authority could not haul that same load of steel from Portland to Salem. So things were somewhat skewed, especially from the perspective of a shipper, or of a carrier without the proper PUC authority.

The passage of the 1994 legislation caught most industry people by surprise. The genesis of the change was a food fight that was waging between UPS, primarily a surface carrier, and Federal Express, which was primarily an air carrier. Federal law at that time contained numerous whats, ifs and wherefores which left some ambiguity as to extent of federal preemption of surface transportation. Thus, through an aviation law, Congress deregulated most state economic regulation of the transportation of cargo by motor carrier.

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As an aside, please keep in mind that much of what happens in Congress is not intuitive.

In any event, PUC authority that was previously worth thousands of dollars lost its value overnight. As another aside, PUC authority had value since it could be bought and sold. Although a carrier could obtain new PUC authority upon a proper showing, the application could attract protests and thus the issuance of new authority could be problematic.

Fast forward more than 13 years, to the present time, and the application of that law is still in dispute. The U.S. Supreme Court recently issued an opinion in a case that originated in Maine, which restricted delivery of tobacco products. The Maine law contained two elements of concern. First, the Maine law required that packages containing tobacco to indicate such, and, further, required delivery companies to deliver the package only to the person to whom it was addressed. If the recipient was under 27 years of age, the delivery companies were required to obtain identification from the recipient before making the delivery.

The second element of concern was that a carrier was presumed to know that a package contained tobacco which could impose civil penalties on a carrier for failure to examine every package.

The F4A prohibited states from regulating carriers' rates, routes or services. The Supremes unanimously concluded that the Maine law conflicted with the F4A and thus

invalidated the Maine law. The court stated that even if the state law only indirectly impacted a carrier's rates, routes and services, that indirect impact was sufficient to invalidate the law. The court noted that the language of the F4A was similar to the language in the 1978 law which deregulated airlines and which prohibited the states from applying state consumer fraud statutes against airlines.

The court further stated, again taking its cue from the airline act, that the goal of Congress in passing the F4A was to assure maximum reliance on competitive market forces in order to stimulate efficiency, innovation and low prices, as well as variety and quality.

Maine argued that the F4A allowed state regulation for public health reasons. The court rejected that argument, stating that while there were other exemptions that might apply, public health was not one of them. In a concurring opinion, one of the justices commented that Congress probably did not think about how the F4A might impact minors's access to tobacco, and urged the Congress to address this issue.

### ***Household goods:***

#### **Monopoly, economical & efficient?**

Congress allows states to regulate household goods transportation which means that HH goods transportation in Oregon was not changed by the F4A. Authority can be obtained by transfer or by new application. State law provides for a regulated monopoly. Yet state policy also requires promotion of "adequate, economical and efficient service", goals that are also common to the F4A.

That's it for now. Until next time, keep the cargo *rollin' on!*

#### **The Obligatory Disclaimer**

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

#### **Short Bio**

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 30 years and emphasizing transportation law, business law and related litigation.