# IN THE SUPREME COURT OF THE STATE OF OREGON

**STUART ETTER,**

Plaintiff–Appellant,

v.

**DEPARTMENT OF REVENUE, STATE OF OREGON,**

Defendant–Respondent.

Tax Court No. 5027

Supreme Court No. S063061

## APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Oregon Tax Court
The Honorable Henry C. Breithaupt, Judge

Gregory P. Bessert OSB No. 854008
gbessert@bessert.com
The Bessert Law Firm
418 W. Main Street #626
Battle Ground, WA 98604
Telephone: (360) 326-8010

Attorney for Plaintiff-Appellant
Stuart Etter

Inge D. Wells OSB No. 881137
inge.d.wells@doj.state.or.us
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 378-4402

Of Attorneys for Defendant-Respondent
Department of Revenue
State of Oregon

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TABLE OF CONTENTS





The Bessert Law
418 W Main Street #626
Battle Ground, WA

The Bessert Law
418 W Main Street #626
Battle Ground, WA

The Bessert Law
418 W Main Street #626
Battle Ground, WA

# TABLE OF AUTHORITIES

**Cases**





The Bessert Law
418 W Main Street #626
Battle Ground, WA

**Constitutional Provisions**





The Bessert Law
418 W Main Street #626
Battle Ground, WA

**Statutory Provisions**





The Bessert Law
418 W Main Street #626
Battle Ground, WA

The Bessert Law
418 W Main Street #626
Battle Ground, WA

**Other Authorities**





The Bessert Law
418 W Main Street #626
Battle Ground, WA

The Bessert Law
418 W Main Street #626
Battle Ground, WA

# 1. STATEMENT OF THE CASE

## A. *Introduction.*

This dispute concerns Oregon's taxation of the pay an air carrier employee receives from his employer. Resolution of this case requires application of federal principles related to the preemption of state law, application of federal principles for statutory construction and interpretation, an understanding of the evolution of Congressional intent and legislative action related to state taxation of interstate transportation workers that spans a 30 year period, and recognition of the interplay between an comprehensive body of federal law that regulates the aviation industry and the terms of an express preemption clause enacted to provide employees of air carriers and their employers with relief from the burden of multi-state income taxation.

The first question presented in this case addresses the extent or scope of an express preemption clause. The plaintiff resides in Washington, is an employee of an air carrier, and has a primary place of employment located in Oregon. He asserts that the preemption clause in 49 USC §40116(f)(2), which includes a description of the air carrier employees Congress intended to relieve from the burden of multi-state income taxation, applies to him and others of similar employment status.

The second question presented concerns one of two savings clauses that



The Bessert Law
418 W Main Street #626
Battle Ground, WA

are related to the preemption clause in 49 USC §40116(f)(2). The savings clauses authorize an air carrier employee's state of residency and any state in which the air carrier employee earns more than 50 percent (the 50% Rule") of the pay he receives from his employer to assess their respective income tax against the air carrier employee's pay. Plaintiff asserts that the 50% Rule is ambiguous and that the pay he receives from his employer is only subject to taxation by his state of residency.

B. *Nature of the Proceedings and Relief Sought.*

This is an appeal of a General Judgment entered in this case on February 19, 2015 by Judge Henry C. Breithaupt in the Oregon Tax Court, Regular Division. ER-11. Plaintiff respectfully requests that this court reverse the judgment of the tax court finding that 49 USC §40116(f) preempts application of Oregon's income tax to the pay plaintiff receives from plaintiff's employer, Horizon Air Industries, Inc. ("Horizon Air").

C. *Nature of the Judgment Subject to Review.*

The tax court entered a General Judgment, after motions and oral argument, holding that plaintiff was not a member of the class of employees described in preemption clause set forth in 49 USC §40116(f)(2). The judgment resulted from the tax court's order denying Plaintiff's Motion for Partial Summary Judgment and granting Defendant's Cross Motion for Summary



The Bessert Law
418 W Main Street #626
Battle Ground, WA

Judgment.

D. *Statutory Basis of Appellate Jurisdiction.*

This court is conferred jurisdiction to hear this case in ORS 305.445.

E. *Effective Date of Judgment and Timeliness of Notice of Appeal.*

This appeal was timely filed. The Notice of Appeal was served and filed on March 18, 2015, within 30 days after entry of the General Judgment on February 19, 2015. ORS 19.255(1).

F. *Questions Presented on Appeal.*

*1. Can an aircraft dispatcher who satisfies the FAA's annual flight deck operations familiarization aircraft dispatcher qualification requirement satisfy the descriptive elements contained in 49 USC §40116(f)(2) for an employee who is entitled to the relief from multi-state income taxation?*

*Proposed answer:* Yes, an aircraft dispatcher who satisfies the FAA's annual flight deck operations familiarization qualification requirement can meet all required elements set forth in the preemption clause of 49 USC §40116(f)(2).

*2. If an aircraft dispatcher qualifies for the relief provided under the preemption clause in 49 USC §40116(f)(2), can a state other than the aircraft dispatcher's state of residency, assess its*



The Bessert Law
418 W Main Street #626
Battle Ground, WA

*income tax against the aircraft dispatcher's pay?*

*Proposed answer:* No, legislative history reflects that Congress' intent was to limit state taxation to an employee's state of residency.

G. *Summary of Argument.*

The tax court based its conclusion on a contextual analysis that contained a fundamental error. In its analysis, the tax court assumed a common meaning for the phrase "scheduled flight", which is a term of art that, in common usage, is used interchangeably with the phrase "scheduled operations". In technical usage the phrase "scheduled flight" is an extension of the phrase "scheduled operations"[1]. Within the context of 49 USC §40116(f)(1)(C) and 49 USC §40116(f)(3)(B), the phrase "scheduled operations" is used to differentiate domestic and flag operations, which require dispatch centers in their operations, from supplemental, commuter, and on-demand operations, which do not require dispatch centers in their operations, and the levels of regulation that apply to each particular type of air carrier. The purpose of the reference to

[1] The phrase "scheduled operation" means any common carriage passenger carrying operation for which the air carrier offers in advance the departure location, departure time, and arrival location. 14 CFR §110.2. The phrase "scheduled flight" represents either a single operation or a series of scheduled operations.



The Bessert Law
418 W Main Street #626
Battle Ground, WA

"scheduled flights"[2] in 49 USC §40116(f)(1)(C) and 49 USC §40116(f)(3)(B) is to provide a further limitation on the extent of preemption to employees of a particular class of air carrier.

Based primarily upon a misunderstanding of the significance of the technical phrase "schedule flight", the tax court concluded that the preemption clause in 49 USC §40116(f)(2) could only apply to flight crew members and could not apply to aircraft dispatchers. The tax court's summary exclusion of flight dispatchers from the class of employees that Congress intended to provide relief from multi-state income taxation effectively subjects 23,113[3] aircraft dispatchers and their respective employers to the burden of multi-state tax reporting, withholding, and payment obligations.

The tax court did not review the text of 49 USC §40116(f)(2) to determine the extent or scope of preemption. The tax court did not apply the facts of this case to the elements of the description Congress provided to

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[2] The term "scheduled flight" was a defined term used primarily during the 1960s and early 1970s. The term "flight" was retained for limited applications, primarily in the context of on-demand flights, however the terminology that embraced the general concept of a "scheduled flight" was changed to "scheduled operations". See App-4-5. Compare 14 CFR §234.1(1964) with 14 CFR §234.2 (2015). See App-4,5,6.

[3] 2014 Active Civil Airmen Statistics: Table 14, FAA U.S. Civil Airmen Statistics (August 2015). www.faa.gov/data_research/aviation_data_statistics/civil_airmen_statistics



The Bessert Law
418 W Main Street #626
Battle Ground, WA

determine whether an employee was entitled to relief from multi-state taxation or apply the test it had provided in previous cases to resolve an ambiguity in the description of employees entitled to relief.

If the tax court had applied the plain meaning of the text contained in 49 USC §40116(f)(2) and applied the test it provided in an earlier case to the facts of this case, the court would have reached a different result, specifically that an aircraft dispatcher can satisfy the criteria set forth by Congress in 49 USC §40116(f)(2), which would have provided for the preemption of all states' income tax laws, subject to proper application of the savings clause.

The tax court did not address the second issue presented in this case, whether the savings clause provided for in 49 USC §40116(f)(2)(B) permits defendant to assess Oregon's income tax against the pay received by plaintiff from his employer. Plaintiff argues that the language set forth in 49 USC §40116(f)(2)(B) is ambiguous when viewed against Congress' comprehensive statutory restriction on multi-state taxation of interstate transportation workers and Congress' repeated statement that only the state of residency is entitled to impose taxation on the pay of an interstate transportation worker.

H. *Summary of Material Facts.*

In the tax court proceeding, the parties stipulated to the material facts in the Stipulation of Facts, which are expressly incorporated and made a part of



The Bessert Law
418 W Main Street #626
Battle Ground, WA

Appellant's Opening Brief. ER-14. Additional facts were provided by Plaintiff in his Declaration. ER- 39.

*1. Plaintiff's state of residency and occupation.*

At all times pertinent to this proceeding, including the tax period ending December 31, 2000, plaintiff has been a resident of Vancouver, Washington. ER-14 ¶1. During the tax period ending December 31, 2000, plaintiff was employed as an aircraft dispatcher by Horizon Air. ER-14 ¶2. Plaintiff's primary place of employment was and continues to be located at the Horizon Air Operations Center located in Portland, Oregon. ER-16 ¶6.

*2. Plaintiff's Duties as an Aircraft Dispatcher.*

As an aircraft dispatcher, plaintiff's duties were set forth in the Horizon Air Dispatch Standards Manual and the Horizon Air Employee Manual. ER-14 ¶4. Horizon Air also retained the right to assign its employees any such additional duties it deemed necessary to maintain its operating certificate. ER-40 ¶5.

In addition to the duties identified by Horizon Air in its Air Dispatch Standards Manual and Employee Manual, plaintiff was also responsible for the duties the Federal Aviation Administration ("FAA") prescribed in its regulations. Plaintiff was jointly responsible for all preflight planning, delay, and dispatch release of a flight with the pilot in command of the flight. He was



The Bessert Law
418 W Main Street #626
Battle Ground, WA

also solely responsible for monitoring the progress of each flight, issuing necessary information for the safety of the flight, and cancelling or re-dispatching a flight if in his opinion, the flight could not operate or continue to operate safely as planned or released. 14 CFR §121.533.

*3. Certification Requirements for Aircraft Dispatchers.*

Any person who desires employment as an aircraft dispatcher is required to obtain an aircraft dispatcher's certificate from the FAA. Plaintiff secured his aircraft dispatcher's certificate in 1983. ER-19 ¶2.

Once issued, an aircraft dispatcher certificate remains effective until it is surrendered, suspended or revoked. 14 CFR §65.15 (2000). Unlike other airman certificates, there are no continuing or recurrent training requirements for an air dispatcher to meet to maintain the effectiveness of his or her aircraft dispatcher certificate.

*4. Flight Deck Operations Familiarization Flights.*

The United States government maintains exclusive sovereignty of airspace of the United States. 49 USC §40103(a)(1) (2000). If a person desires to provide air transportation services within the United States, that person is required to secure a certificate of public convenience and necessity (49 USC §41102(a)(1) (2000)) and an air carrier operating certificate from the FAA. 49 USC §44711(a)(4) (2000). Horizon Air received its operating certificate from



The Bessert Law
418 W Main Street #626
Battle Ground, WA

the US Department of Transportation – Federal Aviation Administration ("FAA") on or about August 31, 1981. ER-15 ¶4.

Once a person is issued Air Carrier Certificate, its operations are subject to regulation under 14 CFR Part 121. Horizon Air was subject to the Federal Aviation Act of 1958, as amended, and the rules, regulations, and standards promulgated thereunder. ER-15 ¶4.

Under Part 121, an air carrier must show that it has enough dispatch centers (14 CFR §121.107 (2000)) and *qualified* aircraft dispatchers at each dispatch center to ensure proper operational control of each of the air carrier's scheduled flights. (*emphasis added*) 14 CFR §121.395 (2000).

Air carriers are provided with a list of requirements that its aircraft dispatchers must satisfy to be considered qualified under Subpart P of Part 121. 14 CFR §121.461(a) (2000). This list requires aircraft dispatchers observe flight deck operations on an aircraft for a five hour period while the aircraft is engaged in Part 121 operations once within every 12 month period. 14 CFR §463(c) (2000).

Horizon Air was subject to these regulations and was required to provide enough qualified aircraft dispatchers to ensure operational control of each of its scheduled flights. 14 CFR 121.395 (2000). Horizon Air was not permitted to use any person as an aircraft dispatcher unless, within the previous 12 calendar



The Bessert Law
418 W Main Street #626
Battle Ground, WA

months, the aircraft dispatcher had satisfactorily completed flight deck operations familiarization in one of the types of airplanes for each group the aircraft dispatcher would be responsible for dispatch. 14 CFR 121.463(c) (2000).

On an annual basis, including the 2000 tax period, Horizon Air would and continues to assign plaintiff the task of flight deck operations familiarization on an aircraft that was in each group of aircraft plaintiff would be responsible to dispatch. ER-40 ¶7. Route selection for the annual flight deck operations familiarization flights is determined based upon FAA recommendations (App.-13) and Horizon Air policy. App.-23.

Upon receipt of his assignment to perform his annual flight deck operations familiarization flight from Horizon Air, plaintiff is permitted to select a flight or combination of flights under the terms of the collective bargaining agreement between the Horizon Air and the Transport Workers Union of America that meets the aircraft, route, and flight time requirements of the assignment and perform the assigned tasks. ER-41 ¶9. Depending upon the number of aircraft groups and route requirements, the minimum annual flight time generally required to fulfill the FAA flight deck operations familiarization ranges between five and 10 hours.

Plaintiff received his customary pay during the period in which he



The Bessert Law
418 W Main Street #626
Battle Ground, WA

completed the operational familiarization tasks assigned to him. ER-40 ¶7. The route assigned to plaintiff originated in Oregon. After take-off, the route traverses Oregon air space and crosses into the air space of one or more states other than Oregon. ER-41 ¶9. For the tax period 2000, plaintiff's assigned route required flight over Oregon, Washington, Idaho, and Montana. ER-21,¶9.

The flight observation requirement for aircraft dispatchers is not a training exercise, it is an annual qualification requirement imposed by the FAA on air carriers holding an Air Carrier Operating Certificate. It is the responsibility of the air carrier to direct its employees to engage in one or more flight deck observation work tasks, provide the employee with the time required for the performance of the work task and provide the equipment necessary for its employees to perform the work task or risk exposure to penalty or revocation of its operating certificate.

*5. Defendant's Authority to Assess an Income Tax Against Plaintiff's Pay.*

Oregon derives its authority to assess a personal income from its constitution. Or Const, Art IX, §1. Oregon exercises its authority to impose a tax on the taxable income of nonresidents that is derived from sources within the state. ORS 316.037(3). For purposes of determining a nonresident's income derived from sources within Oregon, ORS 316.127(2)(b) provides that Oregon



The Bessert Law
418 W Main Street #626
Battle Ground, WA

source income includes income from a business, trade, profession, or occupation carried on in Oregon.

Oregon does recognize the preemptive effect of 49 USC §40116(f)(2) for employers of air carrier employees and does not require employer compliance with the state's withholding at source obligations. ORS 316.162(2)(b). The state does not recognize the preemptive effect of 49 USC §40116(f)(2) for income tax assessments on air carrier employee pay in its statutes. However it does address the effect of 49 USC §40116(f)(2) in the Oregon Administrative Rules although it does misstate the language of the 49 USC §40116(1)(C), which disrupts the interplay between 49 USC §40116(f)(2)(B) and 49 USC §40116(f)(1)(C) and defeats the mechanism crafted by Congress' for single state taxation of air carrier employee pay. OAR 150-316.127-(E)(6).

*6. Federal Regulation of Interstate Commerce.*

The federal government has authority to regulate commerce among the States under Article 1, Section 8, Clause 1, of the US Constitution (the "Commerce Clause"). US Const, Art I, §8, cl 1. The primary source of regulation for interstate commerce is located in Title 49 of the United States Code.

Federal authority over aviation is represented by an expansive network of laws and regulations that is designed to promote safety and encourage the



The Bessert Law
418 W Main Street #626
Battle Ground, WA

availability of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices. 49 USC §40101(a). The statutes and regulations governing aviation generally include Title 49, Subtitle VII, §40101 through §50105 of the United States Code and Chapters I and II, Parts 1 through 399 of Title 14 in the Code of Federal Regulations.

*7. State Taxation of Aviation Engaged in Interstate Commerce.*

Within the network of laws and regulation governing aviation engaged in interstate commerce, Congress identified a number of practices employed by state tax administrators that Congress felt were either discriminatory against interstate commerce or represented an unreasonable burden on interstate commerce, thereby exercising the authority granted in the Constitution. US Const, Art I. §1, cl 1, *Gibbons v Ogden*, 22 US 1, 9 Wheat 1 (1824). 49 USC §40116 represents the primary source of limitations Congress placed on the States to eliminate or substantially reduce the use of these practices.

Included within 49 USC §40116 is the preemption of state taxation of pay received by air carrier employees. 49 USC §40116(f). The scope of the problem addressed by 49 USC §40116(f) is addressed in HR Rep No 91-1195, 91st Cong., 2d Sess, (1970), 3-4.

"The need for this legislation is demonstrated by



The Bessert Law
418 W Main Street #626
Battle Ground, WA

the fact that the policy followed by at least 14 States is to require withholding from the wages of nonresidents who are paid for personal services performed within their boundaries. This type of taxation reaches its most confused application when directed at the transportation workers who due to the nature of their employment, perform work in more than one State. From the point of view of both compliance and enforcement State nonresidents taxation policies fall unevenly on our transportation workers. The major problems encountered by transportation firms is the lack of uniformity in State laws and regulations. It is difficult, time consuming, and costly for the transportation industries to keep current with ever-changing requirements.

A multiplicity of laws and regulations for the administration and enforcement of State tax laws and regulations can obviously cause unnecessary friction and confusion within the framework of interstate commerce, impede the free flow of trade between the several States, and constitute a serious burden on interstate commerce. For illustrations of the multiplicity of State laws see the appendix in this report. A good example of the lengths to which this multiplicity of administration and enforcement could lead is illustrated by the schedules of operations in the air transportation industry. It is possible for a crew to have a monthly schedule requiring flights between New York, Pittsburgh, Chicago, Omaha, Denver, Salt Lake City, and San Francisco. At the end of a month, that crew would have flown over or through most of the States. Obviously, for the carrier to have to prorate that crew's withholding, giving each State flown over a certain percentage, could create a serious burden on interstate commerce. The withholding provisions of the various States can, as illustrated above, create a sizable administrative burden on the transportation firms and increase overhead costs. These costs are added onto the price of the product and it is the consumer who is hurt in the long run. A corollary effect can be found in the labor



The Bessert Law
418 W Main Street #626
Battle Ground, WA

> sector. The transportation workers see their take-home pay reduced by State withholdings and their living standards decline relative to other wage earners. The end result is a demand on their part for higher wages with resulting inflationary impact.
>
> The committee feels that congressional action is necessary to offer relief and to avoid creating a serious economic bottleneck in the transportation industry which can only add to our inflationary problems. The committee, therefore, urges enactment of this legislation as the simplest and most practical answer to this problem."

a) Pub L No 91-569 (1970).

On December 23, 1970 Congress passed Pub L 91-569, 84 Stat 1499 (1970). The statute restricted a state's right to impose employer withholding obligations on nonresident employees employed by rail, express or sleeping car companies, motor carrier companies, water carrier companies, or air carrier companies. 115 Cong Rec 17290, 17295 (1969) ("Interstate Taxation – Interstate Carriers and Employees"), Pub L 91-569, 84 Stat 1499 (1970).

In the legislation, Congress "provide[d] that no part of the wages or salaries paid by certain employers engaged in the transportation of persons or property interstate or foreign commerce to employees who perform duties for such employer principally in more than one State, shall be withheld for income tax purposes pursuant to the laws of any State or subdivision thereof other than the State or subdivision of the residence of the employees concerned, as shown



The Bessert Law
418 W Main Street #626
Battle Ground, WA

on the employment records of the employer. It also provides that no such employer shall be required to file any information returned or other report for income purposes with respect to such wages or salaries with any State or subdivision thereof other than the State or subdivision of residence."

Pub L No. 91-569, 84 Stat 1499 (1970) included four sections that amended three parts of the Interstate Commerce Act (49 USC §301 (1970)) and Title XI of the Federal Aviation Act of 1958 (49 USC §1501 (1970)).

Pub L 91-569 §1, 84 Stat 1499 (1970) amended The Interstate Commerce Act – Part I, 49 USC §1 (1970) to address state withholding tax and information return obligations imposed upon railroad companies, express companies, and sleeping car companies. Pub L 91-569 §2, 84 Stat 1500 (1970) amended The Interstate Commerce Act – Part II, 49 USC §301 (1970) to address state withholding tax and information return obligations imposed upon motor carrier companies.

Pub L 91-569 §3, 84 Stat 1501 (1970) amended The Interstate Commerce Act – Part III, 49 USC §901 (1970) to address state withholding tax and information return obligations imposed upon water carrier companies. Pub L 91-569 §4, 84 Stat 1502 (1970) amended The Federal Aviation Act of 1958 – Title XI, 49 USC §1501 (1970) to address state withholding tax and information return obligations imposed upon air carrier companies.



The Bessert Law
418 W Main Street #626
Battle Ground, WA

Each of the four sections of Pub L 91-569, 84 Stat 1499 (1970) contained language precisely the same as or substantially similar to the following:

> "No part of the compensation paid by ... to an employee who performs his regularly assigned duties as such an employee on a ... in more than one State ..."

While Pub L 91-569, 84 Stat 1499 (1970) did not preempt a state's right to tax the income of a nonresident employee, it did provide the framework for later legislation that would preempt a state's authority to tax nonresident employees of companies engaged in interstate commerce.

b) Public Law No. 96-193 of1980.

On February 18, 1980, Congress amended Pub L 91-569, 84 Stat 1499 (1970) when it extended the preemptive effect of the 49 USC §40116(f) to include a limitation on the states' authority to impose an income tax on certain nonresident employees of air carriers. Aviation Safety and Noise Abatement Act of 1979, Pub L 96-193, 94 Stat 57 (1980).

HR Rep No 715, 96th Cong, 1st Sess (1979) reflects the fact that the U.S. House of Representatives did not provide a provision to address the extension of a federal limitation on States' right to impose an income tax on the income of nonresident employees of air carriers. A Senate amendment to HR 2440, 96th Cong. (1979) provided the only provision addressing the extension



The Bessert Law
418 W Main Street #626
Battle Ground, WA

of the federal limitation of the States' right to impose an income tax on the income of nonresident employees of air carriers, which expressly limited State's right to tax the income of air carrier employee to the employee's state of residency. HR Rep 715, 96th Cong, 1st Sess (1979), 25.

## II. ASSIGNMENT OF ERROR

The Tax Court erred by denying Plaintiff's motion for partial summary judgment and granting Defendant's cross-motion for summary judgment.

### A. *Preservation of Error.*

Plaintiff timely moved for partial summary judgment requesting:

> "that the Court should grant his motion for partial summary judgment finding that Plaintiff is a member of the class of taxpayers generally entitled to the exemption from state income taxation provided for in 49 USC §40116(f)(2) (2000) … ."

The Tax Court denied plaintiff's motion and granted defendant's cross-motion for summary judgment.

### B. *Standard of Review.*

This court's review of a tax court decision or order is limited to errors or questions of law or lack of substantial evidence in the record to support the tax



The Bessert Law
418 W Main Street #626
Battle Ground, WA

court's decision or order. ORS 305.445[4].

C. *Arguments.*

Resolution of this case turns on the proper interpretation of: (1) the disputed elements of the employee description in preemption clause provided in 49 USC §40116(f)(2); and (2) the savings clause provided in 49 USC §40116(f)(2)(B).

*1. The burden of persuasion in cases involving federal preemption of state laws rests with the party asserting preemption.*

The party claiming preemption bears the burden of demonstrating that federal law preempts state law. *Silkwood v. Kerr–McGee Corp.,* 464 US 238, 255, 104 S Ct 615 (1984). In this case, plaintiff bears the burden of persuasion.

*2. Federal principals for statutory interpretation apply in this case.*

Statutory construction as guided by federal case law is required where resolution of a case turns on the proper construction of a specific subsection within a federal statute. *See e.g., Shaw v. PACC Health Plan, Inc*, 322 Or 392, 400, 908 P2d 308 (1995); *see also North Pacific Ins. Co v Switzler*, 143 Or App

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[4] In contrast, a federal district court's decision regarding preemption is reviewed de novo. *Gee v. Southwest Airlines*, 110 F3d 1400, 1404 (9th Cir 1997), *cert den*, 522 US 915, 118 S Ct 301 (1997).



The Bessert Law
418 W Main Street #626
Battle Ground, WA

223, 288 n 4, 924 P2d 839 (1996); *Bulter v. Dept of Rev*, 14 OTR 195, 199 (1997).

*3. The principals of federal preemption do not affect standard federal principals of statutory interpretation in this case.*

Oregon's income tax laws must yield to the language of Congress' express preemption of the state's income taxation of pay received by employees of an air carrier described in 49 USC §40116(f)(2). The Supremacy Clause of the U.S. Constitution commands that the laws of the United States "shall be the supreme Law of the Land." U.S. Const Art VI, cl 2. Congress can foreclose state action "by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." *Lorillard Tobacco Co. v. Reilly,* 533 US 525, 541, 121 S Ct. 2404 (2001); *see Cipollone* v. *Liggett Group, Inc., 505* US 504, 516 (1992). In each case, congressional purpose serves as "'the ultimate touchstone'" in preemption analysis. *Medtronic, Inc. v. Lohr*, 518 US 470, 485, 116 S Ct 2240 (1996) (quoting *Retail Clerks Int'l Ass 'n* v. *Schermerhorn,* 375 US 96, 103, 84 S Ct 291 (1963)).

However, "when a State's exercise of its police power is challenged



The Bessert Law
418 W Main Street #626
Battle Ground, WA

under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *US v. Locke*, 529 US 89, 120 S Ct 1135 (2000), *citing Ray v. Atlantic Richfield Co.*, 435 US 151, 98 S Ct 988 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230, 67 S Ct 1146 (1947)). However, *Locke* continued stating that "As *Rice* indicates, an "assumption" of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Locke* at 108. In *Locke*, "The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke* at 108.

In similar fashion, the state laws defendant seeks to enforce bear upon national and international aviation commerce, an area where there has been a history of significant, if not exclusive, federal presence. The practices identified by Congress in 49 USC §40116 are by the terms of the statute unreasonable burdens and discrimination against interstate commerce. 49 USC §40116(2)(A). For purposes of statutory interpretation of this federal statute, the assumption of non-preemption is non-operative.

The express preemption clause in 49 USC §40116(f)(2) reads as follows:



The Bessert Law
418 W Main Street #626
Battle Ground, WA

> "The pay of an employee of an air carrier having regularly assigned duties on aircraft in at least 2 States is subject to the income tax laws of only the following:"

Congress can "indicate preemptive intent through a statute's express language," *Altria Group v. Good*, 555 US 70, 129 S Ct 538, 543 (2008). The language in 49 USC §40116(f)(2) provides a clear statement of Congressional purpose - the pay of an air carrier employee shall not be subject to state income tax except as otherwise provided in this sub-section. Even if a court was to determine that the assumption of non-preemption was operative in this case, the clear and manifest purpose of Congress expressed in 49 USC §40116(2) defeats the need for any academic debate concerning the effect of a presumption, or lack thereof, against preemption.

However, where there is an express preemption clause in a statute, "the question of substance and scope of Congress' displacement of state law still remains." *Altria Group,* 555 US at 543.

The extent of the preemption clause provided in 49 USC §40116(f)(2) is limited to the pay received by an employee of an air carrier and the description of an employee entitled to relief from multi-state income taxation.

a) The defined term "pay" represents a limitation on the extent of the preemption clause.

In the case of a non-resident, preemption of state income tax only applies



The Bessert Law
418 W Main Street #626
Battle Ground, WA

to the pay he receives from an air carrier. The statute provides a definition for the term "pay" as follows: "money received by an employee for services". 49 USC §40116(f)(1)(A). The term "pay" necessarily excludes all other local source of income that a nonresident may receive from the relief provided by the preemption clause.

b) The description of employees entitled to relief from multi-state taxation represents a limit on the extent of the preemption clause.

The preemption clause in 49 USC §40116(f)(2) also provides a description of the employees of an air carrier that are entitled to relief under the statute. The elements of the description are: (1) an employee; (2) of an air carrier; having (3) regularly; (4) assigned; (5) duties; (6) on aircraft; (7) in at least 2 states.

The description of does not contain language that would limit application of the preemption clause to a specific job function. If Congressional intent had been to limit application of the preemption clause to a specific job function or specific class of job functions, as suggested by the tax court, Congress could have easily used any number of defined terms available to it, such as "airman", "flight crew", or "cabin crew", or it could have provided for a defined term in the statute, but it did not. Rather, Congress choose to describe the class of



The Bessert Law
418 W Main Street #626
Battle Ground, WA

employees entitle to relief from multi-state taxation in broad terms.

The parties have stipulated that plaintiff was an employee of Horizon Air during 2000 (ER-2 ¶2) and that Horizon Air was in the business of providing air transportation services during 2000 (ER-3 ¶3). The parties have also stipulated that plaintiff performed duties assigned to him on an aircraft during 2000 (ER-4 ¶12). Plaintiff, in his declaration, stated that during 2000 the airplane he was onboard during the performance of his assigned duties flew in air space over Oregon, Washington, Idaho, and Montana (ER-9 ¶9). As a factual matter, the parties have stipulated to the satisfaction of elements 1, 2, 6, and 7.

The term "assign" represents the fifth element of the description. The ordinary meaning of the term "assigned" is "to appoint as a duty or task." *Webster's Third New International Dictionary* 132 (unabridged ed. 2002). This element is satisfied by the FAA requirements related to flight deck operations familiarization. The flight deck operations familiarization requirement is a responsibility of the air carrier, not the aircraft dispatcher as previously discussed. Without an assignment for flight deck operations familiarization work task by the air carrier, FAA security regulations prohibit flight dispatcher access to the flight deck. Due to FAA regulations, it becomes a factual and legal impossibility for an aircraft dispatcher to satisfy the flight deck operations familiarization requirement without an assignment from the air carrier.



The Bessert Law
418 W Main Street #626
Battle Ground, WA

Further support for a finding that the plain meaning of the term "assigned" has been satisfied is found in a recent Advice Memorandum addressing Aircraft Dispatcher Duty Time. The FAA's Chief Counsel for Regulations stated that "the FAA has stated that academic training for flight crew members is work *assigned* by a certificate holder is duty. Given that the Agency is similarly concerned with dispatcher fatigue as it is with the fatigue of other people involved with the flight, we see no reason why this concept would not apply to dispatchers. Accordingly, training and *familiarization flights assigned* by a certificate holder to a dispatcher would be considered duty under section 121.265." E*mphasis added*. (App-1). This interpretative opinion by the FAA's Chief Counsel for Regulations provides insight into the FAA's understanding of the process for completion of the flight deck familiarization flights by an aircraft dispatcher and the need for an assignment of duties from the air carrier to the aircraft dispatcher.

The term "duty" represents the sixth element of the description contained in the preemption clause. The ordinary meaning of the term "duty" is an obligatory task, conduct, service, or function that arises from one's position. *Webster's Third New International Dictionary* 705 (unabridged ed. 2002).

Under FAA regulations, if an aircraft dispatcher failed to fulfill the perform flight deck operations familiarization tasks, he is no longer considered



The Bessert Law
418 W Main Street #626
Battle Ground, WA

a "qualified aircraft dispatcher" for purposes of FAA regulation and is not permitted to dispatch aircraft. Further, an aircraft dispatcher's failure to perform an assigned task that could place the air carrier's operating certificate in jeopardy, would constitute a breach of his employment agreement with the air carrier. An assignment to perform flight deck operations familiarization tasks is an obligatory task under these circumstances.

Further support for finding that an aircraft dispatcher satisfies the element of a "duty" is again found in the Advice Memorandum addressing Aircraft Dispatcher Duty Time. The interpretative opinion by the FAA's Chief Counsel for Regulations states that "familiarization flights assigned by a certificate holder would be considered *duty* under section 121.265." (App.-1). *Emphasis added.* This interpretative opinion by the FAA's Chief Counsel for Regulations supports the standard meaning of the term "duty" and a determination under the circumstances involved with this case that an aircraft dispatcher satisfies the sixth element of the description provided in the preemption clause.

The term remaining for consideration is "regularly". The ordinary meaning of the term "regularly" is on a regular basis; at regular intervals. *Webster's Third New International Dictionary* 1913 (unabridged ed. 2002). The term "regular" means recurring, attending, or functioning at fixed, uniform, or normal intervals. *Webster's Third New International Dictionary* 1913



The Bessert Law
418 W Main Street #626
Battle Ground, WA

(unabridged ed. 2002).

This term has been held to be ambiguous in the context of a rail carrier under 49 USC §11504(b)(1). *Dep't of Rev v. Hughes*, 15 OTR 195 (1997).

However, the tax court settled the ambiguity in *Butler v. Dept. of Rev.*, 14 OTR 195 (1997) and again in *Dept. of Rev. v. Hughes*, 15 OTR 316, 320-21 (2001) (interpreting the second element of the Amtrak Reauthorization Act of 1990. 49 USC §11504(b)(1)) (2000). In *Butler* and *Hughes,* the tax court held that the definition of "regular" included normal, typical, or natural duties that may not occur on fixed or specific dates. In *Butler*, the tax court distinguished "regular" duties from "as-needed", "irregular", "unusual" or "special" duties. In *Hughes*, the tax court held that the criteria under 49 USC §11504(b)(1) (2000) did not impose a minimum time requirement for the performance of an employee's duties in another state. In *Hughes*, the tax court held that 18 days of work outside of Oregon each year was sufficient for a finding of regularly assigned duties.

The Court of Appeals for Massachusetts has also addressed the question of what constitutes regular activities under 49 USC §11502(a) (1995) in *Fink v Comm Of Rev*, 71 Mass. App Ct 677 (2008). Citing *In re McCann*, DTA No 816567 (N.Y. Div. Tax App. Nov. 12, 1999) and *Butler v. Department of Rev.*, 14 OTR 195 (1997) the court held that the "intent of the statute is to protect



The Bessert Law
418 W Main Street #626
Battle Ground, WA

employees of railroads who, in any capacity of their employment, could have income taxes imposed by more than one state as a result of their employment." The court further stated that

> "the controlling inquiry is whether the employee has regularly assigned duties that must be performed to accomplish the assigned duties and resultant responsibilities for work on the railroad. That an employee may have some discretion with regard to his schedule in performing his work on the railroad does not per se exclude him from the ambit of §11502(a), so long as he had regularly assigned duties on the railroad, ..."

Under federal principals of statutory interpretation, the same or similar language used within the same or related statutes are to be construed in a similar fashion. *Ratzlaf v. United States*, 510 US 135, 143, 114 S Ct 655 (1994). See: *Gustafson v. Alloyd Co.*, 513 US 561, 570 (1995); and *Wisconsin Dep't of Revenue v William Wrigley, Jr. Co.*, 505 US 214, 225, 112 S Ct 2447 (1992). The language related to the qualification of employees for the relief afforded by the preemption clause in 49 USC §11502(a) is identical to the language in 49 USC §40116(f)(2).



The Bessert Law
418 W Main Street #626
Battle Ground, WA

The statutes' origin is from the same legislation as a solution to the same problem. But for the fact that the statutes address different transportation carriers, the statutes would be identical in all respects. The interpretation of the term "regularly" as used in 49 USC §40116(f)(2) should be no different than the interpretation of the same term used in the same context in 49 USC §11502(a).

In the case of aircraft dispatchers, the flight deck familiarization flights are required by federal regulation to be assigned on a regular basis, each calendar year. Plaintiff acknowledges that the total flight time is short in relationship to the total hours worked during a calendar year. However, an aircraft dispatcher can travel further and encroach upon the taxing jurisdictions of more states during a five to ten hour flight on an aircraft than the taxpayer in the *Hughes* case did in 18 days. As noted in *Hughes*, there is no minimum time period stated in the statute that provides a minimum threshold for satisfaction of the elements in the description of employees entitled to relief from multi-state taxation. Every year an aircraft dispatcher is required to perform assigned duties in multiple states. The FAA and plaintiff's employer preclude plaintiff from repeating the same routes in sequential years as a matter of safety and policy, which means that plaintiff is exposed the different taxing jurisdictions every 12 month period. Plaintiff is representative of the employee Congress intended to provide relief for when it enacted 49 USC §40116(f)(2) and this court should



The Bessert Law
418 W Main Street #626
Battle Ground, WA

find in favor of plaintiff on this issue.

*4. The plain meaning of the savings clause presented in 49 USC §40116(f)(2)(B) is ambiguous when viewed in in the overall statutory scheme and precludes defendant from assessing its income tax on the pay plaintiff receives from his employer.*

The savings clause in 49 USC §40116(f)(2)(B) reads as follows: "The pay of an employee ... is subject to the income tax laws of only the following: the state or political subdivision of the State in which the employee earns more than 50 percent of the pay received by the employee from the carrier." It is the term "earned" that raises the question of the proper application of this savings clause. It is unclear from the isolated language of the provision whether the term "earned" applies to the gross pay of the employee or only to the pay earned while performing his assigned duties on an aircraft. Within the context of 49 USC §40116(f), an interpretation relying on a notion of gross pay would be inconsistent. Such an interpretation would also be inconsistent with the legislative history supporting the savings clause.

Whether a statutory term is unambiguous does not turn solely on dictionary definitions of its component words. Rather, "the plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which language is used,



The Bessert Law
418 W Main Street #626
Battle Ground, WA

and the broader context of the statute as a whole." *Yates v US*, 574 US ___, slip op at 7 (2015) quoting *Robinson v. Shell Oil Co.*, 519 US 337, 341 (1997). Determining whether language is plain requires reading the words and phrases in question in context "with a view to their place in the overall statutory scheme." *King v. Burwell*, 576 US __, 135 S Ct 2480, 2489, (2015). However, the Court recognizes that "a fair reading of the legislation demands a fair understanding of the legislative plan." *King v. Burwell*, 135 S Ct 2480, 2496 (2015).

In interpreting savings clause, the Court "has repeatedly 'declined to give broad effect to savings clauses where to do so would upset the careful regulatory scheme established by federal law'" *Geier v American Honda Motor Co,* 529 US 861, 120 S Ct 1913 (2000) (quoting *United States v. Locke*, 529 US 89, (2000).

Within the context of 49 USC §40116(f) a plain reading of 49 USC §40116(f)(2)(B) appears out of step with the language of the subsection. In 49 USC §40116(f)(2) the extent of the preemption clause is determined with reference to service on an aircraft. In 49 USC §40116(f)(1)(C) the deemed percentage of employee's pay earned is made in reference to flight time, which furthers Congress' purpose of limiting state taxation of interstate commerce workers to their state of residency.



The Bessert Law
418 W Main Street #626
Battle Ground, WA

In 49 USC §(f)(1)(C), if an employee accumulates more than 50 percent of his flight time within a state, the employee is deemed to have earned 50 percent of his pay in the state, which is less than the more than 50 percent requirement in 49 USC §40116(f)(2)(B), which again furthers Congress' purpose of limiting state taxation of interstate commerce workers to their state of residency.

In 49 USC §40116(f)(3)(B) another fiction is used where an employee is granted leave for the performance of services on behalf of the employee's airline union. In this case, if an employee's flight time in one state would have been more than 50 percent but for the time taken for union activities, the time taken for union activities is deemed to be flight time within the state, thereby creating a situation where the employee's flight time in the state exceeds 50 percent of his total flight time. Once the employee's flight time in one state exceeds 50 percent, 49 USC §40116(f)(1)(C) deems the employee's pay earned in the state to be 50 percent, which is again below the greater than 50 percent threshold required for taxation in the savings clause.

There is only one factual setting in which the savings clause in 49 USC §40116(f)(2)(B) is operative and that setting must assume that an interpretation of the term "earned" is based upon gross earnings rather than flight time. Where an employee's flight time is less than 50 percent of his total flight time, but his



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418 W Main Street #626
Battle Ground, WA

percentage of gross pay earned in the state is greater than 50 percent, the state would be entitled to assess its income tax on the pay of the employee.

However, such any such interpretation and result would be in direct conflict with Congress' intent as reflected in the context of the statute and as reported in congressional reports over a series of 20 years.

On July 6, 1990 Congress amended Pub L 91-569, 84 Stat 1499 (1970) when it extended the preemptive effect Pub L 91-569 to include a limitation on the states' authority to impose an income tax on certain nonresident employees of a rail carrier and motor carriers. *Amtrak Reauthorization and Improvement Act of 1990*, Pub L 101-322,104 Stat 295 (1990).

In advance of passage of Pub L 101-322, 104 Stat 295 (1990), the House reported in HR Rep 101-207 (1989) that

> "the bill provides that railroad employees who work in more than one state will be taxed only in their state of residence. The current statute governing such employees, section 11504, has led to confusion and litigation, particularly for workers who reside in states which do not impose state income taxes. Section 3 of the bill clarifies *that railroad workers will be taxed only by states and*



The Bessert Law
418 W Main Street #626
Battle Ground, WA

> *subdivisions thereof in which they reside. This is similar to the manner in which airline employees are treated.* The provision will obviate the need for further litigation and will replace the complex and contentious formula which currently exists in the statute." (*Emphasis added.*)

On November 9, 2000 again amended Pub L 91-569, 84 Stat 1499 (1970) when it extended the preemptive effect Pub L 91-569 to include a limitation on the states' authority to impose an income tax on certain nonresident employees of an interstate water carrier. Pub L 106-489, 114 Stat 2207 (2000).

In HR Rep 106-927 (2000), the House presented an extended discussion of the history and intent of federal legislation preempting state income taxation of interstate workers. Included in its discussion, the report provided the following:

> "Congress has repeatedly attempted to provide a more uniform State taxing framework for interstate transportation workers. In 1970, Congress passed legislation to provide streamlined taxing principles for this class of workers. The legislation prohibited nonresident States from withholding taxes on the income of interstate transportation workers unless the worker earned 50 percent or more of his or her income in the nonresident State. This 50 percent taxing threshold is often referred to as the "Fifty Percent Rule." The act specifically prohibited States from taxing the income of interstate rail, motor carrier and aircraft workers if they did not meet this



The Bessert Law
418 W Main Street #626
Battle Ground, WA

> taxing threshold. While interstate waterway workers were not exempted from having to pay income taxes to nonresident States, the statute did exempt interstate waterway workers from having to report income falling short of the Fifty Percent Rule to nonresident States.
>
> While a promising first step toward tax equalization, the " 50 Percent Rule" proved to be administratively burdensome to States and interstate transportation workers alike. In response to these concerns, Congress incrementally rescinded the 50 Percent Rule with respect to various classes of Interstate transportation workers. *In 1979, Congress prohibited States other than the taxpayer's State of residence from taxing interstate air carrier workers.* Two decades later, Congress eliminated the 50 Percent Rule for 1nterstate motor and railway carrier workers by prohibiting States other than the taxpayer's State of residence from taxing these workers.
>
> The Interstate Commerce Commission Termination Act of 1995 (ICCTA) brought further taxing clarity to railway and motor carrier workers. *While the act reiterated the exemption of interstate railway, aviation, and motor carriers from paying State income taxes to a State other than their State of residence,* it did not extend this protection to interstate water carriers."

The Congressional reports from 1990 and 2000 provide clear statements of a legislative plan to provide for single state taxation of the pay earned by interstate transportation workers.

Determining whether language is plain requires reading the words and phrases in question in context "with a view to their place in the overall statutory scheme." *King v. Burwell*, 576 US __, 135 S Ct 2480, 2489, (2015). However, the Court recognizes that "a fair reading of the legislation demands a fair



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418 W Main Street #626
Battle Ground, WA

understanding of the legislative plan." *King v. Burwell*, 135 S Ct at 2496 (2015).

An interpretation of 49 USC §40116(f)(2)(B) based on flight time that reflects the proper place of the provision within the context of the statute and is consistent with the stated legislative plan executed by Congress over a 20 year period would also be consistent with the interpretations of the Departments of Revenue for the States of Arizona (ITR 11-2, Ariz Dep't of Rev (2011)), California (Franchise Tax Board Pub 1031, 8 (2011)), Colorado (*Interstate Transportation and Commerce Employees,* FYI Income 61, Colo Dep't of Revenue (2005)), Illinois (Ill Admin Code tit 86, pt 100, sec 3120(c)(4)(D)), Minnesota (*Individual Income Tax*, Minnesota Revenue (2014) (available at www.revenue.state.mn.us/individuals/individ_income/Pages/Part-year_Residents_and_Nonresidents), and North Carolina(17 NC Admin Code 06C.0110).

## III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this court reverse the judgment of the Tax Court and holds that Plaintiff is a member of the class of employees described in the preemption clause of 49 USC §40116(f)(2) and that the savings clause set forth in 49 USC §40116(f)(2)(B) precludes defendant from imposing Oregon's income tax on the pay plaintiff



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418 W Main Street #626
Battle Ground, WA

receives from his employer, Horizon Air.

DATED: August 8, 2015

THE BESSERT LAW FIRM

Gregory P. Bessert OSB No. 854008
gbessert@bessert.com
418 W. Main Street #626
Battle Ground, WA 98604
Telephone: 360-326-8010

Attorney for Plaintiff-Appellant
Stuart Etter

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DATED: August 8, 2015

Gregory P. Bessert OSB No. 854008
gbessert@bessert.com
The Bessert Law Firm
418 W Main Street #626
Battle Ground, WA 98604
Telephone: 360-326-8010

Attorney for Plaintiff-Appellant Stuart Etter

## CERTIFICATE OF SERVICE

I certify that I served two (2) copies of the forgoing **APPELLANT'S OPENING BRIEF** on the 8th day of August, 2015, to the following person at the address set forth below.

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INGE D. WELLS OSB No. 881137
inge.d.wells@doj.state.or.us
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

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DATED: August 8, 2015

Gregory P. Bessert OSB No. 854008
gbessert@bessert.com
The Bessert Law Firm
418 W Main Street #626
Battle Ground, WA 98604
Telephone: 360-326-8010

Attorney for Plaintiff-Appellant Stuart Etter

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DATED: August 8, 2015

Gregory D. Bessert OSB No. 854008
gbessert@bessert.com
The Bessert Law Firm
418 W Main Street #626
Battle Ground, WA 98604
Telephone: 360-326-8010

Attorney for Plaintiff-Appellant Stuart Etter