REGULATION OF HOURS OF FLIGHT: A FEDERAL ISSUE?

Since the advent of jet aircraft, more and more people have sought redress through the courts for damages from airplane noise. From one of these cases comes the rule that if an airport is owned by a municipality, the municipality is the proper defendant for an action even though the aircraft are privately owned.[1] Perhaps in anticipation of this liability and in response to increasing public pressure, municipalities are seeking effective means of preventing aircraft noise from disturbing their citizens.

The city of Santa Monica, California, the owner of the local airport, passed an ordinance prohibiting the take-off of jet aircraft between the hours of 11:00 p.m. and 7:00 a.m.[2] Stagg, a jet pilot, violated the ordinance, and an action was filed against him by the city. Stagg contended that the ordinance was preempted by state and federal law and, therefore, invalid. But, in *Stagg v. Municipal Court of Santa Monica*,[3] the California Court of Appeals found that there was no preemption by either state or federal law and that the ordinance was a valid exercise of municipal police power.

In reaching its decision, the *Stagg* court relied heavily on the test for federal preemption set forth in *Loma Portal Civic Club v. American Airlines, Inc.*[4] The *Loma Portal* court stated the test to be "whether the enforcement of state law would conflict with the purposes of the federal legislation, whether by frustrating an affirmative federal purpose or by interfering with a matter intentionally left unregulated by Congress."[5] Interpreting this, the *Stagg* court dismissed the federal is-

1. Griggs v. Allegheny County, 369 U.S. 84 (1962).

2. The Santa Monica Municipal Code provides:

> No pure jet aircraft shall take off from the airport between the hours of 11:00 o'clock p.m. of one day and 7:00 a.m. the next day. The Airport Director or in his absence the watch commander of the Santa Monica Police Department may approve a take-off during said hours, provided it appears to his satisfaction that an emergency involving life or death exists and approval is obtained before take-off.

Stagg v. Municipal Court of Santa Monica, 2 Cal. App. 3d 318, 319, 82 Cal. Rptr. 578, 579 (1969).

3. 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969).

4. 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

5. *Id.* at 591, 394 P.2d at 554, 39 Cal. Rptr. at 714.

sue and concluded that "state action (and impliedly that of a political subdivision thereof) has not been precluded by any extensive pattern of federal regulation in the field of air transportation."[6] This conclusion, while acknowledging the *Loma Portal* court's refusal to recognize federal preemption, is inconsistent with that court's decision not to enjoin flight operations at a public airport at the request of a property owner in the neighborhood of the airport. The *Loma Portal* court based its decision on the ground that it is clearly against the policy of California for its courts to interfere with airport flight patterns established by federal regulation.

The holding in *Stagg,* based as it is on the test of legislative intent announced in *Loma Portal,* should have led the *Stagg* court to inquire whether the ordinance conflicts with valid, applicable federal legislation. In *Allegheny Airlines v. Village of Cedarhurst,*[7] an ordinance prohibiting air flight over the Village of Cedarhurst was held to be a regulation of federally established flight paths and, therefore, in direct conflict with the federal regulatory scheme. And in *American Airlines, Inc., v. Town of Hempstead,*[8] the court enjoined the enforcement of Hempstead's "Unnecessary Noise Ordinance" which prohibited the operation of any machine in the town creating noise above a certain level. Because that level was below that created by aircraft flying over Hempstead from Kennedy International Airport, the court found that the ordinance necessarily regulated flight paths. If the *Stagg* court had considered the nature of the particular aviation activity affected by the Santa Monica ordinance and had found federal regulation of that activity in the form of flight patterns and procedures, then *Allegheny, American,* and *Loma Portal* would have been strong authority for finding federal preemption and holding the Santa Monica ordinance invalid.

Another federal issue, implicit in almost any consideration of federal preemption, is whether the ordinance constitutes an undue burden on interstate commerce. Again, an inquiry into the nature of airport operations affected by the ordinance would have disclosed the commercial or non-commercial character of the airport. If commercial flights had been obstructed by the ordinance, the prohibition on night take-offs should be invalidated because the national interest in con-

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6. 2 Cal. App. 3d at 319, 82 Cal. Rptr. at 579.

7. 238 F.2d 812 (2d Cir. 1956).

8. 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd,* 398 F.2d 369 (2d Cir.), *cert. denied,* 393 U.S. 1017 (1969).

tinuing such operations under the commerce clause would certainly be paramount to the local interest in decreasing the resultant noise.[9] If all or even most of the nation's municipalities were to adopt ordinances similar to the Santa Monica ordinance, the practical consequence would be an over-burdening of facilities barely adequate to handle the load presently thrust upon them. It is inconceivable that the resultant burden on interstate commerce could in any way be classified as tolerable.

But, perhaps the *Stagg* court would have found the operations of the airport to be purely private in nature. It has been argued that the constitutionally-permissible scope of local regulation should not be so limited in the case of small, local, non-commercial airports,[10] and there are cases where injunctions have been granted.[11] But some courts have recognized a public interest in continued operations even when the airport is entirely private.[12]

The *Stagg* court's casual dismissal of the federal preemption issue ignores the fact that air transportation is one of the fields most extensively regulated by the federal government. This regulation, first enacted in 1926,[13] has been extended more and more over the years.[14] Courts have acknowledged the fact that federal control has intensified,[15] and many of them have specifically announced federal preemption of the field.[16] More specifically, in 1968, Congress passed a law providing for the control and abatement of aircraft noise and sonic boom,[17] stating that:

9. *See* Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

10. Harvey, *Airplane Noise: Problem in Tort Law and Federalism,* 74 HARV. L. REV. 1581, 1592 (1961).

11. *See* Anderson v. Souza, 38 Cal. 2d 825, 243 P.2d 497 (1952).

12. Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752 (1947).

13. Air Commerce Act of 1926, 49 U.S.C. § 171.

14. The history of interstate commerce in general, and of air commerce in particular, is traced in detail in Allegheny Airlines, Inc., v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956).

15. *See, e.g.,* Northwest Air Lines v. Minnesota, 322 U.S. 292 (1944).

16. *See, e.g.,* Allegheny Airlines, Inc., v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956), where the doctrine of federal preemption was stated very broadly. But the ordinance in question was enacted as a safety measure, so actually the *Cedarhurst* case must be limited as establishing that only state and local regulation of air safety is preempted. *See also* City of Newark v. Eastern Airlines, 159 F. Supp. 750 (D.N.J. 1958), and American Airlines, Inc., v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd,* 398 F.2d 369 (2d Cir.), *cert. denied,* 393 U.S. 1017 (1969), where the court, while relying on *Cedarhurst,* limited its preemption holding to the facts and effect of the Hempstead ordinance.

17. 49 U.S.C. § 1431 (1968).

> In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration . . . shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom . . . .[18]

It may, then, be logically inferred that Congress intended that any regulation of aircraft noise should emanate from the federal level. This should not be taken to mean, however, that state and local governments are completely powerless to assist in the effort to establish a sound approach to the problem of airport noise. Through the implementation of land use controls, for which authority exists primarily at the local level, local communities can undertake appropriate planning and zoning as may be necessary to make adjacent land areas compatible to the use of the airport.

Unfortunately, "[a]dvanced planning alone will not solve the total airport noise problem. In many communities, property rights will have to be purchased and compensation awarded by the courts will have to be paid . . . ."[19] where the aircraft noise constitutes an actionable invasion of property.[20] In addition, it would seem that minor annoyances from air flights, such as infrequent low flying and other occasional disturbances, are not sufficient justification for local governments' "invoking police powers and enacting legislation against the flight of aircraft generally or in connection with the operation of airports."[21]

It should be apparent that a national as well as a local interest exists in a sound system of airports. Unfortunately, the Santa Monica ordinance serves neither of these interests, and, were the logic of the *Stagg* court extended nation-wide, it is difficult to imagine how an effective system of air transportation could be maintained.[22] Allowing the airport-owning municipality to abate noise by regulation of

18. *Id.* § 1431 (a).

19. Dygert, *An Economic Approach to Airport Noise,* 30 J. AIR. L. & COM. 207 (1964).

20. *See* Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964); Kuntz v. Werner Flying Service, 257 Wis. 405, 43 N.W.2d 476 (1950).

21. Eubank, *Jurisdictional Control of Airflight,* 39 MARQ. L. REV. 324, 329 (1956).

22. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

times for take-off has obvious consequences: rules would not be uniform from airport to airport, thereby disrupting service, and the problem of changing time zones could present some global problems.

So, "while it is arguable that the local authorities possess the power to make regulations controlling the hours of flight, it is unlikely that they would long retain this power if its exercise were stringent."[23]

Richard J. Kahdeman

23. Berger, *Nobody Loves an Airport,* 43 S. CAL. L. REV. 631, 722 (1970).

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