Airport Noise: The Proprietor's Dilemma

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I. INTRODUCTION

The airport noise problem can best be identified by the differing perceptions of the public/airport neighbor, air carrier and airport proprietor. According to the airport neighbor, noise produces stress. It disrupts daily activities including sleep, and interferes with television viewing and conversation. Airport neighbors perceive the problem as one of insensitivity by the air carriers and officials responsible for their distress.

Because individual airports adopt their own noise mitigation measures, the air carrier views noise control as fragmented, inefficient, and confusing. Air carriers perceive the problem in economic terms, as an obstacle to their growth, limiting their market opportunities.[1]

The airport proprietor faces a serious dilemma. "At the same time that the airport sponsor wants to facilitate the growth of air commerce, it must recognize that the local citizenry has reasonable expectations for an environment free of intolerable levels of noise resulting from aircraft operations."[2]

This paper focuses on the various noise mitigation measures adopted by airport proprietors throughout the country in response to their dilemma. Proprietary authority to impose noise restrictions will be re-

1. *Report of the Airport Access Task Force: Hearings Before the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation*, 98th Cong., 1st Sess. 32 (1983) [hereinafter cited as *Airport Access Report*].

2. *Id.*

viewed under the doctrine of preemption. Constitutional limits under the Commerce and Equal Protection Clauses will be analyzed to ascertain the extent of the proprietor's ability to control noise. Finally, the proposed noise rule at Denver's Stapleton International Airport will be examined to determine whether it would withstand constitutional attack.

II. FEDERAL PREEMPTION

The judicial doctrine of preemption stems from the Supremacy Clause of the Constitution.[3] The Supremacy Clause provides that state and local authorities do not possess the power to legislate inconsistently in matters already subject to comprehensive federal law. The federal statutory scheme of airport noise regulation has been cited by numerous plaintiffs as the ground for federal preemption in challenges to proprietary noise regulations.

The Federal Aviation Act of 1958[4] gave the Federal Aviation Administration (FAA) authority over air safety and the nation's navigable airspace. The FAA is given broad authority to "insure the safety of aircraft and the efficient utilization of such airspace"[5] and "for the protection of persons and property on the ground."[6] In 1968, Congress amended the 1958 Act by requiring the FAA to prescribe and amend standards which protect the public health and welfare from aircraft noise and sonic boom.[7]

Although the statutory scheme is pervasive, the federal government has assigned primary responsibility for noise control to local authorities.[8] The federal government has not preempted the entire area of airport noise control because it would then be liable for all takings due to noise related damages.[9]

In *Griggs v. Allegheny County*,[10] the Supreme Court held the local proprietor of the Greater Pittsburgh Airport, rather than the United States, liable for an unconstitutional taking of an air easement over plaintiff's property. Plaintiff's home was 3,250 feet from the end of a runway where planes passed within altitudes of thirty feet. Since, under *Griggs*, the airport operator bears the financial burden for aircraft noise related dam-

3. U.S. Const. art. VI, § 2. *See generally* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW § 9.1 (1986).

4. 49 U.S.C. §§ 1301-1542 (1982)

5. *Id.* § 1348(a) (1982).

6. *Id.* § 1348(c) (1982).

7. *Id.* § 1431(b)(1) (1982).

8. *See* Bennett, *Airport Noise Litigation: A Case Law Analysis*, 47 J. AIR L. COM. 449, 452-53 (1982) (discussing various federal legislative and regulatory statements).

9. Note, *Airports: Full of Sound and Fury and Conflicting Legal Views*, 12 TRANSP. L.J. 325, 342 (1982).

10. 369 U.S. 84 (1962).

ages, it should have the right to control the noise causing that damage.[11]

However, in *City of Burbank v. Lockheed Air Terminal Inc.*,[12] the Supreme Court invalidated a local noise regulation based on preemption. Private owners of the Hollywood-Burbank Airport brought suit against the City of Burbank, which had imposed a based curfew resting on the City's police power. The finding of preemption was based on the pervasive nature of the federal statutory scheme.[13] Additionally, the court stated that if the curfew was upheld and a significant number of municipalities followed suit, the FAA's flexibility in controlling air traffic would be limited.[14]

It appears from footnote 14 of the decision that regulations based on police power are preempted so that an airport would not be subject to conflicting regulations.[15] If a municipality which was not the airport proprietor exercised its police power, an airport could be subject to a number of conflicting regulations.[16]

Burbank limited preemption to noise regulations resting on the exercise of police power. Footnote 14 left open the possibility that the airport proprietor could regulate aircraft noise as long as it did not control flight or aviation safety.[17] Thus, *Burbank* created an exception in the area of airport noise regulation: proprietary noise measures are not preempted as long as they do not interfere with the FAA's role. The following cases illustrate this exception.

In *Air Transportation Association v. Crotti*,[18] plaintiff sought relief from noise standards adopted by the California Department of Aeronautics on the ground of preemption. The court upheld the CENEL (Community Noise Equivalent Level) standard, which prescribes a maximum level of noise, because it did not interfere with the FAA's responsibility for regulating aircraft engaged in flight. Because the SENEL (Single Event Noise Exposure Level) standard prescribes a maximum noise level for aircraft engaged in flight, it was preempted.[19] The court criticized plaintiff's reliance on *Burbank* to invalidate the regulations. The court interpreted footnote 14 of the *Burbank* decision to represent the principle that proprietary measures not interfering with the FAA's role were outside the scope of preemption.[20]

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11. Note, *supra* note 8, at 342.
12. City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973).
13. *Id.* at 633.
14. *Id.* at 639.
15. *Id.* at 636.
16. Note, *supra* note 8, at 341.
17. 411 U.S. at 636.
18. 389 F. Supp. 58 (N.D. Cal. 1975).
19. *Id.* at 65.
20. *Id.* at 64.

In *Global*,[21] several airlines sought to enjoin enforcement of the "Interim Rule" imposed by the Port Authority. The Rule limited the percentage of takeoffs and landings of stage I aircraft at the Port Authority's airports.[22] The Rule imposed stricter standards than the federal Fleet Compliance Program which established a timetable for the elimination of stage I aircraft. In *Globall II* the second circuit reaffirmed *Global I*, which held that the Rule was not preempted. The rule did not conflict nor present an obstacle to the federal Fleet Compliance Program. Thus, *Global* reaffirms the right of "airport proprietors to establish requirements as to the level of permissible noise created by aircraft using their airports."[23]

III. CONSTITUTIONAL RESTRICTIONS

The airport proprietor's ability to control noise restrictions is not unlimited. Though not preempted, the proprietor is subject to the following Constitutional restrictions: (1) the airport proprietor may not impose an undue burden on interstate commerce, and (2) may not unjustly discriminate between different categories of airport users.[24]

A. COMMERCE CLAUSE

The report of the Airport Access Task Force states, "Airport proprietors generally have been cautious about adopting some types of use restrictions, knowing that they have a duty to avoid burdening interstate commerce . . . . The result is that few single use restrictions at a single airport can be shown to burden interstate commerce. . . ."[25] The test applied to determine if a proprietary noise regulation is unduly burdensome is highlighted by several recent cases which indicate that a regulation will not be stricken if its effect on interstate commerce is only incidental.

A U.S. District Court espoused the following multistep test in *National Aviation v. City of Hayward*[26] to determine if a curfew banning all aircraft between 11:00 p.m. and 7:00 a.m. which exceeded a specified noise level was unduly burdensome. First, determine if there is an effect on

21. Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J., 727 F.2d 246 (2d Cir.) (Global I), *on rehearing*, 731 F.2d 127 (2d Cir. 1984) (Global II).

22. Stage I aircraft are the noisiest and oldest of the three categories of jet aircraft established by the FAA. Stage II aircraft are quieter than Stage I, and Stage III aircraft are the most technically advanced and quietest aircraft. 34 Fed. Reg. 18,355 (1969) (codified as amended at 14 C.F.R. Part 36 (1986).

23. Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J., 727 F.2d at 248.

24. British Airways Bd. v. Port Auth. of N.Y. & N.J., 431 F. Supp. 1216 (S.D.N.Y.), *rev'd*, 558 F.2d 75 (2d Cir.), *on remand*, 437 F. Supp. 804 (S.D.N.Y.), *modified*, 564 F.2d 1002 (2d Cir. 1977).

25. *Airport Access Report*, *supra* note 1, at 40.

26. 418 F. Supp. 417 (N.D. Cal. 1976).

interstate commerce. If there is no effect the inquiry is over. Second, determine if the "legislative body 'acted within its province, and whether the means of regulation chosen are reasonably adopted to the ends sought.' "[27] This step includes determining whether the regulation discriminates against interstate commerce. Third, the burden on commerce must be balanced against the local interests supporting the legislation. The *Hayward* court relied on the Supreme Court's most recent formulation of this standard: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[28]

Plaintiffs challenged the curfew as unduly burdensome because it forced them to operate from Oakland Airport rather than the Hayward Air Terminal, thereby impairing their ability to deliver cargo. The court found that the effect was incidental, at best, because (1) some of plaintiffs' aircraft could comply with the regulation, (2) plaintiffs could shift operations to the Oakland Airport when necessary and, (3) plaintiffs' deliveries were at the same level with the regulation as without it. It was, therefore, determined that the effect of the curfew was clearly not excessive when weighed against the legitimate goal of controlling noise.[29] Thus, *Hayward* represents the principle that a noise regulation will be upheld under the Commerce Clause even if it has some effect on interstate commerce.

In *Arrow Air, Inc. v. Port Authority of N.Y. and N.J.*,[30] plaintiff sought relief from enforcement of the Final Rule established by the Port Authority. The Rule did not allow stage I aircraft to operate at the Port Authority's airports. Plaintiff argued that the Rule was unduly burdensome because it would alter its market and cause economic harm. However, the court dismissed plaintiff's argument by stating that the Final Rule only imposed an incidental burden. The burden was considered incidental because the service plaintiff provided to particular cities without the Rule was comparable to service which could be provided by other carriers with the Rule.[31] The court referred to *Exxon Corp. v. Governor of Maryland*, which stated that "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."[32] Thus, *Arrow Air* represents the principle that if service comparable to that pro-

27. *Id.* at 425 (quoting South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177, 190 (1938)).

28. *Id.* at 426 (quoting Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970)).

29. *Id.* at 427.

30. 602 F. Supp. 314 (S.D.N.Y. 1985).

31. *Id.* at 321.

32. 437 U.S. 117, 128 (1978).

vided without a noise regulation can be provided with the regulation, interstate commerce is not unduly burdened.

B. Equal Protection

The standard for reviewing airport noise regulations under the Equal Protection Clause was established in *British Airways*: proprietary regulations must be "fair, reasonable, and nondiscriminatory."[33] In the final decision of *British Airways*, the appellate court reaffirmed the district court's decision to dissolve a proprietary regulation banning the Concorde at John F. Kennedy International Airport. The ban was challenged because the Concorde could meet the maximum permissible noise standard established by the Port Authority. The decision to invalidate the ban was based on the Port Authority's lack of responsibility in setting a noise standard applicable to the Concorde within a reasonable time. Thus, it was the Port Authority's failure to act which was held to be "unreasonable, discriminatory, and unfair" that lead to invalidation of the ban.[34]

In *Santa Monica Airport Association v. City of Santa Monica*,[35] plaintiff challenged the following five regulations imposed by the City of Santa Monica as discriminatory: (1) a night curfew, (2) a noise level restriction defined by the SENEL standard, (3) a ban on helicopter flight training, (4) a weekend and holiday ban on touch-and-go training operations of propeller aircraft, and (5) a total ban on jet aircraft.[36]

To determine if the regulations were discriminatory, the court stated that the regulations must be rationally related to a legitimate state interest. The court applied this standard because the ordinances in question did not involve any suspect classification or fundamental rights. The regulations were regarded as economic, subject only to the rational basis test.[37]

Each ordinance except the jet ban was upheld as a reasonable means to achieve the community's interest in preventing noise. The jet ban was held as discriminatory because there was no difference between the noise emitted by business and executive jets which were denied access and propeller aircraft which were granted access. Therefore, the ban did not further the community's goal of preventing noise.[38]

In *Arrow Air*, the court also applied the rational basis test to determine that the Port Authority's Final Rule was not administered in a discriminatory manner. Plaintiff claimed that the Port Authority discriminated by permitting other air carriers to operate certain stage I aircraft while

33. British Airways Bd. v. Port Auth. of N.Y. & N.J., 558 F.2d at 82.
34. British Airways Bd. v. Port Auth. of N.Y. & N.J., 437 F. Supp. at 818.
35. 481 F.2d Supp. 927 (D.D. Cal. 1979).
36. *Id.* at 930.
37. *Id.* at 935.
38. *Id.* at 944.

plaintiff could not operate its stage I aircraft. In dismissing plaintiff's argument, the court stated that the particular stage I aircraft granted access were quieter due to flight procedures established by the Port Authority. Thus, the Final Rule was upheld as nondiscriminatory because the Port Authority established reasonable procedures to insure compliance.[39] *Arrow Air* reaffirms the standard for review espoused in *Santa Monica*: discrimination will be found when a regulation denies access to a class of aircraft users emitting the same level of noise as a class granted access.

III. AIRPORT NOISE LIMITATION PROGRAM AT STAPLETON INTERNATIONAL AIRPORT (SIA)

The City and County of Denver has recently been confronted with the proprietor's dilemma. Pursuant to an intergovernmental agreement between Denver and Adams Counties, Denver is required to adopt a noise Rule (The Airport Noise Limitation Program) governing the level of noise emitting by aircraft.[40] The purpose of the Rule is to place a cap, or ceiling, on noise emitted by all aircraft operating at SIA. The precise cap will be determined from the total noise emitted by all aircraft during an established base period. In effect, the cap creates a bubble over SIA, which is a novel concept in the area of airport noise regulation.

Generally, the Rule, which has not yet been finalized, limits the amount of noise a nonexempt carrier can emit. Exemptions are allowed for air carriers emitting a de minimis level of noise, not significantly contributing to total airport noise. Exemptions are also allowed for operations providing international service, operations of the United States, and special hardship cases. Each air carrier is issued a noise certificate which allocates the amount of noise their aircraft can emit during a specified time period. Allocations to incumbents are determined by calculating the total noise produced at takeoff and landing by types of aircraft operated by the incumbent during the base period.[41] Noise is allocated to new entrants from a noise bank which is comprised of five percent of the total noise emitted by all air carriers during the base period.[42] The Rule provides for alienability of noise certificates in part or in their entirety. Additionally, the Rule provides penalties for an air carrier emitting noise in excess of its allocation.

39. Arrow Air, Inc. v. Port Auth. of N.Y. & N.J., 602 F. Supp. at 321.

40. Adams County, Colo. and City and County of Denver, Colo., Intergovernmental Agreement Regarding New Stapleton Runway(s) and Noise Mitigation Measures (June 25, 1986).

41. The Rule defines Incumbents as air carriers emitting noise above the de minimis level on the date of implementation of the Rule.

42. The Rule defines new entrants as air carriers which are (1) not exempt, or (2) are not operating at SIA at the date of implementation of the Rule and wish to operate above the de minimis level, or (3) are presently operating on the de minimus level.

Because no Tenth Circuit decisions have involved airport noise regulations, it is difficult to determine if the Rule would withstand constitutional attack. However, it can be argued that the standards espoused by the federal courts should be relied upon to determine the Rule's constitutionality. Therefore, the general tests for proprietary actions can be applied, which require that the Rule must not (1) interfere with the FAA's responsibility for controlling the navigable airspace, (2) impose an undue burden on interstate commerce, and (3) be discriminatory.

A. PREEMPTION

It is likely that both the FAA and air carriers will challenge the Rule based on preemption, the Commerce Clause, and the Equal Protection Clause. It is unlikely that the Rule would be held as preempted because it does not interfere with the FAA's role in controlling the navigable airspace. The Rule does not prescribe a limit for noise emitted by aircraft engaged in flight. The Rule prescribes a limit for noise emissions as measured on the ground; allocations are based only on the noise produced on takeoff and landing.

B. COMMERCE CLAUSE

The Rule may be challenged by the FAA, on behalf of all air carriers, as unduly burdensome on the ground that the Rule markedly reduces the total number of scheduled operations that can be conducted by air carriers at SIA with the existing mix of quiet and noisier aircraft. A recent Notice of Proposed Policy states that the FAA is solely responsible for determining the capacity of airport runways open to the public.[43] If capacity of the SIA runway system is significantly reduced by implementation of the Rule and is lower than that accepted by the FAA, it may be determined that the burden on interstate commerce is more than incidental. Such a finding would invalidate the Rule under the Commerce Clause.

However, if capacity is not significantly reduced, the effect of the Rule would be deemed incidental. As case law illustrates, when the effect on commerce is incidental, it is likely that the Rule will be upheld under the Commerce Clause.

Individual air carriers may challenge the Rule as unduly burdensome on the ground that it causes economic hardship, forcing the reduction and perhaps, elimination of service to particular cities. The air carrier could argue that economic hardship is caused because compliance forces the

43. 51 Fed. Reg. 2985, 2986 (1986) (proposed Jan. 22, 1986) ("[The FAA] reserves for itself the right to determine efficient and safe runway and taxiway operating levels, and to impose operational limits and allocation procedures in such situations.").

carrier to use quieter aircraft which is more expensive and seats more passengers than necessary to meet market demand. Therefore, the air carrier can not afford to provide service to particular cities using quieter aircraft.

As espoused in *Arrow Air*, commerce is not unduly burdened if certain airlines discontinue service to a particular city provided that other airlines can provide comparable service. A finding that comparable service can not be provided may very well invalidate the Rule under the Commerce Clause.

C. EQUAL PROTECTION

It is likely that the Rule will be challenged by air carriers under the Equal Protection Clause on the grounds that (1) it unreasonably discriminates against incumbents who operated quieter aircraft during the base period in favor of those which operated noisier aircraft, and, (2) it unreasonably discriminates against new entrants who are denied operating rights in favor of incumbents.

As a basis for the first challenge, the "quieter" incumbent might argue that the Rule is unreasonable because operating rights are determined according to the base period. Therefore, the method of allocation penalizes the "quieter" incumbent. As a basis for the second challenge, a new entrant could argue that the Rule is unreasonable because operating rights are determined according to the share of noise available, which is insufficient in contrast to the incumbents' share.

In applying the standard for review, the Rule will be invalidated if it is determined that the method of noise allocation is not rationally related to Denver's interest in placing a cap on noise. However, several arguments can be made to illustrate that the method of noise allocation does not violate the Equal Protection Clause. First, the Rule is reasonable because it forces air carriers to pay for the noise they emit. As the Airport Access Report states, air carriers "do not bear the true 'social cost' of their activities. . . . However, if social costs. . .can be identified those costs can be reflected in aircraft operations."[44] The Rule transfers the financial cost of operations in excess of an allocation to the air carrier in the form of a penalty or the market price for purchasing another air carrier's allocation. Thus, the Rule can be regarded as reasonable because it provides an economic incentive for compliance.

Secondly, it can be argued that the Rule is reasonable because it provides for an increase in operations through alienability of noise certificates. If necessary, an air carrier can increase operations by obtaining noise from another air carrier. Thus, the Rule provides flexible proce-

44. *Airport Access Report*, *supra* note 1, at 62.

dures for growth. The Rule provides additional flexibility because it does not mandate the type of aircraft each air carrier must include in its fleet. An air carrier can choose the mix of quiet and noisier aircraft necessary to achieve compliance. Finally, the Rule is nondiscriminatory because access is granted to all classes of airport users. The Rule does not favor any particular class since allocations are based on the level of noise emitted and exemptions are based on the de minimis level of noise.

IV. CONCLUSION

The likelihood of challenge to an airport noise regulation is great considering the public and air carrier's perceptions of the noise problem. If the Rule at SIA is attacked on constitutional grounds, case law illustrates that the City and County of Denver is not preempted if the regulation does not interfere with the FAA's responsibility for controlling aircraft in flight and aviation safety. However, Denver's dilemma will remain unresolved if it is determined that the Rule imposes an undue burden on interstate commerce or is discriminatory. Hopefully, participation by representatives of the neighboring communities and air carriers will decrease the likelihood of litigation. If the Rule at SIA does withstand constitutional attack, a precedent in the area of airport noise regulation may be established for major airports throughout the country.