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## Aviation: Local Airport Proprietors May Impose Noise Requirement For Aircraft Provided the Regulations Are Reasonable and Non-Discriminatory

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## RECENT DEVELOPMENTS

**AVIATION: LOCAL AIRPORT PROPRIETORS MAY IMPOSE NOISE REQUIREMENTS FOR AIRCRAFT PROVIDED THE REGULATIONS ARE REASONABLE AND NON-DISCRIMINATORY—*British Airways Board and Compagnie Nationale Air France v. The Port Authority of New York and New Jersey, et al.*, 431 F. Supp. 1216 (S.D.N.Y. 1977).**

### I. BACKGROUND

As a response to growing American domination of the international aircraft market, France and Great Britain collaborated in the production of a supersonic passenger airplane, the Concorde. Over a period of thirteen years, almost \$3 billion was expended on the plane's development, including over \$100 million to lessen the noise produced by the Concorde. This expenditure was necessitated by the fact that the Federal Aviation Administration (FAA) allowed local airport proprietors to control and limit the types of aircraft which could use their facilities on the basis of noise production.

Congressional policy had been to delegate to local airport owners the job of controlling noise at their airports by the promulgation of non-discriminatory regulations. This power was severely limited by Congressional acts which made it clear that exclusive statutory responsibility for aircraft noise abatement rested with the federal government. Voluntary delegation of authority in the area was subject to ultimate federal control and possible revocation.

The authority of local airport operators was also subject to two further restrictions not directly related to noise, those being that no regulations could be imposed which would place an undue burden on interstate or foreign commerce or which would unjustly discriminate between different categories of airport users.

The Port Authority of New York and New Jersey (PA) is the operator of New York's John F. Kennedy International Airport (JFK).<sup>1</sup> In 1951, the PA adopted a regulation prohibiting any aircraft from landing at or taking off from any PA airport without permission from the authority. The PA eventually adopted 112 PNdB (perceived noise in decibels) as the maximum permissible noise level for any plane using a PA airport, a standard which is still in effect.

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<sup>1</sup>The Port Authority also operates Newark International Airport, in Newark, New Jersey, and LaGuardia Airport, in Queens, New York City.

The operators of Concorde, British Airways and Air France, applied to the FAA in late summer 1975 for amendment of their operations specifications, to permit the use of the SST in transatlantic service. In response to this request, the Secretary of Transportation, William Coleman, issued a Directive and Order on February 4, 1975, allowing each carrier to fly two Concorde into JFK each day and one per day into Dulles International Airport, in Virginia. These were provisional amendments only, valid for sixteen months and subject to immediate emergency revocation. Conceding that the decision involved "environmental, technological and international considerations that are as complex as they are controversial," Secretary Coleman reasoned that the only way in which a subjective matter such as the effect of noise could be analyzed would be under actual operating conditions. Coleman added that he could find no compelling reasons for not allowing the test flights.

The Port Authority, however, could cite many significant reasons for refusing to allow the test flights. Not only was Secretary Coleman's decision seen as an infringement on the PA's rights and powers, but there was also the problem of the residents of Howard Beach and the Rockaways in Queens County. These homeowners, who lived under the flight paths of the JFK runways, saw Concorde not as a technological marvel, but as a serious threat to their accustomed way of life. These residents initiated picketing and letter writing campaigns and formed huge, extremely slow-moving motorcades which all but caused traffic on the access roads to JFK to come to a halt. Repeated injunctions against these "drive-ins" were unsuccessful. Uneasy local politicians pressured the PA to prevent the landings. These local residents were not impressed by Secretary Coleman's impassioned argument in favor of the project.

Yet, while forcefully urging that the SST be allowed to land, Secretary Coleman recognized the right of the PA to refuse landing rights to any aircraft for "any legitimate and legally binding reason."

Disregarding the urgings of the federal government, the PA banned Concorde from landing at JFK. It did not apply its 112 PNdB rule, stating that the special characteristics of the plane's low-pitched rumbling noise were worthy of special research and that further inquiry would be required before Concorde would be allowed to land in New York. Concorde was therefore banned from New York as of March 11, 1976, pending a six-month study of operating experiences

at Dulles, Heathrow and Charles DeGaulle airports. The PA never concluded this study.

## II. THE CASE

British Airways and Air France brought suit in United States District Court (Southern District of New York) to have the PA ban declared invalid. The plaintiffs claimed that the ban offended international treaties and agreements and illegally invaded an area of regulation which had been traditionally considered as being pre-empted by the federal government and specifically pre-empted by the Secretary of Transportation. The PA countered by asserting that Congress had not pre-empted a local airport proprietor's authority to accept or reject aircraft for takeoff or landing on the basis of local regulations appropriate for the area.

### A. *The Question of Federal Supremacy in the Area of Aviation*

The Federal Aviation Act of 1958 established the federal government's pre-eminent role in the control of air traffic. Under this act the federal administrator was given the power to regulate the use of all navigable airspace. Included within that power was the right to supervise "such developmental work and service testing as tend to the creation of improved aircraft. . . ."<sup>2</sup> When the administrative powers of the FAA were made subject to the control of the Secretary of Transportation, the Secretary was also given the power to promote research relating to noise abatement "with particular attention to aircraft noise." That federal authority in the realm of aviation law was paramount was readily accepted by the District Court.<sup>3</sup>

Congress first exercised its power to control aircraft noise in 1968. The statute was clear in granting the federal government the exclusive statutory responsibility for noise abatement through the regulation of flight operations and aircraft design.<sup>4</sup> A Senate report accompanying the bill pointed out, however, that the rights of the airport proprietor to create local noise regulations were not superseded by the bill, so long as such rules were not discriminatory. Much of the local authority over noise control, the court found, was delegated federal power and subject to "the ultimate pervasive federal control."<sup>5</sup> The District Court

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<sup>2</sup>49 U.S.C. § 1301 (1970).

<sup>3</sup>Act of Oct. 15, 1966, Pub. L. 89-670, 80 Stat. 93.

<sup>4</sup>49 U.S.C. § 1431 (1970).

<sup>5</sup>*Aircraft Noise Policy Hearing*, 94th Cong. 2d Sess. 705 (1975-76).

view was novel, since exclusive federal rule making power had never before been asserted.

The PA's imposition of the 112 PNdB noise level requirement had never been challenged by the federal government or by an air carrier. The failure of the PA to apply an approved standing rule was not considered by the District Court.

The District Court's ruling dealt exclusively with the question of federal supremacy and pre-emption. Adopting the reasoning set forth by Secretary Coleman in the Directive and Order and apparently looking only to the plain meaning of the statutes, Judge Pollack found that since federal power was supreme in the field of noise abatement, the PA's refusal to allow a Concorde test landing was improper.<sup>6</sup> The effect of this ruling was that all powers of local airport operators became mere delegations of power from federal authorities and were subject to complete pre-emption at the option of a federal official or agency. The question of the reasonableness of local regulations or actions was ignored.

The Port Authority was ordered to permit the Concorde test to proceed in accordance with the guidelines established by Secretary Coleman. The PA immediately appealed the case.

The Court of Appeals did not deal directly with the reasonableness of the PA's decision since the question was never raised in the District Court arguments. The court did submit that reasonableness was an implicit component of the federal scheme of noise regulation. The federal power was delegated to local authorities with the proviso that control would be exercised in a fair, reasonable and responsible manner. But since no evidence had been offered on the matter, the question was remanded to the District Court.<sup>7</sup>

The mere fact that the issue had to await the evidentiary hearing did not prevent the appellate court from pointing out that the failure of the PA to act in a reasonable manner would "hinder the accomplishment of legitimate national goals" such as free flowing international commerce.

The appellate court also suggested that the treaty obligations of the United States should be considered. Evenhanded treatment for British and French air carriers was mandated by certain of these bilateral treaties. Referring to these compacts, the airlines had argued that the PA ban was not a valid and enforceable regulation since it was not

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<sup>6</sup>43 F. Supp. 1216, at 1226 (1977).

<sup>7</sup>558 F.2d 75, 82 (2d Cir. 1977).

generally applied but was an ad hoc measure directed solely at the SST.<sup>8</sup>

The Concorde litigation was in fact having a disruptive effect on the negotiations for the soon-to-expire Bermuda Agreement on U.S.-U.K. transatlantic flights. Great Britain, which eventually won several important concessions, including the award of new routes at the expense of American airlines, made mention of this fact and the court was quick to agree that the situation was worthy of serious consideration by the PA and the federal government.<sup>9</sup>

After considering the above-mentioned factors, the Court of Appeals remanded the case for a rehearing on the question of the reasonableness of the Port Authority's ban on Concorde.

*B. The Question of the Reasonableness of the Port Authority's Decision*

On remand, District Judge Pollack left no doubt as to the unreasonableness of the PA's action. Thirteen months after the ban was announced, the PA had been re-evaluating scientific and technical data which long had been available that showed that the Concorde could comply with all PA noise requirements, including the 112 PNdB rule. Tests made at Dulles verified this finding.<sup>10</sup> The failure to apply reasonable noise standards to the SST was seen as a PA abdication of the limited cooperative authority. Having forfeited the power, the appropriate federal authority was then permitted to act. In this instance, the Secretary of Transportation was the appropriate authority.

The court ruled that the ban unduly interfered with a valuable national objective and imposed an unfair restriction on the interests of the United States. As a result of this ruling the operators of Concorde were granted the right to land in New York.

The PA appealed again and on October 6, 1977, a three-judge panel modified the earlier order. The panel ordered Concorde flights to begin immediately. While repeating all the earlier judicial statements that the ban was improper, this court did affirm the local right to impose reasonable noise standards.<sup>11</sup> The judicial hints were finally picked up by the PA, for after the decision was announced it

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<sup>8</sup>*Id.* at 85.

<sup>9</sup>*Id.* at 86.

<sup>10</sup>46 U.S.L.W. 2103 (1977).

<sup>11</sup>46 U.S.L.W. 2175 (1977).

decided to enact a series of new noise standards which, while ostensibly being reasonable, would also keep Concorde out of New York.<sup>12</sup>

While pondering what type of new regulations would pass muster with the courts, the PA appealed to the Supreme Court. Associate Justice Thurgood Marshall delayed the effective date of the appellate court's decision until October 24, 1977.<sup>13</sup>

The Supreme Court affirmed the ruling of the appellate court on October 17, 1977, refusing to keep the ban in effect until a final decision could be made on the overall merits of the case.<sup>14</sup> The first Concorde landed at JFK the next day, with only a test crew aboard, meeting the existing noise requirements.

Unlike other areas of federal regulation in which the acts of Congress were so comprehensive as to make reasonable the inference that Congress left no room for supplemental state action, federal statutes and policy made it clear that cooperative state-federal regulation of noise was envisioned. This shared power was to be exercised under restrictions imposed by Congress. Congress only delegated power to local authorities. It did not permanently assign or forfeit any of its powers to the states. Such an action would have fractionalized the noise regulation attempts.

Despite its protestations, the PA has recognized ultimate federal pre-eminence in the area of noise control, as it has now begun consideration of new noise standards that would meet requirements of reasonableness. But with the first Concorde flights into New York having aroused no complaints from local residents, there is the likelihood that organized opposition to SST will vanish and that Concorde will become a regular customer of JFK.

*Peter E. Papps*

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<sup>12</sup>The idea of having Concorde land at Newark International Airport was considered, but only briefly. It was quickly apparent that the runways were too short to accommodate the SST.

<sup>13</sup>N.Y. Times, Oct. 8, 1977, at 35, col. 3 (city ed.).

<sup>14</sup>N.Y. Times, Oct. 18, 1977, at 1, col. 1 (city ed.) (S.Ct. Oct. 17, 1977).