

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

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SHOULD COMMUNITY INTERESTS AGAINST
AIRCRAFT NOISE POLLUTION BE GIVEN UP FOR
THE GREATER GOOD?: A CRITICAL ANALYSIS OF
BRITISH AIRWAYS V. PORT AUTHORITY OF NEW
YORK AND NEW JERSEY

Authored By-Dhiyaaneswar D T

Introduction

The spectacular developments in the aviation industry after the Second World War have to be weighed against the extreme discomfort and damage to communities caused due to aircraft noise pollution and sonic boom.¹ People living adjacent to airports often have to bear the brunt of routine exposure to aircraft noise. The passing of aeroplanes through the airspace, take-offs and landings, and repeated testing procedures emit excessive noise, often resulting in stress, sleep disorders and cardiovascular problems.² The plight of people who undergo prolonged exposure to supersonic aircraft is worse because they may cause serious health issues even when flying as per the rules of the air. Although several countries have adopted legislative measures against excess aircraft noise in conformity with Annex 16 to the 1946 Chicago Convention, aircraft noise litigation is ubiquitous and endless at federal and state levels across the world.³ Very often, measures taken by local authorities to prohibit aircraft noises are in stark conflict with the interests of air carriers giving rise to a wave of lawsuits.

Aircraft noise pollution litigation by disgruntled people suffering from excessive noise in the United States has traditionally been based on three grounds: a) trespass, b) nuisance, and c) unconstitutional undertaking.⁴ A leading case concerning the conflicting interests between local airport authority regulations and commercial supersonic airline operators (Concorde) is the *British Airways v. Port Authority of New York and New Jersey*⁵ case decided by the Court of Appeals for the Second Circuit in 1973.

¹ I.H. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW (8th ed. 2006).

² Basner, M., Clark, C., Hansell, A., Hileman, J., Janssen, S., Shepherd, K. and Sparrow, V., *Aviation Noise Impacts: State of the Science*, PUBMED CENTRAL, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5437751/> (Accessed 1 August 2022).

³ Convention on International Civil Aviation (Chicago Convention), art. 33, 61 Stat. 1180, T.I.A.S. No. 1591 (1946)

⁴ Ricarda L. Bennett, *Airport Noise Litigation: Case Law Review*, 47 J. AIR L. & COM. 449 (1982); *Supra* note 1.

⁵ 558 F.2d 75 (1977)

The decision is a landmark one because it upheld the hitherto unrecognised right of states and local authorities to exercise substantial control over airports in the vicinity.

In this case analysis, I will critically evaluate the ways in which the decision has furthered the jurisprudence surrounding aircraft noise at state and federal levels and the possible ramifications of the decision on the environment and airport-neighbouring communities.

Background Of The Case

The Port Authority of New York and New Jersey operates several airports, including the famous John F Kennedy international airport, which is the principal international gateway to the US. Since the JFK airport is in close proximity to several neighbourhoods, the Port Authority established strict aircraft noise abatement regulations in 1958. It mandated that all aircraft taking off from JFK airport must emit less than 112 PNdB (perceived noise in decibels), which shall be scrutinised at selected points in the community by noise monitors. The standard was fixed not based on a psychological evaluation of a standalone aircraft's effect on the community but on the goal of preventing further deterioration of the existing noisy environment.

In 1974, British Airways and Air France unveiled the Concorde, the first supersonic commercial jetliner that could carry passengers between New York and Paris within three and a half hours as opposed to earlier planes that took over 37 hours. The British and French governments allotted 3 billion dollars for research and development, and Air France and British Airways spent over 6 million dollars on the project. The two airlines held foreign air carrier permits issued by the Civil Aeronautics Board to carry out their operations. Furthermore, the bilateral agreements entered by the US with France and the United Kingdom do not restrict the type of aircraft that can provide commercial air services.⁶

In February 1976, the Department of Transportation of the United States permitted the two air carriers to operate two flights daily into the JFK airport for a study phase of sixteen months, subject to the condition that a curfew was maintained between 10 p.m. and 7 a.m to prevent public nuisance. Despite the department's approval, in March 1976, the Port Authority completely refused to authorise Concorde's use of the airport until a thorough analysis of its sound profile was undertaken by them, spanning six months.

⁶ Robert B. Donin, *British Airways V. Port Authority: Its Impact on Aircraft Noise Regulation*, 43 J. AIR L. & COM. 691 (1977).

The principal reasons for the ban were: (a) that the supersonic plane made a "deep rumble" was nearly two times as loud as the subsonic plane B-747 on take-off; (b) the low-frequency noise emitted by Concorde inducing vibrations in homes adjacent to the airport, and (c) Concorde's noise emissions covered 47.6 square miles of land as opposed to the mere 7.49 square miles for the B-707.⁷

Challenging the Port Authority's decision, British Airways and Air France filed a suit in the District Court of Southern District of New York, which declared the ban illegal because the Department of Transportation's permission pre-empted the Port Authority's right to ban landings. The decision was then presented for review before the Court of Appeals for the Second Circuit.

Issues

The issues, in this case, were a) whether the Port Authority was competent and justified in refusing the air carriers the permission to land Concorde at JFK airport under its noise abatement regulations despite permission granted by the federal authority and b) whether the interests of the local community can take precedence over federal aviation regulations and international agreements.

Law Governing Aircraft Noise

The primary domestic legislative provision protecting citizens from excessive aircraft noise is section 611 of the Federal Aviation Act, 1958. It requires the Federal Aviation Authority (FAA) "to provide relief against current and future relief from aircraft noise and sonic booms."⁸ The section also mandates FAA to comply with the noise pollution regulations drafted by the Environment Protection Act (EPA). Furthermore, the Noise Control Act, 1972, enacts that it is the policy of the US to promote a noise-free environment that does not endanger human health and welfare.⁹

In the international sphere, protection from excessive aircraft noise is embodied in International Standards and Recommended Practices in Annex 16 to the 1944 Chicago Convention adopted in 1971. It lays down the acceptable noise standards during take-off and landing and imposes noise-related requirements for certifying airworthiness. Chapter 4 of Annex 16 contains the noise emission guidelines to be followed by a supersonic aircraft.

⁷ MICHAEL W. PEARSON & DANIEL S RILEY, FOUNDATIONS OF AVIATION LAW 35 (2015)

⁸ 42 U.S.C. § 4321, 4332 (1970).

⁹ 411 U.S. at 627.

Arguments Advanced By The Parties

British Airways and Air France contended that the local Port Authority's ban contradicts the Department of Transport's federal action and imposed fetters on transportation. They relied on the US Supreme Court's decision in *Rice v. Santa Fe Elevator Corporation*¹⁰, where it was held that the Federal Government's decision on matters relating to interstate trade pre-empted any further state regulation. Further, the airlines also alleged that the local authority's decision violated the international air navigation treaties and agreements entered into by the United States with the French and British governments. As the bilateral agreements permit the plying of all kinds of aircraft between the nations, it was contended that special fetters could not be imposed on commercial supersonic planes. The airlines also relied on the Second Circuit Court's decision in *Allegheny Airlines v. Village of Cedarhurst*¹¹ and *City of Burbank v. Lockheed Air Terminal*¹², where it was ruled that the critical safety functions of aircraft fall within the exclusive domain of the Federal Aviation Authority, not local bodies. It was suggested that the Federal Aviation envisages a uniform system of aviation regulation, and local ordinances create problems in scheduling flights and impede the FAA's control over air traffic flow.

The Port Authority, on the other hand, contended that it had the power to regulate the entry and exit of planes on the noise levels as it was the proprietor of the airport. It was contended that the Federal Aviation Act did not pre-empt airport proprietors from promulgating their own standards under any circumstances. Furthermore, the ban was justified on the ground that the supersonic aircraft emitted above the desirable 112 PNdB and produced vibrations that detrimentally impacted the residents.

Decision

Chief Judge Kaufmann of the Court of Appeals of the Second Circuit, in his landmark decision, partly overturned the decision of the District Court and ruled that the order of the Department of Transportation, the Federal Aviation Act and the Bilateral Agreements did not pre-empt the power of the port authority to ban the landing of the supersonic planes in the JFK airport. The court enunciated that letting local authorities decide on the acceptable levels of aircraft noise pollution is a sound public policy because local airport operations are more aware of the effects of noise on the surrounding communities.

¹⁰ 331 U.S. 218, 229-30 (1947).

¹¹ 238 F.2d 812 (2d Cir. 1956).

¹² 411 U.S. 624 (1973).

Furthermore, the court ruled that noise standards are important and justified to protect the community. However, it also held that the airline operations could be resumed when British Airways and Air France comply with the reasonable noise standards which are to be prescribed in the future.

ANALYSIS

The decision of the Court of Appeals for the Second Circuit is a landmark one that advances the jurisprudence concerning aircraft noise pollution in the United States. A remarkable feature of the judgment is the recognition of the local community's environmental interests, which are largely side-lined in International Aviation Law. In the opinion of the author, the court's decision to recognise the power of local authorities to regulate air navigation in the neighbourhoods has opened a range of problems and prospects. These are analysed in this section.

Recognition Of Community Interests Against Aircraft Noise

Pollution

Operation and expansion of airports often receive backlash from the community due to the ill effects of aircraft noise.¹³ Long-term noise exposure is associated with higher stress and psychological morbidity.¹⁴ Therefore, limiting and reducing the absolute number of people affected by aircraft noise and sonic booms is an important legislative and judicial prerogative. The Second Circuit court's decision in the present case is a step forward in this direction.

Although international aviation law (under Annex 16 to Chicago Convention) and the Federal Aviation Act prescribe the noise standards to be followed by aircraft operators, they fail to cater to all circumstances, violating vital health and environmental rights. Very often, due to unique local circumstances that aggravate noise pollution, uniform application of the international standards is rendered impracticable. Therefore, it is necessary to devise noise pollution standards keeping in mind the environmental and social interests of the people living adjacent to airports. The instant decision recognises these interests.

The Second Circuit Court has rightly ruled that aircraft landing and take-off rights must give way to the health, safety and welfare of the members of the public.

¹³ ICAO, *Aircraft Noise*, <https://www.icao.int/environmental-protection/pages/noise.aspx> (last visited Aug 3, 2022).

¹⁴ O. ZAPOROZHETS, *AVIATION NOISE IMPACT MANAGEMENT* 29 (Springer, 2022).

The local noise regulations standards fixed by the public were held to be "clearly not excessive" in light of the legitimate goal of noise reduction in the densely populated neighbourhoods around the JFK airport, which houses over 500,000 people. This is an important recognition that reconciles the tensions between aviation law and human rights law, allowing them to grow in the same directions. By permitting the local authorities to set acceptable noise standards, the court has recognised people's right to a noise-free environment which is crucial for their well-being. The verdict is consistent with the right to physical and mental health recognised under Article 12 of the International Covenant on Social and Economic Rights, 1965 (ICESR).¹⁵

Furthermore, the court was right in rejecting the blanket approval granted to any type of aircraft operated between France, Britain and the US as per the bilateral agreements. Granting such automatic approval to the Concorde civil supersonic aircraft, which emits higher noise and vibration levels, is unreasonable and not environmentally benign.

Recognition Of The Rights Of Local Authorities

Due to its distinct interstate and international character, air navigation is regulated at the national and international levels. In the United States, the Federal Aviation Act provides for centralised administration of air travel in the country to be regulated by the Federal Aviation Authority and the Federal Department of Transportation. Under the Act, the FAA is vested with the power to set noise standards and schedule flight timings. The question before the Court of Appeals in the present case was whether the rules formulated by the federal bodies pre-empt local authorities from making their own noise regulations. The court answered the question negatively and recognised the possibility of co-existing international, national and local aviation norms.¹⁶ In the author's opinion, this is a visible and revolutionary departure from the previous judgments in the United States that have failed to affirm local authority's power to establish landing regulations for the residents.

In *Allegheny Airlines v. Village of Cedarhurst*¹⁷, a village ordinance prohibiting overflights at less than 1000 feet from the ground was struck down as violative of national aviation laws. Similarly,

¹⁵ United Nations (General Assembly), International Covenant on Economic, Social, and Cultural Rights. U.N.T.S. 999 (December, 1966)

¹⁶ Timothy F. Burr, *Local Regulation of SST Flights in the United States: British Airways Board v. Port Authority of New York*, 10 University of Miami Inter-American Law Review 234-235 (1978).

¹⁷ 238 F.2d 812 (2d Cir. 1956).

in *American Airlines, Inc. v. Town of Hempstead*¹⁸, the court struck down the local law fixing acceptable levels of aircraft noise.

Unlike the decisions mentioned above, in the present case, the court rejected the plenary jurisdiction of the FAA over airport noise regulation. It recognises the voices of people who ultimately have to suffer from aircraft noise. The local authority which owns the airport is responsible for noise abatement in the neighbourhood. As it has an intimate awareness of the local conditions, it is best suited to frame noise control policies at the local level. This kind of bottoms-up approach is crucial for environmental management.¹⁹ It ensures that centralised policymakers don't erase the lived experiences of people.

Prevention of Noise Nuisance Litigation

In the author's opinion, the decision is highly pragmatic from an administrative perspective. Earlier in *Griggs v. Allegheny County*²⁰, it was held that airport owners could be held liable for fifth amendment violations if aircraft noise affects neighbourhoods. The permission granted to local airport authorities to abate noise pollution in this case, prevents a wave of noise nuisance litigations against them that may be filed by residents living adjacent to the JFK airport. It saves huge time, cost and energy for the courts and the litigants.

Striking A Delicate Balance Between Competing Interests

Although the Second Circuit Court upheld the power of the Port Authority to frame noise regulations despite the existence of the Federal Aviation Act, it tried its best to strike a balance between community interests and the interests of air carriers. It removed the complete and permanent ban imposed on air carriers by the Port Authority and has accorded them a fair opportunity to reduce their noise levels through improved noise reduction technologies.

Violation Of Reciprocity In International Air Navigation

Although judgment has several positive aspects, it is not free from criticism. The smooth operation of the International Air Navigation requires uniformity, consistency and respect for the

¹⁸ 398 F.2d 369 (2d Cir. 1968).

¹⁹ Office of Sustainability, *Top-Down versus Bottom-Up: Two Approaches to Sustainability* <https://sustainability.wisc.edu/top-down-bottom-up-sustainability/> (Accessed 02 August 2022)

²⁰ 369 U.S. 84 (1962).

Chicago Convention and other bilateral agreements. Permitting local authorities to formulate their own noise laws might lead to stringency and multiplicity of regulations, often impractical and incapable of being adhered to. It reduces the confidence fostered by international agreements and increases uncertainty. The smooth operation of the aviation industry requires some degree of tolerance from local communities, and attempts have to be made to protect local interests without compromising reciprocity in international air navigation arrangements. In the author's opinion, the best way to achieve this is to ensure that federal and local authorities work in partnership while fixing aircraft noise standards.

Conclusion

To sum up, the instant case concerns the conflict between local and federal laws prescribing the levels of acceptable aircraft noise. In its landmark decision departing from earlier judgments, the Court of Appeal for the Second Circuit upheld the right of local authorities to promulgate non-arbitrary aircraft noise policies in addition to federal laws. It is submitted that the court's decision is a positive step that advances the environmental rights of local communities. It recognises local authorities' intimate knowledge and ability to frame well-informed noise rules. However, the judgment must be adopted with caution. Failure to adopt uniform standards may discourage airline operators from investing in a country. Federal and local authorities must work hand in hand to ensure the smooth functioning of airport operations without compromising the public's quality of life.

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