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United States v. County of Westchester: Invalidation of an Airport Curfew

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I. Introduction

On August 24, 1983, United States District Court Judge Robert J. Ward invalidated an airport curfew by granting permanent injunctive relief to the petitioner, United States of America.[1] The subject litigation, *United States v. County of Westchester*,[2] presents a plethora of substantive issues which converge on a disturbing notion: the lack of autonomy which may result when a municipality engages in a cooperative enterprise with a branch of the federal government.[3]

In *United States v. County of Westchester*, legislation[4] enacted by the defendant resulted in the institution of a curfew on all night flight operations at the county-owned Westchester County Airport (Airport).[5] The Federal Aviation Administration (FAA), along with other interested parties,[6]

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1. United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983).

2. *Id.*

3. The federal agency involved in this case is the Federal Aviation Administration.

4. On or about September 1, 1981, the Board of Legislators of Westchester County passed Act 54-1981. Act 54-1981 amended the Rules and Regulations for the Westchester County Airport by adding paragraph 29 to section 324 of said Rules. It provides: "Implemented a mandatory curfew. No aircraft shall arrive or depart from Westchester County Airport between the hours of 12:00 midnight and 7:00 a.m. except in case of emergency."

5. The Airport is owned by the county. It provides services and facilities to persons travelling in and engaged in interstate commerce. FAA operates and maintains one air traffic control tower at the Airport, which is staffed by Federal air traffic controllers. There are over 400 aircraft based at the Airport, approximately 275 to 350 of which are small propeller-driven and turboprop aircraft. The balance are business jet aircraft. Air navigation equipment has been installed and is currently being operated at the Airport by FAA pursuant to an agreement with the County. 571 F. Supp. at 789-90.

6. The other petitioning parties were: a) the National Business Aircraft Association (NBAA)- a New York corporation whose purpose is to protect and promote the interests of member companies in the operation of their aircraft; b) the Aircraft Own-

challenged the curfew on night operations, citing a variety of legal bases. Judge Ward made extensive findings of fact[7] and summarily concluded that permanent injunctive relief was the appropriate judicial remedy.[8] The court held that the county's curfew on all night flight operations at the county airport without regard to the accompanying noise level represented: a) an undue burden on interstate commerce;[9] b) an unreasonable, arbitrary, discriminatory, and overbroad exercise of police power by the county;[10] c) an improper intrusion by the county into an area preempted by Congress;[11] and d) a breach by the county of the federal airport grant-in-aid program under the Airport and Airway Development Act of 1970.[12]

Section II of this Note analyzes the history of the curfew at Westchester Airport and the past legal challenges made by the surrounding localities in an attempt to retain a measure of control in decisionmaking.[13] Section III explores the amalgam of decisions in the area with particular attention paid to the landmark Supreme Court decision, *City of Burbank v. Lockheed Air Terminal* (*Burbank*)[14] and its progeny. Section IV considers the substantive legal bases of Judge Ward's decision, focusing on some underlying considerations that may not have appeared in the formal opinion of the court. This Note reaches the conclusion that a more comprehensive and defined federal approach to the noise and aviation issues presented is needed in order to guide subsequent judicial forays into the field.

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ers and Pilots Association- a New York corporation whose purpose is to promote and protect the interests of owners and pilots of general aviation aircraft and c) Panorama Flight Service, Inc.- a New York corporation whose principal place of business is the Airport and which engages in the business of providing cargo and passenger air transport services. *Id.* at 788.

7. *Id.* at 788-97.

8. *Id.* at 798.

9. *Id.* at 797.

10. *Id.* at 797-98.

11. *Id.* at 797.

12. *Id.* at 798.

13. Surrounding the Airport are the suburban communities of Harrison, Rye, North Castle, Rye Brook, Port Chester, and Mount Pleasant, New York and Greenwich, Connecticut. *Id.* at 791.

14. 411 U.S. 624 (1973).

II. Background

A. *Past Challenges to Expansion at the Airport*

Westchester County Airport was built in 1942 as a patriotic response to the bombing of Pearl Harbor.[15] Since its inception, the noise generated in the predominantly residential area contiguous to the facility has given rise to three separate instances of opposition to its continued expansion.

In 1956, the Airport attempted to expand its facilities through a proposed $2.2 million master plan which included the construction of a new terminal and runway. The proposition, however, was not approved by the residents of Westchester and therefore was not implemented.[16]

With the advent of jet operations[17] at the Airport in the 1960's, the Airport's surrounding communities were confronted with the problem of increasing noise. In response, several grass roots organizations began to surface providing both a forum for complaints as well as an organized means for dissent.[18] In 1968, the Town of Greenwich took an affirmative stand against the proposed expansion of the Airport. At that time, ten airline companies had submitted applications to the Civil Aeronautics Board (CAB) to commence operations. However, CAB concluded that two factors militated against the granting of the requested licenses: the opposition aroused on the local level and the lack of need for a fourth major New York area airport.[19]

Finally, in 1974, a $20 million damage suit[20] was filed by

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15. Greenwich Time, May 15, 1983, at A4, col. 3.

16. *Id.*

17. An aircraft "operation" is generally defined as either a landing or a take-off. 571 F. Supp. at 789.

18. For example, the Town of Greenwich presently has two separate citizen organizations. The first, the Airport Concern Team, was formed in 1981 and is a lobbying group whose primary focus is opposition to expansion at the Airport. The second, Air Conservation Trust, was also formed in 1981. It is a nonprofit, educational group of about 400 homeowners and six civic organizations who collect, analyze, and disseminate information on airport-related issues. Greenwich Time, May 15, 1983, at A4, col. 2.

19. *Id.* at col. 3.

20. Town of Greenwich v. Westchester County, No. B-74-280 (D. Conn. July 29, 1974).

the Town of Greenwich and others against Westchester County over the noise issue. The suit was settled out of court when the county agreed to join a negotiating committee that would attempt to deal with the issues raised by the lawsuit.[21]

B. *The Curfew*

The Westchester County Board of Legislators passed Act 54-1981 in September 1981, implementing the mandatory curfew at the Airport. The curfew prohibited the arrival or departure on a non-emergency basis of any aircraft between the hours of midnight and 7:00 a.m. It applied to all aircraft regardless of the "noise emission level or degree of noise produced."[22] Violation of the curfew was punishable by a fine not to exceed $100.00 or by imprisonment not to exceed thirty days, or both.[23]

C. *Results of the Curfew*

Prior to concluding that the curfew was invalid, the court evaluated its effects. According to the court, the substantiated results of the curfew were: delays in departures as a result of the congestion and loss of efficiency;[24] impaired contractual relations between users of the Airport and its business customers;[25] and decreased flexibility and increased disruptions of business and commercial travel and enterprise.[26] The court concluded that, "[f]lights in and out of other airports are not an adequate substitute for the flexibility provided by business

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21. The committee made significant contributions to noise abatement at the Airport. It worked with owners and operators at the Airport to reduce touch-and-go operations; restrict the use of reverse thrust, except in emergency conditions; initiate higher flights around the Airport; reduce engine runups or maintenance tests on the runway; and obtain noise complaint information through the installation of a noise complaint telephone number. Further, the committee recommended noise abatement flight procedures and a voluntary curfew at the Airport limiting takeoffs and landings between the hours of 11:30 p.m. and 6:30 a.m. Information concerning the voluntary curfew was disseminated by NBAA, FAA and the county. 571 F. Supp. at 791.

22. *Id.* at 794.

23. *Id.*

24. *Id.* at 796.

25. *Id.* at 796-97.

26. *Id.* at 797.

and corporate air flights in and out of the Airport."[27] The court also discussed the post-curfew noise data that had been compiled.[28] The conclusion of the court was that "the overall pattern of findings did not support an inference of substantial community reaction to the operational changes at HPN [Westchester County Airport]."[29]

III. Curfews in Aviation Case Law

A. *General Sources of Regulation*

Like the law concerning other forms of pollution, the law of noise is a combination of federal, state, and local regulation.[30] Federal noise regulation stems from the Noise Control Act of 1972[31] which was patterned after the Clean Air Act.[32] The Aviation Noise Abatement Policy (Policy) of 1976 presents an integrated format with individual plans for federal action, air carrier action, and some local action as well. The Policy summarizes the legal framework regarding aircraft and airport noise and provides: a) the federal government has preempted the areas of air space use and management, air traffic control, safety, and the regulation of aircraft noise at its source; and b) other powers and authorities to control airport noise rest with the airport proprietor - including the power to

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27. *Id.*

28. *Id.* at 794-96. The county retained the services of the consulting firm of Bolt, Beranek, and Newman to conduct a temporary noise monitoring program at the Airport. Essentially, this program was a joint endeavor between the parties in which they agreed to hold a 60 day nighttime operation test period. During this period, data was collected from permitted arrivals between midnight and 6:30 a.m. of aircraft that did not exceed certain noise limits.

29. *Id.* at 794-95. Interestingly however, the opinion is devoid of any reference to the experiences of the noise complaint hotline which operated at the Airport both before and after the institution of the curfew. In the spring and summer of 1981, monthly totals of phone calls to the Airport's complaint line rose from 174 in March to a recorded high of 721 in June. Complaints plummeted after the curfew went into effect in October. In the twelve months that followed, the Airport registered but 159 complaints! Greenwich Time, May 17, 1983, at A13, col. 4.

30. T. Schoenbaum, Environmental Policy Law 1049 (1982).

31. Pub. L. No. 92-574, 86 Stat. 1234 (codified as amended at 42 U.S.C. §§ 4901-4918 (Supp. V 1982)).

32. Pub. L. No. 84-159, 69 Stat. 322 (codified as amended at 42 U.S.C. §§ 7401-7642 (Supp. V 1982)).

select an airport site, acquire land, assure compatible land use, and control airport design, scheduling and operations - subject only to Constitutional prohibitions against creation of an undue burden on interstate and foreign commerce, unjust discrimination, and interference with exclusive federal regulatory responsibilities over safety and air space management.[33] In 1978, the Quiet Communities Act[34] was passed to encourage development of noise control programs on the state and local levels.[35] In addition, FAA issues noise limits for new types of aircraft.[36] The power of a state to generally regulate its political subordinates, including local airport authorities, is well established as a matter of law.[37] Local regulation is generally implemented by the enactment of ordinances which establish maximum noise levels.[38]

The law of noise, therefore, is a collection of federal, state, and local regulations, but a body of law that nonetheless lacks integration. Even though the federal government has entered the regulatory arena and technology is rapidly progressing, the noise problem is far from solved.[39] Land owners proximately located to busy and noisy airports generally are not content to wait until science and the government can eliminate the noise.[40] Property owners have based past legal actions on a number of theories in an effort to alleviate the

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33. U.S. Department of Transportation. Aviation Noise Abatement Policy 34 (Nov. 18, 1976). The policy also provides that the federal government has substantial power to influence airport development through its administration of the Airport and Airway Development Program. Further, the state and local governments may protect their citizens through land use controls and other policy measures not affecting aircraft operations.

34. 42 U.S.C. 4913 (Supp. V 1981).

35. Schoenbaum, *supra* note 30, at 1049.

36. *Id.*

37. City of Trenton v. New Jersey, 262 U.S. 182 (1923); Transworld Airlines v. City & County of San Francisco, 228 F.2d 473 (9th Cir. 1955), *cert. denied*, 351 U.S. 919 (1956); *see generally* Robinson, Environmental Regulation of Real Property 8-16 - 8-18 (1982).

38. Schoenbaum, *supra* note 30, at 1049; *see generally* Robinson, *supra* note 37, at 8-18 - 8-23.

39. Note, *Airports: Full of Sound and Fury and Conflicting Legal Views*, 12 Transp. L.J. 325, 330-31 (1981-82).

40. *Id.*

problem or to recover damages for living in noise-impacted areas.[41]

B. *Pre-Burbank Curfew Cases*

The curfew case law predating the Supreme Court decision in *Burbank* demonstrates the judicial vacillation between the conflicting theories in the area.[42] In *Allegheny Airlines v. Village of Cedarhurst*,[43] a town ordinance which prohibited planes from flying over Cedarhurst at an altitude of less than 1000 feet was challenged. The Court of Appeals for the Second Circuit struck down the ordinance because the federal government had preempted the field of air traffic regulation under the Commerce Clause and because the ordinance was in direct conflict with federal statutes and regulations.[44]

In *American Airlines, Inc. v. Town of Hempstead*,[45] the same court invalidated a town ordinance forbidding anyone from operating a device (including aircraft) creating noise in the town exceeding a certain ground decibel limit.[46] The court's decision, however, did not address the preemption is-

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41. *Id.* at 331. Various legal theories have been advanced but the discussion of them is beyond the scope of this Note. Briefly, these theories and representative cases are: a) inverse condemnation/constitutional taking: *see* Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); b) trespass: *see* United States v. Causby, 328 U.S. 256 (1946); *In re* Ramsey, 31 Pa. Commw. 182, 375 A.2d 886 (1977); c) nuisance: *see* Loma Portal Civic Club v. American Airlines, Inc. 61 Cal. 2d 582, 394 P.2d 548 (1964); San Diego Unified Port Auth. District v. Superior Court, 67 Cal. App. 3d 361, 136 Cal. Rptr. 557, *cert. denied*, 434 U.S. 859 (1977); Greater Westchester Homeowners Ass'n v. Los Angeles, 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), *cert. denied*, 449 U.S. 820 (1980).

42. *See generally* Note, *supra* note 39; Note, *Aircraft Noise Abatement: Is there Room for Local Regulation?*, 60 Cornell L. Rev. 269 (1975); Muss, *Aircraft Noise: Federal Pre-Emption of Local Control, Concorde and Other Recent Cases*, 43 J. Air L. & Com. 753 (1977).

43. 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).

44. *Id.* at 881.

45. 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

46. A decibel is a unit for measuring the relative loudness of sounds equal approximately to the smallest degrees of difference of loudness ordinarily detectable by the human ear, the range of which includes about 130 decibels on a scale beginning with one for the faintest audible sound. Webster's Third New International Dictionary 585 (1976).

sue but struck down the ordinance because it was in direct conflict with federal law.[47]

The California Supreme Court in *Loma Portal Civic Club v. American Airlines, Inc.*[48] declined to accept the theory of complete federal preemption of the field of control of flight operations. The court was not persuaded that a per se rule of federal preemption was judicially sound and concluded that "a holding of federal preemption would have the effect of disabling the state from any action in the entire field. . . .(U)nless Congress had in fact intended such preclusion of state regulation and were to carry out its responsibilities, there would result within that state a lacuna which the state would be powerless to fill."[49]

The *Loma Portal* rationale was subsequently adopted by a California lower court in *Stagg v. Municipal Court.*[50] The court noted that noise abatement is a federal as well as a state objective. Furthermore, if the state regulation was not inconsistent with safety concerns, it would not necessarily present a conflict with federal law, but might well reinforce it.[51] Therefore, the court concluded that reasonable regulations by a municipality as to time, manner, and place of takeoff from its airport, such as a curfew ordinance, were not inappropriate since such regulations produce mere incidental effects rather than an impairment of the right of flight.[52]

A similar result is present in *Township of Hanover v. Town of Morristown*[53] in which a New Jersey court issued an injunction requiring a jet curfew. The court noted that the limitation of the hours of an airport's operation does not in-

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47. State and local statutes can run afoul of the scheme of federal regulation in two ways: a) by being in direct conflict with a federal statute in a field which the Constitution has reserved for the federal government, and b) by having its entire power to regulate in an area negated under the concept of preemption. Muss, *supra* note 41, at 765.

48. 61 Cal. 2d 582, 394 P.2d 548 (1964).

49. *Id.* at 591, 394 P.2d at 554.

50. 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969).

51. *Id.* at 321, 82 Cal. Rptr. at 580 (citing Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 592, 394 P.2d 548, 554 (1964)).

52. *Id.* at 321, 82 Cal. Rptr. at 580.

53. 108 N.J. Super. 461, 261 A.2d 692 (1969).

volve the safety factors which are the primary concern of FAA, and thus is a variable with which a court may concern itself in devising a remedy for an airport noise problem.[54]

From this overview of pre-*Burbank* decisions, one can readily discern the basic controversy whether local attempts to deal with aircraft noise should be considered as presenting a question of complete preemption or one of specific conflict with federal law. However, the particular characterization was not determinative because the results were generally the same regardless of the rationale adopted. If a court did not adhere to a total preemption rationale, an easily perceptible conflict with FAA regulations would generally form the basis for invalidating local legislation or preventing state action which affected flight paths and procedures. In fact, one of the few types of local noise abatement measures which arguably could withstand attack on the ground of conflict is the type of time restriction ordinance which the *Burbank* court struck down on the ground of preemption.[55]

C. *The Burbank Decision*

City of Burbank v. Lockheed Air Terminal, Inc.[56] is the leading case concerning the extent of federal preemption of local governments' authority to regulate aircraft noise.[57] In this case, a group of private owners of an airport brought suit against the city of Burbank, California, seeking an injunction against a city ordinance which made it illegal for jets to take off from Hollywood-Burbank Airport between 11:30 p.m. and 7:00 a.m. In enacting the ordinance, the city was attempting to avoid the *Cedarhurst*[58] and *Hempstead*[59] pitfalls by limit-

54. The court thus found that since the federal legislation was designed to promote safety, its purpose would not conflict with local requirements designed to maintain community tranquility and welfare or protect local property interests. *Id.* at 478-79, 261 A.2d at 701.

55. Note, *Aircraft Noise Abatement: Is There Room for Local Regulation?* 60 Cornell L. Rev. 269, 284 (1975).

56. 411 U.S. 624 (1973).

57. Muss, *supra* note 41, at 779.

58. 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).

59. 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert.*

ing the hours of airport use instead of regulating the flights of the aircraft themselves.[60] Justice Douglas, writing for a five-member majority of the Court, analyzed the regulatory and legislative histories of the various federal statutes concerning aviation and concluded that "(t)here is to be sure, no express provision of pre-emption in the 1972 Act. That, however, is not decisive. . . .It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption."[61] The majority's judgment was that the Noise Control Act of 1972 "reaffirms and reinforces the conclusion that the FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control."[62]

In addition to finding preemption, the majority concluded that, due to the pervasive nature of the federal regulation, a demonstrable need for a uniform national rule in the area was mandated in order to prevent obstruction of the purposes and objectives of Congress underlying the Federal Aviation Act.[63] The Court concurred with the conclusion of the district court that the imposition of curfew ordinances on a nationwide basis would result in the "bunching" of flights in the hours immediately preceding or following the curfew and would, therefore, cause a loss of efficiency in the use of the airways, serve to aggravate the noise problem, and decrease aviation safety.[64] Such a result, the court concluded, is "totally inconsistent with the objectives of the federal statutory and regulatory scheme."[65] Therefore, stated succinctly, the *Burbank* decision is precedent for the notion that FAA has full control over aircraft noise, preempting state and local control.[66]

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denied, 393 U.S. 1017 (1969).

60. Note, *supra* note 39, at 338.

61. 411 U.S. 624, 633 (1973).

62. *Id.*

63. *Id.* at 639.

64. *Id.* at 627, 639.

65. *Id.* at 627-28.

66. However, the Court limited the preemption to the states' police power. Footnote 14 to the opinion states the distinction:

> Airport owners "acting as proprietors" can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclu-

Justice Rehnquist, in dissent,[67] determined that there was insufficient expression of congressional intent to infer preemption. He emphasized that states should not be precluded from exercising their historic police powers "unless the requisite pre-emptive intent is abundantly clear."[68] Justice Rehnquist's analysis of the legislative history led him to conclude that merely by allowing a municipality to regulate aircraft noise through the use of its police power was not an obstacle to the accomplishment of the purposes of Congress and thus, was not preempted.[69]

D. *The Progeny of Burbank*

Some courts, in the wake of *Burbank*, have utilized specific aspects of that opinion as a basis for decision, while other courts have focused on the dissent. Some federal courts have held that the effect of *Burbank* is to bar airport proprietors from restricting the patterns, frequency, and scheduling of flights, and to prohibit any limitation on the permissible types of aircraft.[70] Other courts, while agreeing that proprietors may not regulate "aircraft," have held that airport operators do retain responsibility for the proper construction, operation, and maintenance of ground facilities, and for land use planning designed to minimize the effects of noise.[71]

Several federal courts, supporting the FAA position, have interpreted *Burbank* as recognizing the power of a proprietor to impose airport use restrictions to the extent that they are reasonable and nondiscriminatory.[72] In two cases involving

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> sion is nondiscriminatory. . . .But, we are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. . . .Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power.

Id. at 635-36.

67. Justices Stewart, Marshall, and White joined in the dissent.

68. 411 U.S. 624, 643 (1973).

69. *Id.* at 652.

70. Leudtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975); County of Cook v. Priester, 22 Ill. App. 3d 964, 318 N.E.2d 327 (1974), *aff'd*, 62 Ill.2d 357, 342 N.E.2d 41 (1976).

71. *E.g.*, Air Transp. Ass'n of America v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975).

72. Schoenbaum, *supra* note 30, at 1054.

flights of the Concorde supersonic transport (SST) airplane, the second circuit concluded that New York City's John F. Kennedy Airport may impose reasonable noise limitations, even though the regulations might preclude the commencement of SST service.[73] A lower federal court in California has upheld the right of a noncommercial municipal airport to impose a *Burbank*-type curfew.[74] Furthermore, the *Burbank* opinion strongly suggests that any local noise or use restrictions, by whomever imposed, substantially upsetting current air schedules or preventing the use of currently operational commercial aircraft, would unacceptably burden both federal aviation policy and interstate commerce.[75]

In *United States v. State of New York*,[76] the federal government challenged a curfew at Republic Airport which the state of New York had promulgated in response to local community complaints of noise pollution. The curfew, which is remarkably similar to the curfew in *United States v. Westchester*,[77] was deemed to be a nullity by the reviewing court. The asserted bases for the decision were: a) violation of the Supremacy Clause in that even though Congress had not completely displaced state regulation in the area, the state enactment is nullified to the extent that it actually conflicts with federal law;[78] and b) a violation of the Airport and Airways Development Act of 1970 in that airports receiving federal funding must be made available for use by the United States at all hours.[79]

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73. British Airways v. Port Auth. of New York, 564 F.2d 1002, 1011-13 (2d Cir. 1977); British Airways Bd. v. Port Auth. of New York, 558 F.2d 75, 82-85 (2d Cir. 1977).

74. National Aviation v. City of Hayward, 418 F. Supp. 417, 424-25 (N.D. Cal. 1976).

75. *See generally* Skillern, Environmental Protection: The Legal Framework, 285-88 (1981); Note *supra* note 54, at 286-88.

76. 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1907 (1984).

77. That is, a mandatory curfew prohibiting operations between the hours of 11:00 p.m. and 7:00 a.m. *Id.* at 260.

78. *Id.* at 265.

79. *Id.*

IV. Analysis

Judge Ward engaged in an extensive examination and analysis of the factual issues and circumstances presented in *United States v. County of Westchester*. His conclusions of law, however, though supported by the cited precedents, do not seem to satisfactorily address all the relevant arguments. For example, the conclusion reached with regard to the preemption issue is based exclusively on the *Burbank* holding.[80] As a result of the limited presentation of contrary authority by the county, Judge Ward made no attempt to undermine the reservations of the *Burbank* dissenters but conclusorily decided that state and local action were preempted. Certainly, absent a contrary expression by the Court or Congress, Judge Ward was not required to address the concerns of the *Burbank* dissenters. Perhaps a more forceful argument could have been presented by the defendant county as to the viability and applicability of those aspects. Such a position would seemingly be justified in light of the post-*Burbank* congressional enactments which specifically returned a measure of autonomy to states and local communities.[81]

Similarly, with regard to the lawfulness of the curfew and the alleged burden on interstate commerce,[82] Judge Ward merely cites the landmark decisions in the area. Of particular note is the reliance he placed on the factually similar case of *United States v. State of New York*.[83] That decision, however, is more properly analyzed in terms of economic effects and the Contract Clause of the Constitution.[84] In that case, a prima facie case of contractual impairment was deemed to have been presented. The petitioner had given notice that should such a curfew be imposed and withstand scrutiny, its customers would be left with no alternative but to relocate to

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80. 571 F. Supp. at 797.

81. *See supra* text accompanying notes 30-34. For a more extensive analysis of the preemption issue, *see generally*: Note, *supra* note 54, at 274-88; Muss, *supra* note 56, at 765-70; Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. Pa. L. Rev. 197 (1978).

82. *See supra* note 74.

83. *See supra* note 75.

84. U.S. Const. art. I, § 10.

another airport.[85] In point of fact, the determinative element which resulted in the curfew invalidation was that Republic Airport had agreed to and received federal financial assistance pursuant to the Airport and Airways Development Act of 1970. Among the Act's provisions is a requirement that, as a condition to obtaining federal funding, an airport owner must give assurances that "all of the facilities of the airport developed with federal financial assistance and all those usable for landing and takeoff will be available to the United States. . . .in common with other aircraft *at all times.*"[86]

The identical circumstance is present in *United States v. County of Westchester* and constitutes a major stumbling block for the county enactment. Judge Ward concluded that "(t)he curfew on flight operations at the Airport constitutes a breach of the terms, conditions, and assurances set forth in the grant-in-aid agreements between the county and FAA entered into pursuant to the Airport and Airways Development Act of 1970."[87] As a result, FAA declined to provide further grant-in-aid funds to the county for the Airport based on its decision that the Airport, by enacting the curfew, had failed to comply with the terms, conditions, and assurances set forth in the existing grant agreements.[88]

Another aspect which failed to appear in the court's formal opinion is the proposed "reconstruction" of the facility under review. A so-called "master plan" is in the process of implementation.[89] The master plan is a blueprint for a major overhaul at the Airport. The comprehensive plan is a $51.2 million rebuilding program, including $31.6 million to be financed by federal, state, and county taxes.[90] The proposed expansion is to commence in the spring of 1984 and continue for

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85. 552 F. Supp. 255, 261 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1907 (1984).

86. 49 U.S.C. 2210(a)(6) (1982), *emphasis added.*

87. 571 F. Supp. at 798.

88. *Id.* at 791.

89. For a thorough analysis of the master plan and its implications, see a five part series on the topic written by Michael Hart which appears in the Greenwich Time commencing May 15, 1983.

90. The remaining $19.6 million is envisioned as coming from the private sector. Greenwich Time, May 15, 1983, at A4, col. 2.

seven years.[91] The necessity for continual federal aid via the Airport and Airways Development Act of 1970 becomes more apparent once the county's reorganization plans for the Airport are disclosed. The subtle yet thoroughly critical interplay of these economic considerations however failed to appear in the analysis of the court.

A final important variable which was only briefly alluded to in the opinion was the county's failure to engage in any systematic quantification of the nature or extent of a noise problem at the Airport prior to the passage of the curfew. Similarly, the county did not perform any studies prior to enactment indicating that the proposed legislation would specifically address the needs of the residents of the communities in and around the Airport.[92] Certainly, the failure to fully explore all aspects of the noise problem must have been a persuasive factor in the court's conclusion that the curfew was an unreasonable, arbitrary, and overbroad enactment.

V. Conclusion

Westchester County Airport is a facility serving general aviation, a number of corporate jets, and a limited number of scheduled airlines. At the behest of citizen groups who complained that the quiet enjoyment of their homes was denied by such operations, the local government decided to enter the arena. The result was a blanket curfew which closed the airport to all aircraft during the nighttime hours without regard to the environmental impact of generated noise. Some noise reduction was achieved,[93] but the curfew also engendered a significant "bunching" of flights causing delays and reducing overall safety.[94] Thus, the action taken by the local govern-

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91. *Id.* The primary aspects of the "master plan" are: a) increasing the capacity of the Airport to handle as many as 350,000 takeoffs and landings a year; b) increasing the Airport's parking areas from a current 387 spaces to more than 1200 spaces; c) increasing the Airport's terminal space from 9890 square feet to as much as 46,000 square feet; and d) increasing the space for commercial airline carriers. *Id.* at A5, col. 1.

92. 571 F. Supp. at 798.

93. *See supra* text accompanying note 29.

94. In addition to the overall effect on aviation safety, other disbenefits of a cur-

ment did not result in a significant improvement in the noise situation; it did, however, adversely affect air transportation.[95]

At present, FAA employs two primary mechanisms to protect what it considers to be vital cogs in the air transportation system. One such device is litigation. The various legal theories employable in the realm are demonstrably apparent in the case at issue: a) the subject legislation may be deemed to impose an undue burden on commerce; b) a noise standard may interfere with a federally preempted authority to regulate the safe and efficient use of airports; c) an airport restriction may unreasonably discriminate among users; d) the limitation may violate the terms of federal airport grants.[96]

The other technique used by FAA to exact compliance is the conditioning of grants. When FAA provides airport development funds, that money is conditioned upon certain assurances from the airport operator. Breach of the agreements results in the use of the other remedy, litigation.

On another front, the legal theories in noise litigation have been judicially expanded so as to warrant recovery for noise-related effects under a nuisance theory for emotional distress, as well as under the traditional inverse condemnation theory for deprivation of property.[97] In an effort to avoid possible lawsuits and decrease objectionable noise levels, airport proprietors and municipality non-proprietors are implementing airport use restrictions.[98] Until FAA undertakes to draft comprehensive regulations which balance the need for some degree of local autonomy, the need for a viable and safe air transportation system, and the environmental as well as economic considerations at stake, the judiciary will continue to be the final arbiter in an area replete with countervailing con-

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few generally are "bunching," increased air congestion, delays, noise during daylight hours, inefficient utilization of aircraft and ground equipment, and a corresponding increase in operating costs and fares. Muss, *supra* note 41, at 788, n.173.

95. Helms, *Noise Pollution and Airport Regulation*, 47 J. Air L. & Com. 405, 410 (1982).

96. *Id.* at 411.

97. Bennett, *Airport Noise Litigation: Case Law Review*, 47 J. Air L. & Com. 449, 488-89 (1982).

98. *Id.*

siderations. For this reason, this area of environmental law mandates cooperation between state and federal governments and demands as much clarification concerning requirements and standards as Congress or the state legislatures can provide.[99]

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99. Skillern, *supra* note 74, at 287.