Journal of Air Law and Commerce

Volume 33 | Issue 1 Article 11

1967

Current Legislation and Decisions - Recent Decisions

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RECENT DECISIONS

DOMESTIC

Federal Aviation Act — Mechanics Liens — Federal Recordation

Plaintiff, Crescent City Aviation, sold an aircraft to Vinco Corporation under a conditional sale contract. Plaintiff immediately thereafter sold this contract to the defendant, Beverly Bank. A short time after the sale to Vinco, the plaintiff performed maintenance services on the aircraft at Vinco's request. Having received no payment for these services, plaintiff filed, pursuant to state statute, a notice of a mechanic's lien. However, no recordation was made in accordance with Section 503 of the Federal Aviation Act of 1958.[1] When Vinco Corporation defaulted on the conditional sale contract, plaintiff brought suit to foreclose its asserted mechanic's lien, and defendant counterclaimed to replevy the aircraft which was being held by the plaintiff. *Held:* Plaintiff's statutory mechanic's lien cannot be given effect where it is not recorded as required by the Federal Aviation Act, and the defendant, as purchaser of the conditional sales contract, has the immediate right to replevy the aircraft. *Crescent City Aviation, Inc. v. Beverly Bank*, 219 N.E. 2d 446 (Ind. App. 1966).

Under the Supremacy Clause of the Constitution, when Congress enacts legislation in a proper sphere of law, the federal law becomes superior to that of the state. Clearly, Congress has chosen rightfully to preempt the field of aviation by enacting the Federal Aviation Act. This act provides the exclusive manner in which liens upon aircraft may be validly recorded. Indiana, recognizing federal preemption, repealed its aircraft registration and certificate of title act in 1965. Although the law of the state still determines the validity of the instrument recorded, this question does not arise until such recordation has been completed within the scope of the Federal Aviation Act. Proper filing becomes in essence a condition precedent to invoking the statutory or common law lien in cases such as the one presented here. In addition, the court found that the defendant was the owner of the aircraft and was entitled to its immediate possession. Where the owner is the prevailing party, it is within his power to replevy immediately after the entry of judgment is signed. This decision once again clearly indicates that the exclusive way one can secure an interest in an aircraft is by compliance with the recordation provisions of the Federal Aviation Act. Absent compliance, the validity of one's lien cannot be successfully asserted against subsequent purchasers without knowledge of such claim. *B.J.K.III*

[1] 72 Stat. 772, as amended, 49 U.S.C. § 1403 (1964).

Antitrust — Airport Authority — Governmental Function

The plaintiff, E. W. Wiggins Airways, joined as defendants, the Massachusetts Port Authority, Butler Company and its subsidiary, Butler-Boston, in a suit for treble damages, alleging violation of Sections 1 and 2 of the Sherman Anti-Trust Act. The plaintiff's cause of action rested on the contention that the Port Authority and Butler Company conspired to monopolize fixed base operations[1] at Logan Airport by granting the exclusive operating rights to the subsidiary, Butler-Boston. Plaintiff was one of two companies conducting fixed base operations under a lease from the Port Authority's predecessor. When time came for renewal of the plaintiff's lease, the Port Authority, which had assumed operation of the airport, declined to renew but allowed the plaintiff to continue operation as a tenant at will. Subsequently, the Port Authority sent letters to the plaintiff and other fixed base operators, disclosing its intent to lease the fixed base operations at Logan Airport to a single operator and enclosed a list of requirements and qualifications. Plaintiff notified the Port Authority of its ability and readiness to perform, but heard nothing further from the Port Authority until it received a notice to vacate the premises within ninety days. Plaintiff contended that in order to comply with this eviction notice it had to sell its equipment and business to Butler-Boston at a loss. Sometime after receipt of the notice, plaintiff complained to the Federal Aviation Agency,[2] but its action was too late to aid the plaintiff who sold out before the FAA Administrator ordered the Port Authority to negotiate with all interested parties to correct the situation complained of. Defendants answered that the Port Authority was an agent or instrumentality of the State of Massachusetts and, as such, was exempt from the Sherman Act. The lower court dismissed the suit for failure to state a claim upon which relief could be granted and plaintiff appealed. *Held, affirmed:* The Port Authority performs a governmental function, and its action does not violate the Sherman Anti-Trust Act which is aimed at private action rather than governmental action. *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966).

In holding the Port Authority exempt from the anti-trust laws, the court followed a long line of precedents holding the Sherman Act inapplicable to state action or official action directed by a state.[3] The court further stated that the question of governmental immunity was never in issue since there was no Congressional intent to impose liability under the antitrust legislation on official state actions. The fact that the Port Authority can sue and be sued in its own name did not affect the question of immunity. Since the Port Authority had not violated the law, neither

[1] A fixed base operation is one that provides facilities, fuel, equipment, supplies, and services at an airport which are used by aircraft, crews, passengers and in handling freight connected therewith.

[2] The complaint asserted that establishing Butler-Boston as the sole and exclusive fixed base operator violated section 308 of the Federal Aviation Act of 1958. The new Transportation Act does not change the cause of action, but merely substitutes the Transportation Department's Administrator of the Federal Aviation Administration for the FAA Administrator. See § 3, 80 Stat. 932 (1966).

[3] The leading case is Parker v. Brown, 317 U.S. 341 (1943).

the Butler Company nor its subsidiary could be guilty of having illegally aided it. Therefore, the only remedy seemingly available to future plaintiffs is to pursue the cause of action created by Section 308 of the Federal Aviation Act of 1958, which prohibits the grant of an exclusive right of use of any airport facility upon which federal funds have been expended. Unfortunately, there does not seem to be any provision in the FAA's regulations for maintaining the status quo, resulting, as in this case, in relief which arrives too late to be of any use.

A.J.H. II

Administrative Law — Injunctive Relief — Interlocutory Decrees

Suit was instituted by United Aircraft in federal district court seeking injunctive relief to restrain the NLRB's conduct of an unfair labor practice case and the withdrawal of its interlocutory order overruling the trial examiner's dismissal of certain allegations in the complaint. The case was still pending before the NLRB, and its order was intended only to hold the matter open. There was no allegation that the Board had exceeded its statutory authority, but rather, that the Board was delaying its decision an unreasonably long time. The district court denied appellant's motion for preliminary injunction and granted the Board's motion for summary judgment for lack of jurisdiction over the subject matter. *Held, affirmed:* Jurisdiction to review final orders of the NLRB is vested in the courts of appeals under Section 10(e) and (f) of the National Labor Relations Act, and there is no provision for review of interlocutory orders by either the district courts or the circuit courts. *United Aircraft Corp. v. McCulloch,* 365 F.2d 960 (D.C. Cir. 1966).

Section 10(e) and (f)[1] of the National Labor Relations Act provides for review of final orders of the Board in an unfair labor practice proceeding by the circuit courts of appeals, but the act has no provision for review of interlocutory orders "because the power 'to prevent any person from engaging in any unfair practice affecting commerce,' has been vested by Congress in the Board and the Circuit Court of Appeals."[2] The Supreme Court has construed these "procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation,"[3] and, therefore, a district court lacks equity jurisdiction to enjoin the Board from holding a hearing involving an unfair labor practice.[4]

[1] National Labor Relations Act § 10(e) & (f), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(e) & (f) (1964).
[2] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 48 (1938).
[3] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 47 (1937).
[4] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 47 (1938).

There is, however, a narrow area where a district court has jurisdiction to enjoin acts of the Board. The Supreme Court, in *Leedom v. Kyne*,[5] held that a district court had jurisdiction in an original suit to prevent deprivation of a right expressly granted by section 9(b)(1) of the act. The Court subsequently limited *Leedom* in *Boire v. Greyhound Corp.*[6] by pointing out that the former decision rested solely upon an admitted violation of the statute by the Board, and that a factual determination by the Board cannot be reviewed by a district court. Such action on the part of a district court is limited to insuring that the Board has not exceeded its statutory jurisdiction, *i.e.*, matters of statutory construction. In *Deering Milliken, Inc. v. Johnston*,[7] relied on by United Aircraft, the court considered itself controlled by *Leedom* and held that the Board was abusing its statutory duty to hear and decide cases with reasonable dispatch, and, therefore, a district court has jurisdiction to compel Board performance of its duty.

The court in the instant decision distinguished *Deering* by stating that the relief granted was from an action considered by the court to be final. However, "final agency action" in *Deering* was determined under Section 10(c) of the Administrative Procedure Act.[8] The court also held that the order was not final under the National Labor Relations Act, and, hence, not appealable under section 10(f) of that act. It is not apparent in the present case whether the court considered the provisions and remedies of the APA where the " 'special statutory review proceeding' is not available or is inadequate."[9] The cases are possibly reconcilable, however, on the basis of factual showings concerning the delay. The court here stated, "We are not able to say that the cause of the delay was entirely one-sided," while in *Deering* the delay was caused solely by the Board's action. One might question the validity of *Deering's* extension of *Leedom* in light of *Boire*, but to some degree it appears *Deering* is still valid, since there is no other method available to obtain relief from the Board's derogation in the performance of its statutory duty.

E.S.K.

Labor Law — Discrimination — Promotion Lists

Starner and Goulart were non-union employees of Hughes Aircraft. The company maintained a promotion policy which avowedly promoted men on the basis of their ability and production. The list of promotions included Goulart and Starner. The union had made repeated attempts to

[5] 358 U.S. 184 (1958).
[6] 376 U.S. 473 (1964).
[7] 295 F.2d 856 (4th Cir. 1961).
[8] Administrative Procedure Act § 10(c), 60 Stat. 243 (1946), 5 U.S.C. § 1009(c) (1964).
[9] Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 864 (4th Cir. 1961). The court in *Deering* based its remedy on the APA, holding the delay was a violation of § 6(a) of the act, and, hence, a legal wrong under § 10(a) and final action within the meaning of § 10(c). See *Id.* at 865-66.

enlist them in the membership of the union. The union steward warned them that they might lose their promotion unless they joined the union and delivered an admonition that the "list was not final," but they still refused to join the union. Thereafter, the steward declared to the management that the union would no longer represent these employees and pressed for substitution of two union men for them. Soon after, the names of Starner and Goulart were dropped from the promotion list and were replaced by two union members who possessed less seniority and skill. When Starner and Goulart inquired why they had been removed from the list, the only explanation offered was that their replacements had more skills and seniority. Thereupon, Goulart and Starner charged the company with an unfair labor practice. *Held:* Such actions on the part of the union violate Sections 8(b)(1)(a) and 8(b)(2) of the National Labor Relations Act, and the company violates Section 8(a)(3) when it accedes to such action at the union's request. *Matter of Hughes Aircraft Co.*, 5 CCH LAB. L. REP. ¶ 20,583 (1966).

The command of section 8(a)(3) is that it shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. The Board found that neither skill nor seniority, the two reasons proffered by the company, justified the preference and that the substitution was, therefore, the product of union induced discrimination. The *Hughes* facts and decision bear a strong analogy to the earlier case of *Brodsky & Son*,[1] where the union violated the act by causing the employer to deny promotion to a non-union member and to grant it instead to the union's candidate.

J.D.R.

Insurance — Misrepresentation — Aerial Flights

On a life insurance policy application filed with the defendant company, deceased gave a negative response to the question, "Have you made any aerial flights in the last 5 years as a pilot or crew member?"[1] In reality, however, deceased had held a student pilot certificate while participating in a college ROTC program and had accumulated 20 hours dual time and 16½ hours solo time. Subsequently, the deceased was killed in a military aircraft accident in which he was a student pilot. Plaintiff, the beneficiary of the policy, instituted suit against the company for its refusal to recognize her claim. The insurer contended that the insurance was obtained by misrepresentation, fraud, and concealment of material facts. The trial court, applying the "popular sense" meaning of the term "pilot,"[2] ruled

[1] 114 N.L.R.B. 819 (1955).

[1] The question further required, "If yes, furnish details or submit aviation questionnaire."

[2] The court defined *pilot* as, "one who actually operates and flies the aircraft in the course of an aerial flight."

that the deceased had incorrectly answered the policy application. From a summary judgment adverse to her interests, the plaintiff appealed. *Held, affirmed:* Giving an incorrect answer to a material question in a policy application constitutes a substantial misrepresentation of a material fact sufficient to preclude recovery. *Anderson v. Stonewall Jackson Life Ins. Co.*, 3 AV. L. REP. (9 Av. Cas.) ¶ 18, 308 (Fla. Dist. Ct. App. 1966).

The plaintiff asserted first, that the application was ambiguous since there are numerous classifications of pilots (private, licensed, military and student pilots) and second, that her son was merely a *student* pilot; thus, the deceased's answer was not false. The appellate court accepted the trial court's definition of the term "pilot," and reasoned further that if the question appeared ambiguous to the deceased-applicant, the additional requested explanation if the answer was "Yes" afforded him ample opportunity to state his particular situation.

A.C.R.

Practice and Procedure — Trial Courts — Fees and Costs

Plaintiffs, as executors of deceased's estate, instituted a suit on behalf of the widow and children for the deceased's wrongful death arising out of a crash of one of the defendant's planes. At the trial on the issue of liability, the jury returned a verdict for the defendants, but the trial judge entered a judgment n.o.v. for the plaintiffs. Following the trial on damages, the appellate court reversed the judgment n.o.v., entered judgment for the defendants, and charged the costs of the suit to plaintiffs. In addition to the costs of the appeal, which were properly taxed to the losing party, the costs included court fees, transcript costs, and supersedeas bond incurred at the trial level. It is these latter costs to which the plaintiffs objected. Accordingly, they appealed this "costs" judgment to the Second Circuit. *Held:* The taxing of trial costs to the plaintiffs following the reversal of a judgment n.o.v. in favor of the plaintiffs constitutes no abuse of discretion. *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 362 F.2d 799 (2d Cir. 1966).

The plaintiffs contended (1) that defendant's failure to await the completion of the trial to order the transcript created unnecessary costs; and (2) that the posting of the supersedeas bond to stay execution of the judgment was unnecessary. The court found the charge for the transcript was proper, even though the defendants obtained the daily transcript for their convenience when they could anticipate the need for the complete transcript for post-trial motions, because the amount charged was the prevailing rate and did not include the extra "daily" copy charge. The court rejected plaintiffs' second contention that the cost of the supersedeas bond should not be taxed to them. While the court agreed that lower courts should tax nonstatutory costs sparingly, it stated that a supersedeas

bond is an ordinary and necessary device to stay execution during an appeal and, thus, a proper item of costs. The court noted that the plaintiffs failed to object to the method of staying execution and that the plaintiffs' afterthought that the court use attachment of defendants' airplanes as a substitute for the bond was wholly without merit. Thus, the court found no basis for concluding that the trial court had abused its discretion in taxing these costs to the plaintiffs.

P.O.W.

FAA — Pilot Responsibility — Supervision of Co-Pilot

Schaffer and Dionne were pilot and co-pilot respectively of a Convair 340 transport operated by Frontier Airlines. On a clear but dark night, the co-pilot was making a landing at the Rock Springs, Wyoming, airport. When the aircraft touched down, it hit on its nose gear 356 feet beyond the threshold of the runway, then bounced 1,000 feet down the runway and bounced again before coming to a halt approximately 4,100 feet down the runway. The hard landing was caused by human error and not mechanical malfunctions of the aircraft, and resulted in extensive damage to the aircraft. Upon hearing, the Administrator issued retroactive suspension orders against both the pilot and co-pilot. *Held, affirmed:* A pilot in command of an aircraft who, while the co-pilot was at the controls, fails to monitor properly the rate of descent and speed of the aircraft and who permits both to be excessive without calling the co-pilot's attention to these excesses is not properly supervising the approach and landing of the aircraft, and the pilot must share the responsibility for the careless operation of the airplane. *McKee v. Schaffer,* CAB Docket Nos. SE 641 and 642, CAB Order No. S-1395 (3 Nov. 1966).

The Civil Aeronautics Board found that if the pilot had monitored the panel instruments carefully, he would have known the rate of sink and would not have had to estimate it. The Board found that cases relied upon by the pilot were not pertinent. Those cases hold that a pilot in command may be absolved from charges of violations of the safety regulations where a careless landing is made by a co-pilot only where he was in no position to control the actions of the co-pilot. Schaffer's failures were, therefore, carelessness on his part and, as such, a violation of the applicable safety regulations.

W.C.S.

Air Freight Forwarder — Terminal Area — Extension

Emery Air Freight filed an application with the CAB for a tariff under which it would be allowed to extend its pickup and delivery service from

Boston Airport to Nashua, New Hampshire, a distance of thirty-four miles, and thus outside the normal twenty-five mile terminal area restriction placed on air freight forwarders. Emery proposed sameday service to Nashua in coordination with airline schedules through the use of small vans. The application also cited the strong cultural, commercial, and industrial affinity to Boston and the allegation that most of Nashua's commerce moves through the Boston Gateway. Following the grant of the tariff by the CAB, Law Motor Freight, the motor carrier who formerly carried parcels for Emery between these two points, filed suit for the dismissal of the CAB order. Law contended that the ICC's criteria should be adopted by the CAB to determine whether the proposed pickup and delivery service would be outside the terminal area. *Held:* When granting a tariff, the CAB should use its own standards and need not recognize those of the ICC. *Law Motor Freight, Inc. v. CAB,* 364 F.2d 139 (1st Cir. 1966).

A twenty-five mile radius from the airport has been used as a rule of thumb to proscribe a terminal area in which bona fide pickup and delivery service related to air transportation may operate by the authority of the CAB free from ICC regulation. The CAB, in granting the tariff, based its decision on the finding that the proposed service would be in connection with air transportation and would be within a terminal area identifiable by a combination of reasonably close communities, where the service rendered in smaller trucks is closely tied in with air schedules and where rates are geared to smaller shipments. The ICC regulations urged by the petitioner differ in that exemption will be allowed if the motor carriage is incidental to transportation by air and does not extend beyond a single homogeneous community. This area is identifiable as such by factors of commercial and industrial integrity. In holding that the CAB was acting within its authority in applying its own regulations, the court stated that its decision did not bind the ICC, who could subsequently rule that Nashua was not within the Boston terminal for the purpose of exemption. However, the court did note that the twenty-five mile rule must be a strain on the ICC's tolerant definition of a "homogeneous community."

J.A.M.

FOREIGN

Warsaw Convention — France — Personal Injury

Following a landing at the airport of San Bonet, the plaintiff, a passenger aboard an Air France flight, was conducted along with the other passengers to the terminal buildings by an employee of the carrier. As the plaintiff crossed the "customs garden" (apparently the traffic apron) enroute, he stepped on a broken man-hole cover, fell into the well thus uncovered, and seriously injured his leg and spinal column. The trial court

gave judgment for the plaintiff but allowed the carrier to take advantage of the limitation on liability prescribed by Article 22 of the Warsaw Convention, the accident having happened in the course of disembarcation operations referred to in Article 17 of the Warsaw Convention. *Held, reversed and remanded:* Although the Warsaw Convention's applicability to the act of "disembarcation" is not intended to cease when the passenger puts his foot on the traffic apron where the airplane is parked, the plaintiff has failed to establish that the "customs garden" where the accident occurred presented risks inherent in aeronautical operations. *Maché v. Air France.*[1]

The appellate court agreed with the trial court that the accident happened in the course of disembarcation, and was of the opinion that it would be abusive to restrict embarcation and disembarcation to the passenger ramp only, as the traffic apron also presents a danger for the passenger arising from air transport. However, the court concluded that there must be a specific finding as to the inherent risks presented by the "customs garden" in order to establish liability at all on the part of Air France. This decision does not deviate from the theory of the unity of contract for air transportation but rather reaffirms the theory as a valid solution under the Warsaw Convention.

Contracts — Pilot Training — Liability

Plaintiff entered into a contract with defendant Air Club whereby defendant undertook to train plaintiff as a pilot. An accident ensued in which plaintiff was injured. Plaintiff brought suit on the theory that the contract was one of air transportation because such a contract, in case of accident, put the burden of proving lack of negligence on the party providing the air transportation. *Held:* The contract is one of service (*i.e.*, pilot training) of which air transportation is only incidental, thus shifting the burden of proving the negligence of defendant to the plaintiff. *Girgenti v. Air Club of Rome.*[1]

The essence of the contract was the service of pilot training, and any actual movement from place to place by air was incidental to the training of the candidate. The court found that Air Club bound itself to train the candidate with the best means and greatest care; however, it could guarantee neither his competency as a pilot upon completion of the instruction period nor, even less, his physical safety under any circumstances. Thus, the burden fell upon the plaintiff to prove that the accident was caused through some fault of the defendant.

[1] The summary of this case is drawn from a translation of the full reprint of the case in Revue Française de Droit Aérien, 1966, p. 228. Translated by Randy Williams.

[1] This case is summarized from a translation of the complete text reprinted in 4 IL DIRITTO AEREO (1966). Translator: Italo Giovannoni.