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STATE TAX ON FLIGHT EQUIPMENT—SITUS—INTERSTATE COMMERCE—DUE PROCESS

Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment

74 Sup. Ct. 757 (June 1, 1954).

Petitioner, incorporated in Oklahoma and with home port at St. Paul, Minnesota, attacks the validity of a Nebraska statute imposing an apportioned ad valorem tax on its flight equipment in Nebraska where petitioner's airplanes make eighteen scheduled stops daily to discharge and load passengers and freight. The Supreme Court, finding no violation of the commerce or due process clauses of the U.S. Constitution, denied the petition for declaratory judgment and injunction. Federal regulation of air commerce, the Court stated, is based upon the commerce powers of Congress, not national ownership of the airspace, and the Commerce Clause does not immunize interstate air carriers from a fairly-apportioned, nondiscriminatory state tax consistent with existing federal regulation set forth in the CAA. The Court found sufficient regular contact with Nebraska to establish a tax situs. Due process was satisfied since the tax was in proportion to the protection and benefits received by petitioner during the stopover of its planes in that state. In a dissenting opinion, Mr. Justice Frankfurter rejected the sufficiency of such contacts and viewed the Nebraska statute as an intrusion on the Commerce Clause.

POWER OF CAB TO SPECIFY AIRPORT AS TERMINAL POINT—NOTICE

City of Dallas v. Civil Aeronautics Board

4 CCH Avi 17,381 (D.C. Cir. May 20, 1954).

In granting authority requested by an airline to operate a new route segment, the CAB designated Dallas and Fort Worth, Texas, as a single terminal point to be served through Fort Worth's airport located midway between the two cities. Petitioner argues that Dallas will not be well served by the airport and that the CAB is without authority under section 401 (f) of the CAA to make such designation. The court held that the CAB has authority to designate an airport rather than a city as a terminal point. As authorized by section 401 (f), the CAB order described "terminal points" and "service to be rendered." This designation did not constitute a "term, condition, or limitation" on the air carrier's right to control its schedules, equipment, and facilities. The court further found that there was sufficient notice to the parties that the issue of service through the Fort Worth airport would be before the CAB, although the issue was not specifically raised by the application for requested authority.

AIRLINE PASSENGER INSURANCE—VENDING MACHINES—COVERAGE

Lachs v. Fidelity and Casualty Co. of N. Y.

118 N.E. 2d 555 (Ill. Ed.) (Ct. of Appeals, N.Y. March 4, 1954).

Decedent purchased an insurance policy from an automatic vending machine situated in front of the airport ticket counter and bearing the sign "Airline Trip Insurance" in large letters. The policy's coverage clause,

however, limited coverage to "Civilian Scheduled Airlines." Decedent boarded a non-scheduled airliner and was killed in a crash. In an action by the beneficiary, the court denied defendant's motion for summary judgment, stating that the term "scheduled airline" is ambiguous. Defendant had the burden of showing that the term is susceptible of only one meaning, since the average person does not ordinarily distinguish between "scheduled" and "nonscheduled" airlines. Clarity in meaning, continued the court, was particularly essential in view of the use, location, and labeling of the vending machine.

PUBLIC UTILITIES COMMISSION—COMMON USE FACILITIES—RATES

Trans World Airlines, Inc. v. City and County of San Franisco

119 F. Supp. 516 (N.D. Cal. March 5, 1954).

Plaintiff airline leased from the defendant landing and take-off facilities at the San Francisco Airport. Twice during the lease, the Public Utilities Commission of San Francisco prescribed higher rates for use of the Airport than those fixed by the lease. The Court denied declaratory relief and directed plaintiff to account for unpaid charges. "Common use facilities" such as the plaintiff leased, asserted the court, constitute a public utility service which the city charter empowers the Commission to regulate. The lease agreement was valid when executed but binding as to rates only in the absence of regulation by the Commission acting on behalf of the public.

LIABILITY FOR CROP SPRAYING—DAMAGE TO PROPERTY

Pendergrass v. Lovelace

262 P. 2d 231 (New Mex. Sup. Ct. Oct. 9, 1953).

Defendant engaged an airplane operator who was an independent contractor to spray his infested premises. The owner of an adjacent cotton field sues for damages to his property resulting from the spraying. The court held the defendant liable relying on the exception to the rule that an employer is not responsible for the negligence of an independent contractor. Since the spraying involved use of a potentially dangerous solution, defendant could not delegate responsibility and escape liability.

TIME LIMITATIONS ON SUITS—TARIFFS FILED WITH CAB

Crowell v. Eastern Airlines

81 S.E. 2d 178 (N.C. Sup. Ct. April 7, 1954).

Before boarding the plane, plaintiff fell at defendant's airport premises and sues for injuries. The ticket folder provided that time limits for giving notice of claims and instituting suits were set forth in the carrier's tariffs. Plaintiff failed to comply with the time limit specified in a tariff filed with the CAB. The court held, by construing section 401 (a) of the CAA and CAB regulations, that neither the CAA nor the CAB require the air carrier to file such time limits. Therefore, plaintiff is not bound by unauthorized tariffs. Moreover, a mere reference by the ticket folder to limitations contained in the tariffs was not sufficient to bind the plaintiff. It was further held that there was no basis in the lease for requiring the city as lessor to indemnify the airline as lessee for such injuries.

AIR FREIGHT FORWARDER—REGULATION OF COOPERATIVES

Consolidated Flower Shipments, Inc.-Bay Area v. Civil Aeronautics Board
4 CCH Avi 17,387 (9th Cir. June 9, 1954).

Petitioner is a non-profit cooperative association incorporated under the Agricultural Code of California. Its exclusive business is that of a freight forwarder in the shipment of flowers in the San Francisco area. The CAB found that the petitioner was engaged indirectly in air transportation without qualifying to do so and issued a cease and desist order. In affirming the order, the court found that the evidence supported the finding of the public nature of petitioner's business and that it was engaged in air freight forwarding within the scope of CAB regulation. While certain cooperative freight forwarders in the rail and motor fields are specifically exempt from regulation under the Interstate Commerce Act, there is no such exemption in the CAA.

TRANSPORTATION OF SURFACE MAIL BY AIR—POWER OF CIVIL AERONAUTICS BOARD TO EXEMPT CARGO CARRIERS FROM CERTIFICATION PROCEEDINGS

American Airlines, Inc. v. Civil Aeronautics Board
2 CCH Aviation L. Rep. 17,948 (D.C. Cir., Feb. 9, 1956).

Plaintiff carrier held a certificate of public convenience and necessity which authorized the transportation of mail; it also carried *surface* mail under an experiment being conducted by the Postmaster General. Certain cargo-only carriers petitioned the Civil Aeronautics Board for permission to carry surface mail under the experiment program. They maintained that the Board had authority to permit this under Section 416 (b) of the Civil Aeronautics Act which provided for exemptions from the usual certification requirements for air carriers. The plaintiff contested these petitions, stating that the Board lacked authority to issue exemptions to these cargo carriers because there was no showing of "unusual circumstances," "undue burden," or "public interest" which the Statute required. The Post Office took the position that as additional volume of mail was anticipated, the Board should make available the additional facilities of the cargo carriers. The Board granted exemptions to the cargo carriers, and the plaintiff appealed. The court affirmed the decision of the Board, holding that the statutory requirements of "undue burden" and "unusual circumstances" had been met by a showing that certification proceedings had been instituted by the cargo carriers but would not be concluded in time to permit participation in the experiment program. Also, this experiment was clearly in the public interest. A dissenting opinion by Edgerton, C. J., concluded that the time required for certification proceedings was not an "unusual circumstance" within the meaning of the Act.

MUTUAL EXCLUSIVITY OF AIR ROUTE APPLICATIONS—JUDICIAL REVIEW OF CAB ORDER—APPLICATION OF ASHBACKER RULE

Delta Air Lines, Inc. v. Civil Aeronautics Board
2 CCH Aviation L. Rep. 17,817 (D.C. Cir., Oct. 24, 1955).

Eastern Air Lines filed an application with the Civil Aeronautics Board seeking certain modifications in its east-west routes and also additional north-south route segments for service between Cincinnati, Ohio, and Memphis, Tennessee. Delta Air Lines also applied to the Board to add service between these two cities. Delta maintained that the traffic between

these points would support only one service and that therefore the applications were mutually exclusive. Without the benefit of a hearing on this issue, the Board ruled that they were not mutually exclusive. Delta petitioned for review and asked for a stay of Board proceedings on the Eastern application. The Board proposed to conclude its hearing on the merits of Eastern's application and in its final order decide (1) whether any new north-south segments should be certified, (2) the exclusivity issue, and (3) if the application were not found to be exclusive, whether Eastern should be certified. The Board further contended that a "simultaneous decision" upon the two applications would satisfy the rule in the *Ashbacker* case. The court, however, felt that the Board's interpretation of this case would not sufficiently protect the rights of the second applicant, Delta. It held that the *Ashbacker* rule should be construed to mean that "where the applications of two qualified applicants for a license are as a matter of economic fact mutually exclusive, each applicant is entitled to a comparative hearing and consideration with his adversary. We think mere 'simultaneous decision' does not meet the requirement." The requirement for a comparative proceeding was meant to encompass all the "give-and-take of contesting parties, including cross examination, rebuttal, participation in prehearing proceedings, objection, briefs and arguments as contesting parties." Thus, the court held that the Board could not hear Eastern's application on its merits without hearing Delta and without first deciding finally whether Delta had a right to a hearing as a mutually exclusive applicant. The court ordered a stay of the application proceedings until a decision on the issue of exclusivity was reached.

LIABILITY OF CONTROL TOWER FOR CRASH ON ATTEMPTED LANDING UNDER ADVERSE WEATHER CONDITIONS

Smerdon v. United States

2 CCH Aviation L. Rep. 17,840 (D. Mass., Nov. 18, 1955).

Plaintiff, as administrator of the estate of the decedent, brought suit under the Federal Tort Claims Act for alleged negligence of the government-operated control tower in permitting a visual landing of decedent's plane in a heavy fog. The pilot of the plane involved was experienced and proficient in the use of instruments in ground-controlled landings. On the day when the accident occurred, he approached the Boston airport and was advised by the tower that weather conditions were extremely poor and visibility was below the minimum required for a visual landing. In addition, the tower's radar instruments were clouded by the precipitation to such an extent that an instrument landing was impossible. The pilot was advised of these facts when he was approximately six miles from Boston Airport, but he also received a weather report from the tower concerning a nearby airport where more favorable weather conditions prevailed. Mistaking this report for a description of conditions at the Boston airport, and seeing a section of its runway, the pilot requested visual flight clearance to make his landing. The tower granted the landing request and kept constant radio contact with the pilot. When the plane was a half mile from the end of the runway it entered a fog bank which engulfed it until it crashed into Boston Harbor, causing the death of the plaintiff's decedent. The plaintiff contended that under the safety regulation of the Civil Aeronautics Board the tower had a duty to the plane and its passengers to help them land safely, and it failed in this duty by authorizing the visual landing. The government replied that the tower only had the duty of clearing aircraft in control areas in order to prevent collisions. The court held that the tower did not have the responsibility of determining whether or not a given weather condition was safe for landing. The tower performed its

duty by furnishing official weather reports and clearing the air corridor selected by the pilot for his landing. It was not up to the tower to dispute the pilot's report of visibility, and therefore the court concluded that there was no negligence shown under these facts.

MUNICIPAL AIRPORT—CONTROL OVER PRIVATE ACCESS ROAD—DENIAL OF COMMON LAW DEDICATION

City of Oakland v. Burns

289 P. 2d 271 (Cal. District Court of Appeal, Oct. 31, 1955).

The City owned and operated an airport through its board of port commissioners. The principal roadway to the airport had been paved and maintained by the board, and it had been, and still was, open to the public at all times for access to the terminal building, hangars, and other installations. A City ordinance prohibited the operation of commercial ground transportation services to or from the airport in the absence of approval by the board. Pursuant to this and other regulatory ordinances, the board awarded an exclusive contract for the furnishing of transportation services to the airport to a specified carrier. The defendant was a competing carrier who held a certificate of public convenience and necessity granted by the Public Utilities Commission. This certificate gave him the right to provide limousine service to the airport over the most appropriate public streets and highways. The plaintiff City instituted this action to enjoin this service on the ground that the access road was a private road on airport property, and as such was under the exclusive control of the board. The defendant contended, successfully in the trial court, that this road had been dedicated to the public through its continued and open use over a period of 25 years. On appeal, *reversed,* on the ground that the City had no capacity to dedicate the road without following the statutory formalities for the opening of public streets. The court recognized that a municipal corporation may dedicate land that it holds as a private owner, but it held that the Oakland City Charter contained exclusive provisions with respect to the opening of streets which did not include dedication. The court also noted that an easement by prescription could not be acquired against a municipal corporation because the public as a whole had an interest in land set aside for general use.

MUNICIPAL AIRPORTS LOCATED IN ADJACENT TOWNSHIP—EFFECT OF LOCAL ZONING ORDINANCE

Aviation Services, Inc. v. Board of Adjustment of the Township of Hanover

119 A. 2d 761 (N.J. Sup. Ct., Jan. 9, 1956).

The plaintiff's lessor, the town of Morristown, New Jersey, had acquired a tract of land located within the boundaries of the defendant Township. This property was developed as the municipal airport of Morristown and a portion of the airstrip and buildings were leased to the plaintiff, an air flight school. Pursuant to an expansion program the plaintiff applied to the building inspector of the Township of Hanover for permission to reconstruct and enlarge the buildings it had leased. This improvement had been authorized by Morristown, but the application was denied by the Township on the ground that a local zoning ordinance had impliedly excluded airports from these residential areas. The plaintiff then filed a complaint which in substance contested the right of the Township to subject the Morristown Municipal Airport to its zoning ordinance. The trial court denied effect to the ordinance. On appeal to the Supreme Court of New Jersey the Township maintained that the airport was a public utility and therefore was exempt from zoning regulations only after specific findings of public neces-

sity by the state Public Utilities Commission. The court stated that an airport was not a public utility as defined by statute, but at any rate, the legislative authorization of municipal airports indicated an intent to immunize the acquisition and maintenance of airports from local zoning power. The policy of encouraging progress through local air facilities and the interest of the public in the use of these services demand a freedom from local restriction, but the court limited its decision by noting that it was not to be construed as giving judicial recognition to a program of wholesale aggrandizement of territory.

POWER OF LOCAL PUBLIC UTILITIES COMMISSION TO MODIFY MUNICIPAL CONTRACTS—COMMON USE FACILITIES AT AIRPORT

Trans World Airlines, Inc. v. City and County of San Francisco

2 CCH Aviation L. Rep. 17,866 (9th Cir., Dec. 19, 1955).

In 1942 the plaintiff Carrier and the defendant City entered into a formal agreement for a period of 25 years whereby the Carrier leased hangar and office space in the City's airport at a fixed charge. In addition, the lease covered certain "common use" facilities including landing fields, runways, aprons, and the like. In 1950 the Public Utility Commission of the City issued a resolution purporting to fix the charges for the "common use" facilities at a rate higher than that specified in the 1942 agreement; thereupon the Carrier brought a declaratory judgment action seeking to hold the City to the terms of its contract. The City defended on the ground that the 1942 agreement was superseded by the Commission's resolution, and this defense was sustained by the District Court. On appeal this judgment was reversed on the theory that California state law permitted a city to establish by contract the rates to be charged by an airport for a lease of this nature. The court recognized that under the California Constitution a state statute could not regulate a "municipal affair," but as construed, this term did not include the operation of a municipal airport. Thus, the court concluded that the City could not abrogate a valid contract expressly authorized by state law.

AIRLINE TRIP INSURANCE POLICY—COVERAGE DURING FLIGHT ON CONNECTING AIRLINE—NOTICE REQUIREMENTS

Commander v. Fidelity and Casualty Company of New York

2 CCH Aviation L. Rep. 17,852 (W.D. Va., Oct. 8, 1955).

An action was commenced on a standard air insurance policy by the beneficiary of the insured after the latter was lost in a forced landing at sea. The policy covered the insured "while riding in or on a conveyance . . . provided or arranged for, directly or indirectly, by (the) airline. . . ." In this case the insured had purchased a ticket from American Airlines for a trip from Newark, New Jersey, to Provincetown, Masachusetts, with a change of planes at Boston. It was during the flight from Boston to Provincetown, on the connecting airline, that the accident occurred. The beneficiary of the policy was the wife of the insured, and when she learned of her husband's death, she fell into a state of shock that lasted two or three weeks. The defendant was not notified of the loss until approximately two months after the accident. It resisted payment on two grounds: (1) that the term "conveyance" as used in the policy did not include a flight on a connecting airline, and (2) that the plaintiff had not complied with the notice requirements of the policy. The court held that the plaintiff was entitled to recover the face amount of the policy; the connecting flight was clearly covered by the terms of the policy, and the plaintiff gave notice to the defendant within a reasonable period after loss. The court pointed out

that as the policy had been drawn by the defendant, a liberal construction of its terms was to be afforded to the plaintiff.

WRONGFUL DEATH ACTION—IDENTITY OF PILOT ESTABLISHED BY PRESUMPTION

Drahmann v. Brink

2 CCH Aviation L. Rep. 17,918 (Ky. Court of Appeals, Jan. 27, 1956).

In an action brought for the wrongful death of a guest passenger in a private plane which crashed while attempting to land, the trial court directed a verdict for the defendant, the estate of the owner of the plane. The deceased, Brink and Drahmann, were business associates. Brink owned a private plane which he used for business purposes, and he invited Drahmann to accompany him on a business trip to Miami, Florida. Brink was a skilled and experienced pilot, while Drahmann knew nothing about the operation of aircraft. The plane was equipped with dual controls, only one set of which could be operated at a time. It was shown that Brink piloted the plane to Florida without event and was also operating the controls on the take-off for the return flight. The plane crashed, killing both occupants, in Atlanta, Georgia after a series of unsuccessful attempts to land at the airport in that city. Eye witnesses reported that on the first of these attempts the plane overshot the runway and executed proper maneuvers for regaining altitude. However, a second attempt on another runway was so improperly performed so as to indicate that it was not managed by an experienced pilot. As a result of numerous departures from proper flight procedure, the plane stalled and crashed to the ground. On appeal, the court held that the foregoing facts were sufficient evidence of gross negligence on the part of the pilot to warrant the submission of the case to the jury; furthermore, the identity of the pilot could properly be established by inference or rebuttable presumption. As all facts pointed to Brink's control of the plane, the court concluded that in the absence of contrary proof, he would be considered as the pilot of the plane, and the issue of his negligence would be determined by a jury. A dissenting opinion by Sims, J., pointed out that negligence can never be presumed, and the cause of this fatal crash, and whose negligence, if anybody's, was responsible for it, would be left purely to surmise and guesswork. He therefore felt that there was no issue which could be submitted to a jury.

DEFECTIVE AIRCRAFT ENGINES—SUIT AGAINST MANUFACTURER, SUIT AGAINST VENDOR

Trans World Airlines, Inc. v. Curtis-Wright Corporation

2 CCH Aviation L. Rep. 17,849 (N.Y. Sup. Ct., Dec. 1, 1955).

TWA purchased certain airplanes from the Lockheed Aircraft Corporation which carried engines manufactured by Curtis-Wright, the defendant. As a result of latent defects in these engines, they failed to operate properly and it was necessary for TWA to spend large sums of money to repair and restore them to working condition. TWA sued the manufacturer for these expenditures. The court held that the proper remedy in this situation was an action against the vendor of the airplanes, Lockheed, on an implied warranty theory, and not a suit directed toward the manufacturer. The basis for this holding was the fact that no accident had occurred as a result of the manufacturer's negligence. The court stated that no actionable wrong was committed if the danger caused by the manufacturer's negligence was averted; if an ultimate user were permitted to sue the manufacturers in such a case, "there would be nothing left of the citadel of privity and not much scope for the law of warranty." (See Note, this edition, for discussion of liability of manufacturers for structural or design defects. Ed.)