Journal of Air Law and Commerce

Volume 19 | Issue 3 Article 10

1952

Digest of Recent Cases

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TORT — NUISANCE — OPERATION OF PRIVATE AIRPORT — EFFECTIVE RELIEF

Anderson v. Souza
—— Calif. ——, 243 P. 2d 497, 1952 US&CAvR 216 (April 24, 1952)

The California Supreme Court split three ways when presented with the problem of citizens complaining that the operations of a neighboring private airport constituted a nuisance and prevented the rightful enjoyment of their homes. The plaintiffs objected to both the noise and the creation of apprehension of crashes.

The majority of the court found the existence of a nuisance in the operation of the airport though not in the mere presence of the field. Furthermore, the court asserted its power over the controversy as it found nothing to distinguish the private airport from any other private business. Extensive federal and state regulations did not affect its decision in this respect. The court discussed the differences in public and private fields with regard to powers acquired and methods of authorization.

The result reached by the majority was an award of damages, but a refusal to affirm the use of injunctive relief and the remand of the case to the lower courts for further investigations of the possibilities of operating the airport without creating a nuisance. The court declared that the plaintiffs had no right to complete abatement until they assumed the burden of showing it was impossible to run the airport without harm to the rights of those on the surrounding land.

In a concurring and dissenting opinion, Justice Schauer supported the refusal of the injunction but would have gone further and denied damages. Because the damages were caused by the independent acts of the customers of the airport, the owner of the field should not have to assume the liability. A comparison was drawn to the development of automobile law with the suggestion that it would be as inequitable to hold the defendant in this case as it would be to place the liability for highway problems on the owner of a garage. The justice also relied on statements of public policy supporting the creation of an extensive airport system.

Justice Carter in a dissenting opinion approved of the award of damages but also favored the issuance of a permanent injunction. He claimed it should be the burden of the defendant to show that the field could be operated in a manner not causing a nuisance. He pointed out the ineffectiveness of money damages in compensating the plaintiffs and urged the use of the injunction to prevent a multiplicity of suits.

DAMAGES — PERISHABLE FREIGHT — AIR FREIGHT TARIFFS — PRIMARY JURISDICTION RULE

Furrow & Co. v. American Airlines
102 F. Supp. 808 (W.D. Okla. Jan. 9, 1952) 1952 US&CAvR 209.

The plaintiff, a wholesale florist, sought recovery for goods damaged because of delay in time of delivery. It was the contention of Furrow & Co., though found by the court to be unsupported by the evidence, that the defendant's agents were to notify the plaintiff's agents on arrival of the goods after business hours.

The court decided in favor of the defendant. Under the Air Freight Rules Tariff No. 1 (Rule 3.11a) and No. 3.10 the carrier did not assume the risk of such loss. The tariffs determine the liabilities of the parties — even where one of the parties does not have actual knowledge of the provisions involved.

With tariffs filed with the CAB, the plaintiff's attack on certain sections as unreasonable would not be heard by the court under the primary jurisdiction rule. The statutory remedies must be exhausted before the court's jurisdiction can be invoked.

ADMINISTRATIVE LAW — CAB REGULATION — RESTRICTION OF OPERATIONS OF NONSCHEDULED AIR CARRIERS — RIGHT TO FORMAL EVIDENTIARY HEARING

CAB v. American Air Transport, Inc.
20 U.S.L. WEEK 3336 (U.S. June 17, 1952)

The United States Court of Appeals for the District of Columbia certified questions involved in this case to the Supreme Court. Two nonscheduled air carriers had been successful in the trial court in obtaining a permanent injunction restraining the CAB from putting in effect, until the Board should give the carriers a full evidentiary hearing, a regulation which curtailed the carriers' operations. Summary judgment was entered in favor of the carriers in the trial court.

The Court of Appeals inquiry sought to ascertain the nature of the administrative action and the consequent hearing requirements. If on the face of the action, there was an amendment of the license; then, the possibility was raised that the action was void unless an adjudicatory hearing was held. However, if the new regulation merely defined the old one and was without taint of arbitrary or capricious elements, then was the action valid if taken by the rule-making procedure? The court asked an answer to the problem of whether the validity of the action was dependent on the finding of fact that the regulation varied the terms of the license or whether the validity was determined by some other condition.

DENIAL OF CERTIFICATE — SURFACE CARRIER CONTROL OF AIR CARRIER — COMPARISON WITH COMPETING APPLICANTS — PETITION FOR TRANSFER OF CERTIFICATES TO SURFACE CARRIER

Continental Southern Lines v. CAB
—— F. 2d ——, 1952 US&CAvR 191 (D.C. Cir., April 17, 1952)

Continental Southern Lines was the only applicant with surface carrier connections among several petitioners seeking routes in an area where the Board wished to encourage establishment of immediate service. Also, Continental had a contract with Transcontinental Bus System for that surface company to purchase all of the air carrier's stock.

The court found that Continental had not made sufficient showing of probable compliance with sec. 408 of the CAA (regulating surface carrier participation in air transportation). The court sustained the Board's finding that the record the plaintiff presented did not justify certification in the public interest. The Board having made this determination, was under no duty to decide whether Continental's proposed service was superior to that offered by the other applicants.

Furthermore, the Board was not in error in denying a request to transfer the certificates to Transcontinental, the surface holding company, for the purpose of avoiding a sec. 408 proceeding. This type of transfer would require a finding by the Board that the action was in the "public interest." Since Continental failed to produce a record on which the Board was willing to grant a certificate in the "public interest," the denial of the transfer was proper.

ADMINISTRATIVE LAW — CERTIFICATE — LIMITED SUSPENSION ORDER — SUBSTITUTION OF LOCAL SERVICE AIR CARRIER FOR TRUNKLINE CARRIER — JUDICIAL REVIEW

Western Airlines v. CAB., Bonanza Air Lines, Inc., Intervenor —— F. 2d ——, 1952 US&CAvR 200 (9th Cir. May 19, 1952)

The CAB suspended for a limited period the certificate of Western Air Lines for service of El Centro and Yuma. It granted a temporary certificate to a local feeder, Bonanza Air Lines, in order to see whether more extensive local service could be satisfactorily instituted.

Western objected to the move by the Board and advanced three arguments against the legality of the action. First, the order was said to be not a suspension, but in fact a revocation. Western pointed to the history of permanence of feeder air lines similar to Bonanza. The court rejected this contention. It reviewed the possible events preventing the suspension from becoming permanent and postponed any action until after the suspension period when it would know the final decision of the Board.

Second, Western claimed the order invalid as the Board could not eliminate a carrier with a permanent certificate in order to approve a new carrier. The court refused this argument and stated the result would be an "unreasonable limitation on the Board's power." Greater flexibility was needed in assigning routes to adequately serve the public interest. The experiment in change of carriers might well produce valuable information to aid the Board's future determination.

Third, deprivation of property without due process of law was asserted by Western. This count was barred by the court since it was noted that the issue was not raised in the case before the Board. Chief Judge Stevens in a short concurring opinion indicated that though the orders did not constitute a violation of due process and did not appear to be so clearly illegal as to require the court's interference; nevertheless, the administrative action did appear "to impose an undue burden on Western."

ADMINISTRATIVE LAW — RESCISSION OF TEMPORARY CERTIFICATE FOR LOCAL SERVICE — REOPENING OF AN AREA LOCAL SERVICE PROCEEDING

Southwest Airways Co. v. CAB, Bonanza Air Lines, Inc., Intervenor —— F. 2d ——, 1952 US&CAvR 206 (9th Cir. May 19, 1952)

In the same administrative order that governed the case of *Western Airlines v. CAB,* Southwest lost a temporary local service authorization. Southwest contended that the Board had not made sufficient findings upon which to base its rescission order. The court sustained the Board's rescission which was based on a finding that the need for improved local air service should be determined by a reopening of an old case and a consolidation of several petitions.

The court distinguished the methods the Board must use to terminate a temporary and a permanent certificate. A temporary authorization, not yet effective and dependent on an administrative order, may be rescinded by a reconsideration by the Board of its own order.

TORT — NEGLIGENCE — AIRPORT FIRE — DIRECTED VERDICTS

Indamer Corp. v. Crandon
——F. 2d ——, 1952 US&CAvR 223 (5th Cir. April 18, 1952)

Suit for loss by fire of the plaintiff's plane was brought against a Port Authority, a municipal organization operating for profit the Miami International Airport; Carribean Air Transport, Inc., a lessee of one of the hangars; and Air Transport Maintenance Co., a sublessee. On appeal an instructed verdict for the defendants was reversed as to the first two parties, as the plaintiff had made out a *prima facie* case of negligence for the spread of the fire. The Port Authority had a duty to use care for the safety of the planes. The Carribean Co. was held on charges of creating and permitting conditions favorable to fire.

However, because defendant Air Transport had notified the Port Authority of the danger and had sought relief, and because the fire hazard was apparent to the plaintiff-bailor; the court affirmed the directed verdict for the third defendant.