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JURISDICTION OF THE FEDERAL GOVERNMENT IN CIVIL AVIATION

Introduction

The federal regulatory power in the field of air transportation has been of immense importance to the development of the industry. The aircraft is of such a nature, inherent in this mode of transportation, that it knows no bounds, either domestic or international. It is unlike rail or motor transportation in that aircraft are not hindered by physical boundaries or barriers. Because of this peculiarity, uniformity of regulation is indicated. The Federal Government has, therefore, made regulations in the public interest for the whole country through its power over interstate and foreign commerce. But the states also have an interest in regard to protection of the public safety and private property under the police power. It can be seen that in the interest of uniformity of regulation there is bound to arise a conflict between federal and state interests, thus raising the question of jurisdiction of the state or Federal Government. This conflict has given rise to confusion as to which regulation should be followed, state or Federal. It also raises the question whether local regulation is a burden on interstate commerce and as such, unconstitutional.

Federal jurisdiction is based on the power of Congress "to regulate commerce with foreign nations and among the several states." Another form of this power is seen in the exclusive jurisdiction of the Federal Government over all matters of admiralty. United States Constitution, Article 3, Section 8. Almost from the first flight of aircraft, there has been a deep interest shown by the Federal Government. Immediately after the First World War this federal interest was shown in the search for better methods of flight, however, mostly from a military standpoint. This presents one of the great distinctions between air transportation and other forms of transportation. Here, there was federal stimulus from its very inception. This aid was almost entirely responsible for the successful start of commercial aviation.

Historical

The first state regulation began in Massachusetts in 1911. Not much was done by any of the other states until 1922 when the Uniform Aeronautics Act was first promulgated. By 1926 there were safety regulations in all states. The Federal Government stepped in in the interest of uniformity with the Air Commerce Act of 1926. Until 1938 there was no economic regulation by the Federal Government. In 1938, after repeated amendments to the Air Commerce Act, a new form of federal regulation took effect in the Civil Aeronautics Act of 1938. This act was specifically

limited to control over interstate commerce as regards economic regulations. A much broader control was given to the Civil Aeronautics Board under the term "air commerce" in respect to safety regulation. This included "any operation or navigation of aircraft which directly affects or which may endanger safety in interstate, overseas or foreign air commerce." Civil Aeronautics Act of 1938, Section 1-3.

In 1944 three states had statutes for economic regulation of civil aviation, limited to intrastate carriage by air, and specifically omitting those carriers who carried mail. Up to 1949, forty-one states had some sort of regulatory body functioning in the field of civil aviation. About half required licenses for aircraft and airmen; thirty had minimum altitude requirements. For the most part the state aviation officials recognize the need for cooperation to maintain a uniform air law for the country as a whole. This does not solve the quandry, since the main question is whether or not there can be uniform application of the same law. There has not been in the past. A uniform law has been construed and misconstrued in so many ways that one must wonder if it be the same law. The Civil Aeronautics Act of 1938 laid out two separate areas of federal regulation and the limit to which the Federal Government could go in these fields.

Safety Regulation

The jurisdiction of the Federal Government under the Civil Aeronautics Act of 1938 gives the Civil Aeronautics Board control over "air commerce" which includes all those operations that affect the operation of aircraft or may endanger such operation in interstate commerce. "The power of Congress over interstate commerce is plenary and complete in itself, and may be exercised to its utmost extent and acknowledges no limitations other than those prescribed in the Constitution".¹ Authorization for the federal regulatory power by which interstate commerce is affected comes from the Shreveport Rate Case.²

The power of Congress to legislate on that which affects interstate commerce, first enunciated in the Shreveport Case, was recently upheld in Rosenhan v. United States.³ This case showed that safety regulations apply to all who enter an airway. The court said that, since the defendant admitted he was operating in an interstate airway, he was subject to safety regulation even though there was no present danger from his being there at the particular time. Congress sought to eliminate all potential dangers, and therefore it assumed control over all flights within an interstate airway. One case⁴ went even further and said that any flight in United States airspace could be controlled by the Civil Aeronautics Board regulation. Drumm had made one interstate flight and one intrastate flight without a federal license. No airways were entered, the flights were not commercial and no federal facilities were used. This case hinged on the

1. Gibbons v. Ogden, 9 Wheaton 1 (1824).

2. Shreveport Rate Case, 234 U.S. 342 (1914), held that Congress has the power to regulate that which is purely intrastate commerce where it affects interstate commerce.

3. Rosenhan v. United States, 131 F. 2d 932 (C.C.A. 10th 1942).

4. Drumm v. United States, 55 F. Supp. 151 (D.C., Nev. 1944).

application of the Civil Aeronautics definition of "air commerce". The Act gave the Civil Aeronautics Board power to make regulations for flights that "may affect or endanger" interstate commerce. Congress has the power to regulate intrastate commerce where it affects interstate commerce, and its occupation of the field gives the Federal Government exclusive regulatory control over those phases upon which it has acted. ¹ Any state regulation which conflicted with federal regulation would be an unconstitutional burden on interstate commerce. ² If the subject of the regulation requires uniformity among the states, the power of Congress is exclusive. Regulation of civil aviation would seem to indicate uniformity. If the subject admits of diversity of regulation, a state may regulate until the Congress has occupied the field. ³ There has never been a real test as to whether the state may regulate in this field, since the state aviation officials have endeavored to make all state regulations conform to the federal regulations. No individual has been willing to test the jurisdiction of the Federal and state regulatory areas in regard to safety regulations. The Rosenhan and Drumm cases, supra, settled the matter by use of the theory that interstate commerce was "affected". But no real test ⁴ has yet been made of the police power of the state in regard to such things as minimum safe altitudes around airports.

With the advent of the omni-range there seems to be little of the United States which will not be subject to the safety regulations of the Civil Aeronautics Administration, since the entire United States will then be one airway and there can then be no flights which are not in a federal airway. That these state laws are a burden on interstate commerce is obvious, but are they an unreasonable burden so as to make them unconstitutional? The question remains one of many yet unsettled in civil aviation law.

The fact that a purely intrastate carrier has a mail contract with the Federal Government covers a wide area in which there might have been state regulation but for the carriage of mail. Once a carrier gets a mail contract it must conform to the safety regulations laid down by the Civil Aeronautics Administration as only certified carriers may carry the mail. By sections 1-3 under the definition of "air commerce", a mail carrier is included as one of those carriers subject to air safety regulations. Thus the carrier comes under the federal jurisdiction through the mail contract regardless of the operation, whether interstate or intrastate, and a state may be excluded from regulating a purely intrastate activity.

Uniformity of safety regulations seems desirable, and therefore the exclusion of the states from this field should be the next step of the courts.

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1. International Shoe Co. v. Pinkus, 278 U.S. 261 (1928).
 2. Even though the state has acted in the field first, it will not exclude federal regulation. As Chief Justice Stone said in United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942), "No form of state activities can constitutionally thwart the regulatory power granted by the Commerce Clause to Congress."
 3. In this situation Congress must clearly indicate its intent to occupy the field. Missouri Pacific Ry. Co. v. Norwood, 283 U.S. 249 (1930). When expressed clearly, the state regulation ceases. Chicago, Rock Island & Pac. R.R. Co. v. Hardwick Farms Elevator Co., 266 U.S. 426 (1913).
 4. In a New York case (The People of the State of New York v. Katz) the New York City minimum safe altitude regulations were upheld as not placing an unconstitutional burden on interstate commerce. 1 Avi. 272 (1948).

It is generally recognized that the Federal Government should have exclusive jurisdiction over air transportation. The difficulty in the past has been just how it was to be obtained. J. C. Cooper in an article in Journal of Air Law and Commerce¹ considered the Causby case² as giving the Federal Government exclusive jurisdiction over airspace; that this decision considered navigable air space as within the public domain is the view of the writer of that article. Cooper was in favor of federal control of airspace. He cited the decision in United States v. California,³ where the Causby case was cited, to show that the United States had control of the area inside the three-mile limit.

It should be noted that there is a manifest difference between sovereignty in the air and the property rights of the landowners beneath the airspace. The Federal Act does not take away any of the property rights which are exclusively subject to the police power of the state. These rights should not be confused with the power of the Federal Government to regulate in the public interest the use of the air space over the whole country.

Bogert, in Problems in Aviation Law, 1921, suggested that jurisdiction could be acquired under the admiralty clause of the Constitution which gives the Federal Government exclusive jurisdiction over admiralty matters. Others would apply the theory that various types of state regulation place a burden on interstate commerce and are therefore unconstitutional. They show this by a breakdown of the different types of burdens: Physical Burden, as exemplified by the state requirement of safety appliances in Southern Railway v. United States;⁴ Financial Burden, as shown by the Minnesota Rate Case⁵; Administrative Burden, as shown in the Atlantic & Pacific Stores v. Stahl⁶, where it was held that a state may not require, for interstate carriers or those affected with interstate commerce, certificates of convenience and necessity. The report of the American Bar Association⁷ in 1922 expressed the opinion that there would be no need for a Federal Constitutional Amendment to give the Federal Government exclusive jurisdiction over airspace. They expressed the feeling that all that was needed was more federal legislation and the field would be occupied to the exclusion of the states.

Another theory supported by Wigmore is that treaties will give the United States exclusive jurisdiction. The Pan American Convention on Commercial Aviation, signed in 1938, required uniformity of aviation safety regulations in each contracting state. Dean Wigmore suggested that this treaty and the decision in the case of Missouri v. Holland⁸ gave the United States Government exclusive jurisdiction over civil aviation. If the United States could get the necessary jurisdiction in no other way, it would seem that by treaty the United States could legislate on matters that are wholly intrastate by the power of the treaty to control the situation. The

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1. 15 Journal of Air Law and Commerce 27.
 2. United States v. Causby, 328 U.S. 256 (1946).
 3. United States v. California, 332 U.S. 19 (1947).
 4. Southern Ry. Co. v. United States, 222 U.S. 20, 27 (1911).
 5. Minnesota Rate Case, 230 U.S. 352 (1913).
 6. Atlantic & Pacific Stores v. Stahl, 36 F. 2d. 260 (1929).
 7. Report on Aeronautics, 47 A.B.A. 413 (1922).
 8. Missouri v. Holland, 252 U.S. 416 (1920).

Missouri case, *supra*, held that when the United States makes a treaty with a foreign country, it will be supreme, and the state regulation of the matter would be superseded thereby.

As suggested by this theory it can be seen that by a bilateral treaty, approved by the United States Senate, the law of aviation of the land could be made uniform to conform with the treaty obligation. This application of the treaty power would appear to be limited to formal treaties approved by the United States Senate. It would not apply to bilateral executive agreements. Congress could, of course, by statute overrule the treaty as it can with any other statute, and the last enactment would be the law.

The power of the Federal Government over foreign commerce comes from the Constitution; it is complete in itself and may be exercised to its utmost extent and acknowledges no limitations other than are prescribed by the Constitution ¹. Uniformity is not necessary ². The power extends to every instrument and agent by which such commerce is carried on ³. However, there can be no regulation of those carriers that never touch the United States.

As the Civil Aeronautics Act only gave power to the Civil Aeronautics Board to control those carriers that fly between the United States and some other country, operations wholly without the United States seem, at first glance, not to be the subject of the safety regulations, since the Federal Government does not have jurisdiction over them. But on a closer examination, there does seem a basis for the employment of the federal power. All aircraft which bear United States registry must secure airworthiness certificates, and the certificates of registry may be used as the basis of jurisdiction as is done in the registry of ships under admiralty. In order to maintain its United States registry an aircraft must have a properly certified pilot and crew. It seems, therefore, that on a failure of the pilot and crew to maintain the proper safety standards, their certificates could be revoked, and the aircraft safety regulations of the United States enforced, even though the aircraft never touched United States territory during its normal operation.

Economic Regulation

The Civil Aeronautics Act of 1938 gives the Civil Aeronautics Board the power to make economic regulations for "air transportation" which is defined in sections 1-10 of the Act to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft". The economic regulations do not include regulation of intrastate activities and neither do they include contract nor private carriers. Carriers which serve as feeder lines are subject to the federal economic regulations. The area of regulation is much smaller than that of "air commerce" to which safety regulations apply.

State enactments have been limited to control over purely intrastate carriage by air, and a number of states attempt little or no regulation in this field. There is little or no doubt but that Congress could take over

1. *Holland v. Lowell Sun Co.*, 315 U.S. 784 (1941).

2. *Currin v. Wallace*, 306 U.S. 1 (1938).

3. *Loronzetti v. American Trust Co.*, 45 F. Supp. 128 (1942).

most of this field if it so desired. ¹ The extent to which regulation may go is seen in the case of Wickard v. Filburn, ² where it was held that the Agricultural Adjustment Act of 1938 applied to a farmer even though his crop never entered the stream of interstate commerce. Justice Jackson said in that case, "even...if activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'."

Since Wickard v. Filburn ³ and United States v. Sullivan, ⁴ there seems little room for state regulation of anything if the Federal Government has acted. These cases held that Congress may regulate the first producer who has nothing to do with interstate commerce right down to the ultimate seller who sells to the actual consumer, both entirely intrastate. These decisions are far reaching and seem to include all phases of business subject to regulation if Congress sees fit, regardless of any connection with interstate commerce. The resulting trend seems to be that Congress may legislate on anything that may have a resulting effect on the national economy, however small the individual case may be; when all these individuals are taken together there can be seen no economic activity which is not subject to regulation. State regulation of rates of carriers passing through the States would be a burden on interstate commerce and discriminatory. Intrastate carriers could be controlled by the Civil Aeronautics Act as affecting interstate commerce. The Civil Aeronautics Board could control purely intrastate operations in this manner. If the Aeronautics Board made a finding that a particular intrastate carrier were placing a burden on interstate commerce because it operated in direct competition with interstate carriers and had an effect on the uniformity of interstate rates, that carrier could be regulated under the doctrine of the Shreveport Case. ⁵ A typical example of this situation exists at present in California. Intrastate carriers are operating between Los Angeles and San Francisco in competition with interstate carriers which are subject to the economic regulations of the Civil Aeronautics Board. These carriers are without control and have undersold the interstate carriers. The California Public Utility Commission cannot decide whether it has authority to regulate these carriers. In the meantime, these carriers are seriously affecting the interstate carriers who have lost considerable business to them. The Civil Aeronautics Board has not sought to regulate these carriers, but it is suggested that it does have the power.

This appears to leave the states free to act only on those areas where Congress has not acted. As far as the Civil Aeronautics Act of 1938 is concerned, it is expressly mentioned therein that Congress regulates interstate, overseas and foreign air commerce only as applied to economics. The Civil Aeronautics Board has therefore regulated only that phase of

1. A state cannot fix rates for transportation which is a part of interstate commerce. Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U.S. 557 (1886).

2. 317 U.S. 111 (1942).

3. *Supra*.

4. 332 U.S. 698 (1948).

5. *Supra*.

intrastate air carriage which connects with interstate carriers. Intra-state carriers have not been the subject of the interstate regulations of the Civil Aeronautics Board; but if these carriers, though operating entirely within one state, should carry United States Mail they come within the regulatory power of the Federal Government (C.A.B.), and the state is excluded from regulating them.

Because of the small net revenues from passenger and freight service a mail contract is very often all that enables a carrier to keep from operating at a deficit. It very often happens that a carrier even though it operated entirely within one state, would accept a mail contract and the resulting federal regulation, just for the financial boost from the Federal Government. Air transportation, still young, has yet to get over its growing pains, and these air mail subsidies have played a large part in its rapid growth and advancement. The very existence of most carriers is now dependent on these subsidies.

Economic regulation of foreign air transportation is limited to those carriers which operate between the United States and a foreign country,¹ but, even if the act included wholly foreign operations, it is doubtful if there could be such regulation on foreign soil. Such rates and their control would be a matter for the countries between which they operated, and for the United States to regulate them would be an infringement on their sovereignty. This is to be distinguished from safety regulation in that the United States registry gives these carriers the right to land; but to carry on a business is something of another sort, as all commerce is subject to the laws and regulations of the admitting country and the carriers would be required to conform to them. Economic regulation of carriers operating wholly without the United States is therefore not authorized by the Civil Aeronautics Act, and it does not seem to be capable of enforcement even if it were included in the act.

Conclusion

Safety regulations apply to all mail carriers in interstate or foreign commerce, any operation within a civil airway, any operation which affects or may endanger interstate, overseas or foreign air commerce. Almost all the field of safety regulation seems to have been taken over by the Federal Government. The area of airport safety and minimum altitudes is still in doubt. There are no federal decisions on these points yet. It is essential to the air transport industry that there be uniformity of safety regulation. The industry is of such a nature that even its intrastate aspects have an interstate flavor. The national interest in the industry and in national defense indicate federal regulation. The wholly foreign operations of United States registered carriers can be controlled through the medium of their registry in that they must be certified in order to obtain this status. Conformance to Civil Aeronautics Board standards may thereby be enforced.

In the field of economic regulation there has been but occasional state effort at control. Even if the states did attempt to regulate, it is doubted that they would be in a position to effectuate many controls because, as a

1. Civil Aeronautics Act, Section 1 (21).

matter of practical policy, very few states could afford to set up the necessary machinery for regulation. The Federal Government has been limited by Congress in its control to those activities which are interstate or feed interstate lines, foreign carriers operating between the United States and another country, and those carriers which engage in the carriage of mail, regardless of their intrastate character. Congress could expand this regulation to cover all those intrastate carriers which affect interstate commerce and this must of necessity include all carriers with very few exceptions. An attempt at economic regulation of United States carriers operating entirely without the United States would be an encroachment on the sovereignty of foreign nations, and therefore impractical.

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