ILLINOIS POLLUTION CONTROL BOARD
January 26, 1987

IN THE MATTER OF:	)	
	)	
PUBLIC AIRPORT NOISE	)	
REGULATIONS,	)	
35 ILL. ADM. CODE	)	RES 87-1
PART 904 (DOCKET R77-4)	)	

RESOLUTION OF THE BOARD (by J. Marlin):

In its Proposed Opinion and Order of April 10, 1986, the Board proposed to adopt regulations limiting noise emissions from public airports. These proposed regulations were published in 10 Ill. Reg. 6907, April 25, 1986. Two public hearings were held on October 10 and 20, 1986, at which testimony and exhibits were presented, and 40 written comments were received during the comment period; this comment period extended through December 15, 1986 pursuant to written requests from various hearing participants.

During this first notice period, the City of Chicago, in Public Comment 167, brought to the Board's attention a decision which was rendered in October, 1986 by the Illinois Appellate Court for the Second District. Bryski v. City of Chicago, No. 2-85-0140, October 15, 1986. Application has been made to the Illinois Supreme Court for leave to appeal Bryski v. City of Chicago, No. 64397. This application is currently pending before the Supreme Court; Board staff has been advised by the Court Clerk that decision is not expected prior to the first week of February, 1987.

In its Proposed Opinion of April 10, 1986, the Board had found that "neither the supremacy nor the interstate commerce clause of the United States Constitution preempts the Board from regulating airport noise in the manner suggested by the Attorney General" Id. at 25. This determination was reached after an analysis of relevant federal case law, the primary cases upon which the Board had relied being City of Burbank v. Lockheed, 411 U.S. 624 (1973); San Diego Unified Port District v. Gianturco, 651 F.2d 1306 (9th Cir. 1981); and Air Transport Assn. v. Crotti, 389 F. Supp. 58 (N.D. Cal 1975). The Board placed considerable reliance on the "proprietor's exception" to the otherwise total federal preemption of airport noise, which exception was referenced in footnote 14 of the Burbank Opinion, 411 U.S.635 n.14 and discussed in Crotti and Gianturco. The Board's proposed rules were crafted to require governmental entities who are airport proprietors to exert all measures within their power, and not otherwise pre-empted by federal law, to abate the noise generated by their airport facilities.

As of the writing of the Board's April, 1986 Proposed Opinion, no Illinois court decision had squarely addressed the proprietor's exception. The Illinois Appellate Court for the First District had three times addressed the pre-emption issue as it related to attempts by local governments to impose controls affecting airports of which they were not the proprietors. LaSalle Natl. Bank v. County of Cook, 34 Ill. App. 3d 264, 340 N.E.2d 79 (1st Dist. 1975) (upholding ordinance limiting building heights within two miles of designated airports); County of Cook v. Priester, 22 Ill. App. 3d 964, 318 N.E.2d 327 (1st Dist. 1974) (invalidating zoning ordiance imposing aircraft weight limitations), aff'd. without reaching supremacy clause issue, 62 Ill.2d 357, 342 N.E.2d 41 (1976); and Village of Bensenville v. City of Chicago; 16 Ill. App. 3d 733, 306 N.E.2d 562 (1st Dist. 1973).

In Bensenville, several communities surrounding O'Hare Airport alleged that aircraft operations from the airport emitted noise and air pollution over the communities so as to constitute a public nuisance. Bensenville therefore sought an injunction prohibiting Chicago from 1) expanding the airport in such a manner as to expose the communities to higher noise levels, 2) allowing the airport's facilities to be utilized by any aircraft which emit noise beyond a certain level and 3) permitting any aircraft which produce noise in excess of a certain level to utilize airport facilities unless such aircraft was in use prior to the date of the requested relief.

Remarking that the "real thrust" of the complaint was to prohibit aircraft while in flight over the communities from producing noise in excess of prescribed limits, the court found the matter before it was controlled by the Burbank decision (which was then some six months old). After extensively quoting that decision, the court held that under the Federal Aviation Act, as amended by the Noise Control Act of 1972, the federal government had, "so occupied the regulation of aircraft noise and air pollution as to preempt any state or local action in that field." 306 N.E.2d at 566. The court did not quote or otherwise consider footnote 14.

One year later, in Priester, the court held that "the level of federal regulation of air commerce by the Federal Aviation Agency (sic) is so pervasive as to deprive other governmental bodies of the power to act [to regulate airport noise]"; 318 N.E.2d at 331. However, the court specifically distinguished Airport Owners and Pilots Assn. v. Port Authority of New York, 305 F. Supp. 93 (E.D.N.Y. 1969), which was cited by the County for the proposition that "a local authority may make regulations which have the effect of curtailing activities not forbidden by federal regulation"; the court stated that the case was not applicable "because there the power sustained was not the result of operation of police powers, but of a proprietary power of the

Port Authority". 318 N.E.2d at 331. The court implied, although it did not explicitly give, recognition of a proprietor's exception.

As aforementioned, in LaSalle National Bank the Supreme Court did not reach the appellate court's handling of the preemption/proprietor's exception issue, as this was not necessary to disposition of the case. In its decision, the appellate court noted that in Priester it had held that "the federal government had essentially pre-empted the field of air commerce which was affected by the county's weight restriction" there at issue, but went on to state that Priester did not apply to the building height ordinance at issue in LaSalle. 340 N.E.2d at 87.

Thus, following sound principles of case construction and stare decisis,* in the absence of controlling Illinois case decisions to the contrary, the Board was free to construe the Burbank proprietor's exception in light of the rationale expressed in various non-binding federal precedents argued to the

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*As defined and described in Black's Law Dictionary 1577-1578 (rev. 4th ed. 1968), stare decisis is a legal principle requiring courts, and administrative agencies, such as the Board:

> To abide by, or adhere to, decided cases....Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same....Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy....
>
> The doctrine is limited to actual determinations in respect to litigated and necessarily decided questions, and is not applicable to dicta or obiter dicta. [citations omitted].

Obiter dicta is defined as:

> remark[s] made, or opinion[s] expressed, by a judge in his decision, upon a cause, 'by the way', that is, incidentally or collaterally, and not directly upon the question before him or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Id. at 1222.

Board by the various participants in this proceeding. However, in the Bryski decision, the Second District Appellate Court specifically addressed the "proprietor's exception" issue.

Bryski involved a class action suit brought in 1983 by various residents of Du Page County against the City of Chicago, and six airlines which lease terminals at O'Hare for money damages resulting from noise, vibration and air pollution. The circuit court dismissed plaintiffs' inverse condemnation count without prejudice, but dismissed with prejudice seven other counts which asserted various other legal theories for recovery.

On appeal, the plaintiff-citizens argued five issues: (1) Federal law does not preempt nuisance or trespass claims against airport proprietors, (2) the Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat. 1983, ch. 15, par. 1-101, et. seq.) does not bar recovery from the City, (3) the airlines are joint venturers or co-proprietors with the City in the operation of O'Hare, (4) plaintiffs' complaint adequately stated a cause of action for trespass and nuisance, and (5) the circuit court erred in dismissing plaintiffs' counts requesting a mandatory injunction ordering the City to issue obligations to cover the damages sought. The Appellate Court for the Second District addressed the first issue only, finding that federal law does preempt nuisance and trespass claims against airport proprietors, leaving the action for inverse condemnation as the plaintiffs' only proper remedy. Slip op. at 15-16.

In reaching this result, the Second District analyzed the various major airport noise cases the Board discussed or mentioned in its proposed airport noise opinion, including the U.S. Supreme Court's decisions in Burbank and Griggs v. Allegheny, 369 U.S. 84 (1962), the Seventh Circuit's decision in Luedtke v. Milwaukee, 521 F.2d 387 (7th Cir. 1975), the California District Court's decision in Crotti, and the Illinois Appellate Court's decisions in Priester and Bensenville. The key sentences in the Bryski Opinion are as follows:

> "Despite plaintiffs' arguments to the contrary, [footnote 14 to the Burbank decision] is not a positive recognition of a "proprietorship exception," but merely an expression of the [U.S. Supreme] court's refusal to consider the issue at that time.
>
> We disagree with those cases from other jurisdictions which hold that airport proprietors may be held liable for nuisance and trespass and adopt the reasoning of the United States Court of Appeals for the Seventh Circuit, as expressed in Luedtke v. County of Milwaukee (7th Cir. 1975), 521 F.2d 387, which stated that the proprietor of a

> county-owned airport and federally certified airlines operating out of that airport could not be charged with negligence or creating a nuisance to the extent they conformed with Federal laws and regulations. This holding fully incorporates the Supreme Court's ruling in Burbank that airspace management has been federally preempted. ...
>
> We find support for our conclusion in [Priester and Bensenville] [citations omitted], in which the courts noted the pervasive nature of Federal regulation over air commerce. ...Plaintiffs' current actions are based solely on the inflight operation of aircraft arriving at and departing from O'Hare in full compliance with Federal regulations. Plaintiffs do not predicate their complaint on ground noise or pollution and do not allege in their complaint that the defendant city or airlines have violated Federal regulations in the operation of the airport.
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> As plaintiffs' claims in nuisance and trespass are based completely upon the inflight operation of aircraft, they necessarily interfere with the Federal regulation of airspace management and are preempted by Federal law under Burbank. We hold the circuit court correctly dismissed plaintiffs' complaint against the city, as O'Hare's proprietor, and the airlines, as co-proprietors, for nuisance and trespass based upon the noise, vibrations and pollution generated by O'Hare air traffic." Slip op. at 15-16

The Board notes that in crafting its proposed airport noise regulations, the Board has recognized the ability of the Federal Aviation Administration (FAA) to veto various noise abatement strategies which do not deal solely with ground noise. Examples of such strategies, which are subject to FAA veto, are airport curfews and changes in approach or take-off flight paths. Implementation of these strategies in a particular situation could adversely affect air safety or the free flow of interstate commerce, interests which are within the FAA's jurisdiction. It was not the Board's intent to "preempt" the FAA's jurisdiction in these areas, but rather to compel the airport proprietor to interact with the FAA to determine the limits of what can and cannot be safely and practically done to abate the effects of the noise from airborne jets at specific airports. The incentive for such interaction would be either to achieve compliance with the statewide noise standard, or to amass sufficient information to persuade the Board to set an "adjusted standard" for a particular airport conditioned on that airport's continued implementation of all in-flight abatement measures permitted by the FAA, as well as

controls of noise generated on the ground. To the extent that Bryski could be read as precluding imposition by the state of any duties, including consultation with the FAA, on the airport proprietor relating to in-flight noise beyond payment of an inverse condemnation award, the major component of the Board's proposed rules might be prohibited.

The Attorney General, in P.C. 176, asserts that Bryski is "consistent with the Board's stated legal basis for the proposed regulatory scheme". However, the Board believes that the sweeping language of the Second District Bryski decision could be quite readily interpreted under the principle of stare decisis as precluding the Board from proceeding with those portions of the proposed Airport Noise Regulations which compel airport proprietors to consider implementing measures to abate inflight noise apart from those required by the federal government. Such an interpretation would require the Board to determine whether or how to proceed with the balance of the proposal.

It is the opinion of the Board that the potential statewide regulatory ramifications occasioned by the language of the Bryski decision should be brought to the attention of the Illinois Supreme Court, so that it may make a fully informed decision as to whether the Bryski decision merits review. The Board accordingly petitions its attorney, the Attorney General, to take all appropriate steps to "intervene" as a "friend of the court" on the Board's behalf in this matter, and to advocate the Board's interest in a fully informed Supreme Court decision.

The Board notes that any resolution of this basic legal issue by the Supreme Court at this point in the R77-4 proceeding could result in substantial economies of time and resources for all concerned. The Board recognizes the inevitability of appeal of its actions in this docket, and further recognizes that the appellate process could be lengthy. If the Bryski decision is narrowed, even if appeals are not avoided, the scope of such appeals could be greatly reduced; the earlier a decision is reached, the earlier any lawful noise abatement regulations can be enforced by the state.

Finally, until any and all appellate review of Bryski is completed, the Board will take no further action in this docket.

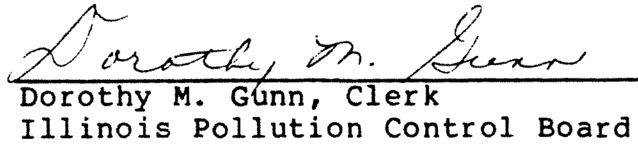
Given the high degree of public interest in this proceeding, the Clerk is directed to cause service of copies of this resolution on all 200-odd persons on the R77-4 notice list, for the purposes of advising them of the status of this matter.

IT IS SO RESOLVED.

J. Anderson concurred.

J. T. Meyer voted present.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Resolution was adopted on the 26th day of January, 1987 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board