

ILLINOIS POLLUTION CONTROL BOARD
December 3, 1987

IN THE MATTER OF:)
)
PUBLIC AIRPORT NOISE REGULATIONS) R 77-4
35 ILL. ADM., CODE PART 904)

ORDER OF THE BOARD (by J. Marlin):

The public comment period concerning these proposed rules adopted April 10, 1986 had initially been closed by the Board as of December 15, 1986. It was, however, reopened by the Board for further argument concerning Bryski, et al. v. City of Chicago, et al., 148 Ill. App. 3d 556, 499 N.E. 2d 162 (2d Dist. 1986), a decision by the Illinois Appellate Court which relates to the Board's authority under federal and state law to regulate airport noise. The last argument concerning this case was ordered to be filed by April 22, 1987, and the comment period was again closed. (See RES 87-1, January 26, 1987, and Orders of February 19 and April 16, 1987.)

On November 2, 1987, the Suburban O'Hare Commission (SOC) filed a "motion to defer rulemaking" which essentially requests that the Board stay these proceedings until entry of a final decision in a case pending in the United States Court of Appeals for the Seventh Circuit, Lawrence C. Bieneman, et al. v. City of Chicago, et al., No. 87-2077. On November 3, 1987 SOC supplemented the motion by filing copies of the District Courts decision in Bieneman, as well as certain appellate briefs filed in the case. There has been only one response to this motion, that filed by the Air Traffic Association of America (ATA) on November 16, 1987. ATA alternatively requests that the motion be dismissed or denied.

In support of its motion, SOC recites that the Illinois Appellate Courts decision in Bryski relied, in large part, on the decision in Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975), decided by the United States Court of Appeals for the Seventh Circuit, which the Bryski court felt bound to follow. SOC asserts that the Bieneman case concerns many of the same issues which were before the courts in both Bryski and Luedtke.

The United States District Court, in the Bieneman case, held that it was bound by the Luedtke decision. In the Bieneman appeal, Plaintiff-Appellant Bieneman has requested that the Seventh Circuit reverse the decision in Luedtke. SOC argues that, should the Bieneman case result in a reversal or abandonment of the Luedtke decision, the Bryski decision would no

longer warrant the consideration of any additional action by the Illinois Pollution Control Board.

SOC did not provide an estimated decision date, noting only that the Bieneman appeal has been fully briefed, and that it is anticipated that a date for oral argument will be set shortly.

In response, ATA asserts that:

"There is no reasonably predictable basis to surmise that the Bryski decision could be changed as the Motion tries to suggest. The Board's deliberations should go forward in the normal course under the authority of Bryski, and of other judicial authorities on federal preemption of the aviation field.

The SOC Motion refers only to Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975). It ignores that the decision in Bryski is also based on prior Illinois decisions in County of Cook v. Priester, 22 Ill.App.3d 964 (1st Dist. 1974) and Village of Bensenville v. City of Chicago, 16 Ill.App.3d 733 (1st Dist.). Whatever might flow from some future reading of Luedtke, the determination of federal preemption in Bryski has other foundation in the law of Illinois.

In view of the length of time the proceeding has been pending and its posture in respect of statutory requirements governing agency rulemaking, all considerations of sound and efficient agency administration require that SOC's request for an indeterminate delay of the Board's processes for the most speculative of reasons be denied.

The Board is persuaded by ATA's reasoning. Even assuming that the result of the Bieneman case -- after any appeal to the U.S. Supreme Court -- is reversal of the Luedtke decision, the Illinois court's rulings in Bryski remain binding on the Board pursuant to the principles of stare decisis unless and until they are modified in a subsequent case. Thus, the Board would be deferring action for two indeterminate time periods: the period during which the federal courts take action in Bieneman, and the period during which some unknown case raising Luedtke issues makes its way through the Illinois Appellate and Supreme Court. To defer action in this docket for what could well be several years would be unfair to the many participants in this action, and an unsound use of the Board's discretion. In the event that

any legal or other developments occur subsegeunt to the Board's actions in this docket, any person is free to file a new petition for rulemaking before the Board pursuant to Section 27 of the Environmental Protection Act for consideration of such developments.

The motion to defer rulemaking is denied. The Board will continue deliberations in this matter.

IT IS SO ORDERED.

J. T. Meyer abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 3rd day of December, 1987, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board