# Airport Perimeter Rules: An Exception to Federal Preemption

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## I. INTRODUCTION

Any prospective airline passenger who has attempted to book a non-stop flight between the west coast and Washington, D.C.'s convenient National Airport has discovered that no such flight is possible. The reason lies in the phenomenon of airport perimeter rules.

Airport perimeter rules establish maximum permissible distances of non-stop flights into and out of a given airport. These rules serve as a means of controlling airport growth. Specifically, perimeter rules: 1) control increasing air traffic at a given airport; 2) reduce ground congestion by catering to business customers who move through the airport more quickly, with less luggage, and with fewer "meeters and greeters" than the leisure traveler; 3) maintain the airport as a short- and medium-haul facility by diverting long-haul traffic to a nearby airport, thus easing the burden on the parking lots, baggage handling, terminals, and other facilities; and 4) assure full utilization of a nearby, less convenient airport.[1] The traditional promulgating authority for airport perimeter rules is the airport proprietor.

Perimeter rules tend to be controversial because they represent an encroachment by state or local authorities into the federally-preempted area of aviation. Two related issues arise from this apparent head-on confrontation. First, may a local airport proprietor impose a perimeter rule, limiting the distance of permissible routes into and out of a given airport, in view of Section 105(a)(1) of the Airline Deregulation Act of 1978 ("ADA") which prohibits states and interstate agencies from regulating the "rates, routes, or services of any carrier?"[2] Second, do the "proprietary powers and rights" of airport operators preserved by Section 105(b)(1) of the ADA include the power to enact airport perimeter rules?

## II. FORMAL AIRPORT PERIMETER RULES AT NATIONAL AIRPORT, LAGUARDIA AIRPORT, AND LOVE FIELD

### *A. NATIONAL AIRPORT*

Beginning in the 1950's, air carriers serving Washington, D.C.'s National Airport ("National") filed an agreement with the Civil Aeronautics Board ("CAB") to a 650-mile perimeter rule on non-stop flights to and from National. Seven cities, ranging in distance between 650 and 1,000 miles from National, were permitted to maintain non-stop service operat-

1. *See* Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J., 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1467 (1988) [hereinafter *Western*].

2. 49 U.S.C. §§ 1301-1542 (1982); § 105 of the ADA is codified at 49 U.S.C. § 1305 (Supp. 1987).

ing as of December 1, 1965.[3] Although the agreement expired on January 1, 1967, the air carriers continued to abide by its terms until May, 1981. At that time, three carriers—American Airlines, Pan American Airways, and Braniff International—announced plans to fly non-stop to National from cities located outside the perimeter. The Federal Aviation Administration ("FAA") viewed the perimeter rule as a means of controlling increasing traffic and delays at National.

In 1976, as a result of a lawsuit brought against the U.S. Department of Transportation ("DOT"), the FAA, and various airlines by a coalition of citizen groups to abate noise and air pollution at National, the Fourth Circuit Court of Appeals ordered the FAA to prepare an environmental impact statement ("EIS") concerning its operation of National and nearby Dulles International Airport ("Dulles").[4] In the supplementary draft EIS prepared in 1980, the FAA first discussed the possibility of a flat 1,000-mile perimeter rule to replace the existing 650-mile perimeter rule.

In August, 1980, the FAA proposed a flat 1000-mile perimeter rule regulation as part of Secretary of Transportation Goldschmidt's amended Metropolitan Washington Airport Policy.[5] The regulation would have abolished the 650-mile perimeter rule and its exceptions, and was to take effect on January 1, 1981. However, Congress stepped in and the new policy, including the 1,000-mile perimeter rule, was delayed.

On November 27, 1981, as part of Secretary of Transportation Drew Lewis' updated policy, the DOT promulgated a perimeter rule regulation similar to the one proposed in 1980.[6] This regulation superceded an interim rule maintaining the existing 650-mile perimeter, which the DOT had ordered the FAA to adopt on May 8, 1981. The interim rule prevented the inauguration by American, Pan American, and Braniff of their proposed non-stop flights to National from points beyond the perimeter.

National's 1,000-mile perimeter remained in place until 1986 when Congress expanded the perimeter to 1,250 miles as part of the Metropolitan Washington Airports Act of 1986.[7] Under this Act, the FAA was au-

3. These "grandfathered" cities were: Minneapolis, St. Louis, Memphis, Miami, Orlando, Tampa, and West Palm Beach. Metropolitan Washington Airports, 46 Fed. Reg. 58,046 (1981).

4. Virginians for Dulles v. Volpe, 541 F.2d 442 (4th Cir. 1976).

5. 45 Fed. Reg. 62,398 (1980).

6. "This [the 1,000-mile perimeter rule] will change the existing regulation, which prohibits nonstop operations to and from National beyond 650 miles except for seven cities located between 650 miles and 1,000 miles away. . . . The perimeter would maintain the long-haul nonstop service at Dulles [Dulles International Airport] and BWI [Baltimore-Washington International Airport] which otherwise would preempt shorter haul service at National. This is most consistent with the roles proposed for National Airport as a short/medium-haul facility and for Dulles as an unrestricted facility available for all types of operations." 46 Fed. Reg. 58,045 (1981).

7. Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, §§ 6001-6012, 100 Stat. 3341, 3341-3376 (1986) (codified at 49 U.S.C. §§ 2451-2461 (Supp. 1987)). National's new perimeter rule reads, "[a]n air carrier may not operate an aircraft nonstop in air transporta-

thorized to lease National to the newly-formed Metropolitan Washington Airports Authority. In essence, the Act placed National on par with other major airports by giving proprietary control over the airport to a local governmental authority. National's perimeter rules have been successful in preserving the short- and medium-haul nature of National, in controlling increasing traffic, and in stimulating growth at lonely and under-utilized Dulles airport, by diverting long-haul traffic there.

### *B. LaGuardia Airport*

An airport perimeter rule similar to National's is in effect at New York City's LaGuardia Airport ("LaGuardia"). LaGuardia is part of a multi-airport system in the New York City area operated by the Port Authority of New York and New Jersey ("Port Authority"), as part of a congressionally-approved compact between the States of New York and New Jersey.[8] In addition to LaGuardia, the Port Authority operates Kennedy International Airport ("Kennedy") and Newark International Airport ("Newark"). Of the three major airports, LaGuardia is both closest to New York City and smallest.[9]

Between the mid-1950's and 1984, LaGuardia operated with an informal perimeter rule prohibiting non-stop operations in excess of 2,000 miles. The informal perimeter rule was adhered to by all of the air carriers operating at LaGuardia for nearly 30 years.

On September 13, 1984, however, after Air Canada Airlines threatened to violate the informal perimeter rule, the Port Authority Commissioners adopted a formal perimeter rule for LaGuardia, effective November 1, 1984. This perimeter rule limits non-stop air carrier operations, except on Saturdays when there is little congestion, to points within 1,500 miles of LaGuardia. Denver, Colorado, which is approximately 1,638 miles from LaGuardia, was grandfathered because continuous non-stop service between LaGuardia and Denver had existed since October, 1981, and because this service constituted a significant portion of LaGuardia operations.[10]

In support of its belief that business travelers cause less airport congestion than do vacationers, the Port Authority instituted the perimeter

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tion between Washington National Airport and another airport that is more than 1,250 statute miles away from Washington National Airport." 49 U.S.C. § 2461 (Supp. 1987).

8. N.Y. Unconsol. Laws § 6631 *et seq.* (McKinney 1979 and Supp. 1986); N.J. Stat. Ann. §§ 32.1-35.1 *et seq.* (West 1963 and Supp. 1986).

9. LaGuardia has 662 acres while Newark has 2,300 acres and Kennedy 4,930 acres. Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 2, Delta Air Lines v. Port Auth. of N.Y. & N.J., 108 S. Ct. 448 (1987) (No. 87-333).

10. Western, *supra* note 1, at 953.

rule to encourage the airport's use by business travelers, and the use of Newark and Kennedy by leisure travelers.

### C. LOVE FIELD

On February 18, 1980, Congress approved a perimeter rule for Love Field in Dallas, Texas, as part of the International Air Transportation Competition Act of 1979.[11] The "Love Field Amendment" prohibits interstate passenger service to or from Love Field; however, three exceptions are provided for. The first exception, which serves as the perimeter rule, permits turnaround service between Love Field and points inside the four states contiguous to Texas: Louisiana, Arkansas, Oklahoma, and New Mexico. The other exceptions provide for continued operation of interstate charter flights to and from Love Field (limited to ten flights per month) and interstate commuter service by airlines operating aircraft having a capacity of 56 passengers or less.

The Amendment imposes certain conditions on the airlines that are permitted to serve Love Field. First, air carriers that provide through service or ticketing with another carrier are not permitted to operate interstate service from Love Field. Second, those carriers offering service between Love Field and points in the four contiguous states are not permitted to offer or hold out service to and from points beyond the four contiguous states. Third, only turnaround service is permitted; flights operating to and from Love Field may not operate to points beyond the four contiguous states. This condition, for example, does not prevent a Love Field carrier from operating flights between points within the four contiguous states and points in other states beyond; however, it does prevent such a carrier from operating one-stop flights between Love Field and points beyond the four contiguous states through points located within the four contiguous states.

Near the conclusion of the Amendment's legislative history, the authors noted that Sections 105(a) and (b) of the ADA apply to the authority to serve Love Field on interstate flights authorized by the Amendment.[12]

## III. THE AIRLINE DEREGULATION ACT OF 1978 AND FEDERAL PREEMPTION

In 1958, the Federal Aviation Act of 1958 ("FAA Act") granted the

11. International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35 (1980).

12. Prohibition of Certain Flights Into and From Love Field, Texas, Pub. L. No. 96-192, 1980 U.S. CODE CONG. & ADMIN. NEWS (94 Stat.) 86.

FAA power to regulate U.S. navigable airspace.[13] The Act established complete and exclusive federal sovereignty over the national airspace. The FAA employs this power to ensure aircraft safety and the efficient utilization of airspace, by prescribing air traffic rules and regulations to protect persons and property on the ground.

Beginning in 1978, forty years of pervasive federal economic regulation of commercial aviation came to an end when the ADA established a thorough program of economic deregulation of the airline industry. The ADA, over a seven-year period, phased out CAB control over air carrier rates, routes, and service. While federal economic regulation was eliminated, the FAA retained its responsibility for managing U.S. airspace.

The federal statute dealing with the powers of airport proprietors relative to those of the federal government is Section 105, which amended the FAA Act. Section 105(a)(1) of the ADA provides that:

> [n]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.[14]

At the same time, however, the ADA preserved the "proprietary powers and rights" of local entities operating airports. Section 105(b)(1) provides:

> Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.[15]

An airport authority's proprietary function permits it to enact regulations benefiting citizens who live near the airport, such as airport noise regulations or airport curfews. Such powers are analogous to the powers that a store owner would need to run his business, such as setting store hours. In contrast, governmental (police) powers permit the airport authority to promote the public welfare generally. A municipalities' obligation for the health, safety, or general welfare of the public is performed using such powers.

## IV. Airport Proprietor Regulations as Exceptions to Federal Preemption of Aviation

An important issue in the perimeter rule case law is the extent of an

13. Federal Aviation Act of 1958, as amended by Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

14. 49 U.S.C. § 1305(a)(1) (Supp. 1987).

15. 49 U.S.C. § 1305(b)(1) (Supp. 1987).

airport operator's proprietary powers and rights. Are such powers and rights limited narrowly to include only airport noise regulations, for example, or have courts permitted airport proprietors to regulate in areas other than noise?

Prior to 1973, local governments and airport proprietors attempted to reduce aircraft noise through regulations based upon their police and proprietary powers.[16] However, in 1973, the U.S. Supreme Court held that airport proprietors could enact reasonable noise regulations only through their proprietary powers. In *City of Burbank v. Lockheed Air Terminal, Inc.*,[17] Burbank adopted an ordinance pursuant to its police powers, which prohibited jet aircraft from taking off from Hollywood-Burbank Airport between 11:00 P.M. and 7:00 A.M. The Court held the ordinance invalid because Congress had preempted state and local control over aircraft noise. However, because Burbank was not the airport's proprietor, the Court expressly limited its preemption holding to state and local exercise of the police power. In an oft-quoted footnote 14, the Court stated:

> The letter from the Secretary of Transportation also expressed the view that "the proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport*, from issuing regulations or establishing requirements as to the permissible level of [aircraft] noise. . . . Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory."[18]

Thus, the Court expressly left open the question of whether there was any limitation on an airport proprietor's ability to regulate noise or impose other non-discriminatory regulations on the operations of an airport by utilizing its proprietary powers.

In 1975, a federal district court upheld the right of airport proprietors to determine the type of air service and the types of aircraft they wished to have operating from their airports. The airport proprietor was allowed to determine the most efficient and effective method to limit noise in compliance with a state statute requiring airports to limit the noise exposure of surrounding residential communities.[19] The proprietor's power to implement reasonable noise control procedures was a consequence of its exposure to liability for damage caused by airport noise.

In 1984, the Second Circuit Court of Appeals upheld a noise regulation which limited the *cumulative* level of noise exposure at an airport,

16. *See generally* Rockett, *Airport Noise: Did the Airport Safety and Noise Abatement Act of 1979 Solve the Problem?*, 52 J. AIR L. COM. 499 (1986); Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 747 (1979); Note, *Airports: Full of Sound and Fury and Conflicting Legal Views*, 12 TRANSP. L.J. 325 (1982).

17. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

18. *Id.* at 635.

19. Burbank Air Transp. Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975).

thus expanding the type of noise regulation that could be enacted by an airport proprietor. This method of regulating noise pollution is in contrast to the more restrictive and traditional form of noise regulation which merely monitors the decibel level of takeoffs and landings.[20] Other courts as well have acknowledged that airport proprietors may enact reasonable noise control regulations.[21]

Case law subsequent to the *Burbank* opinion has expanded the airport operator's proprietary powers beyond the realm of noise regulations; the courts have validated several other proprietor-imposed regulations. For example, a U.S. district court upheld the Port Authority's imposition of a takeoff fee as a means of controlling airport growth. A twenty-five dollar fee was exacted from each aircraft landing or taking off from each of the three major New York area airports during certain peak traffic hours, as a means of reducing airport congestion.[22] The fee was found not to actually exclude any general aviation aircraft from the three major airports and was therefore declared to be "valid as a reasonable, if not ideal, method of effecting the most efficient utilization of air space and the air time involved."[23]

In 1984, a U.S. district court recognized the power of an airport proprietor to regulate airport capacity as a means of controlling congestion.[24] The airport proprietor's authority to deny an air carrier access to an airport already filled to capacity was upheld as a means of allowing the proprietor sufficient time to develop reasonable rules to allocate ground space and takeoff and landing slots. The judge pointed out: "The legislative history is unmistakably clear that Congress did not intend that the preemptive force of 49 U.S.C. § 1305(a)(1) [ADA § 105(a)(1)] would interfere with long recognized powers of the airport operators to deal with noise and other environmental problems at the local level."[25] Local airport proprietors could issue reasonable, nonarbitrary, and nondiscriminatory rules defining permissible noise levels or limiting other dangers created by aircraft using the airport.

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20. Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J., 727 F.2d 246 (2d Cir. 1984).

21. Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981); British Airways Bd. v. Port Auth. of N.Y. ("Concorde II"), 564 F.2d 1002 (2d Cir. 1977); and Nat'l Aviation v. City of Hayward, Cal., 418 F. Supp. 417 (N.D. Cal. 1976).

22. Aircraft Owners & Pilot's Ass'n v. Port Auth. of N.Y., 305 F. Supp. 93 (E.D.N.Y. 1969).

23. *Id.* at 107.

24. Midway Airlines v. County of Westchester, 584 F. Supp. 436 (S.D.N.Y. 1984) [hereinafter *Midway*].

25. *Id.* at 440 n.18 (quoting 124 CONG. REC. 37,419 (1978) (Statement of Sen. Ted Kennedy)).

## V. THE PERIMETER RULE CASES

### *A. THE CITY OF HOUSTON V. FAA*

The first court of appeals decision to rule on the issue of whether an airport perimeter rule is a valid exercise of an airport proprietor's authority was *City of Houston v. FAA*.[26] Houston, located beyond National's 1,000 mile perimeter, filed a petition for review of the perimeter rule on September 22, 1980. Houston essentially argued that the FAA's perimeter rule violated the terms of the Administrative Procedure Act, that it had no rational basis, and that the FAA lacked the statutory authority to promulgate such a rule.

The Court, after finding that the FAA and DOT acted reasonably and in good faith, held that the perimeter rule not only had a rational basis but comported with common sense as well. The Court reasoned that a perimeter rule was an ideal means to promote the desired end: maintaining National's short-haul character while promoting nearby Dulles, which was nearly deserted. Such a perimeter rule, said the Court, encourages the type of passenger who does not cause airport congestion—the one-day, arrive-and-return business traveler from New York who carries "nothing but a briefcase." Those passengers, however, who travel to National from more distant cities such as Houston were intentionally burdened by the rule. These travelers, since they are generally unable to complete their affairs in a single day, must stay overnight and therefore carry baggage. They have less need of National's convenience to downtown than the one-day, arrive-and-return business traveler. The Court alliterated that such "luggage-ladden travelers are precisely those who make National congested."[27]

The perimeter rule did not infringe on a constitutional right to travel since passengers were not completely barred from traveling between cities beyond the perimeter and Washington, D.C. Rather, the perimeter rule gave travelers a choice between convenient non-stop service to Dulles or slightly lengthier, one-stop or change-of-plane service to National via one of the cities within the perimeter, such as Chicago or St. Louis. The Court made clear that passengers have no constitutional right to the most convenient form of travel.[28]

The heart of *City of Houston*, however, involved an argument that airport proprietors were preempted from promulgating perimeter rules. Although the Fifth Circuit pointed out that airport proprietors have an extremely limited role in aviation management, they rejected Houston's preemption challenge to National's perimeter rule. The Court made its

26. *Houston*, *supra* note 1.
27. *Id.* at 1192.
28. *Id.* at 1192, 1198.

holding applicable to airport proprietors generally, despite the fact that the perimeter rule was promulgated by a federal agency with statutory authority to make such a rule, as opposed to the more traditional airport proprietor lacking such authority.[29] The key to this apparent paradox is the court's dual holdings which found, as an independent ground for the decision, that the FAA acting in its proprietary capacity as the owner/operator of National and Dulles had authority to impose perimeter rules to control ground congestion. The Court also found, as an independent ground, that the FAA Act authorized the FAA to enact perimeter rules based on its power to "promulgate reasonable regulations concerning the efficient use of the navigable airspace."[30]

The Court reviewed Section 105 of the ADA and immediately dispensed with the claim that this statute barred the FAA from promulgating a perimeter rule. The restrictions of Section 105 did not bind the FAA, since the statute only applies to states, political subdivisions, interstate agencies, and political agencies of two or more states. In addition, the Court found that the FAA, acting in its proprietary capacity as operator of National and Dulles, would not be bound by Section 105 because "Congress, in § 1305 [Section 105 of the ADA], sought to prevent the proprietor of a rural airstrip [as opposed to a metropolitan area airport] from infringing upon the federal government's turf."[31]

The Fifth Circuit limited its holding by carefully drawing this distinction between the authority of a local/rural airport proprietor to impose a perimeter rule and the authority of a multi-airport system proprietor to do so, as was the case here.[32] The Court distinguished an earlier case involving the invalidation of a perimeter rule in effect at John Wayne Airport which had imposed a perimeter on flights from more than 500 miles away.[33] In this case, the Fifth Circuit pointed out, the perimeter rule was imposed by a local airport with no connection to nearby Los Angeles International or Ontario International airports (and therefore no connection to the multi-airport system serving the Los Angeles area). Therefore, John Wayne Airport "could not blithely take such an action upon itself. . . . Section 1305 [§ 105 of the ADA] removes control over routes, etc., from local airport proprietors."[34] The Court clearly left open the opportunity for airport proprietors who form a part of a multi-airport system in a large metropolitan area to impose reasonable perimeter rules.

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29. *Id.* at 1194.

30. *Id.* at 1196.

31. *Id.* at 1194.

32. *Id.*

33. *Id.* citing Pacific Southwest Airlines v. County of Orange, No. CV 81-3248 (C.D. Cal. Nov. 30, 1981).

34. *Id.*

### B. WESTERN AIR LINES V. PORT AUTHORITY OF N.Y. & N.J.

The ability of airport owners, acting in their proprietary capacity, to impose perimeter rules was addressed most recently by both the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit in *Western Air Lines v. Port Auth. of N.Y. & N.J.*[35]

On March 27, 1986, Western Air Lines ("Western") obtained several slots at LaGuardia in a lottery conducted by the FAA.[36] Upon receiving the slots, Western immediately requested permission from the Port Authority to inaugurate non-stop service between LaGuardia and its Salt Lake City hub. Western believed that it was necessary to provide such service in order to effectively compete in the New York City airline market. Solely because Salt Lake City is 1,989 miles from LaGuardia (489 miles beyond the perimeter), the Port Authority denied Western's request for non-stop service. On August 13, 1986, Western filed suit in the U.S. District Court for the Southern District of New York alleging that the Port Authority's perimeter rule was contrary to Section 105(a)(1) of the ADA.

The District Court denied Western's application for preliminary and permanent relief and held that LaGuardia's perimeter rule was not preempted by Section 105(a)(1) of the ADA, reasoning that "in the absence of conflict with FAA regulations, a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serves an equally legitimate local need and fits comfortably within that limited role, which Congress has reserved to the local proprietor."[37]

In reaching its conclusion, the District Court initially considered Western's allegation that Congress intended in Section 105(b)(1) of the ADA to preserve only those proprietary powers necessary to regulate noise or other potential sources of direct financial liability for the airport operator. The Court reviewed airport noise regulation case law to determine the extent of the "proprietary powers and rights" covered by Section 105(b)(1). The Court reached two conclusions. First, the case law did not reject the existence of proprietary interests in addition to noise. The cases merely sought to insure that, when such an interest existed, the proprietor did not regulate beyond the scope of that interest. Second, the cases made clear that proprietor-imposed regulations in addition to noise were valid exercises of proprietary power.

Turning to Section 105 of the ADA and its legislative history, the Dis-

35. The District Court decision is found at 658 F. Supp. 952 (S.D.N.Y. 1986); the Court of Appeals decision is found at 817 F.2d 222 (2d Cir. 1987).

36. The purpose of the slot system is to promote the more efficient use of navigable air space by limiting the number of flights arriving and departing at high density traffic airports during certain hours.

37. *Western, supra* note 1, at 958.

trict Court noted that Section 105(b)(1) did not expressly limit proprietary powers to noise regulation and that "presumably Congress would have so limited the section if that is what it had in mind."[38] The Court found the legislative history of Section 105 to indicate unmistakably that Congress did not intend to preempt the "long recognized powers" of airport operators to deal with noise and other environmental problems at the local level.[39]

The District Court concluded that:

> [a] proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps even more so than the regulation of noise; and the ability of a proprietor such as the Port Authority to allocate air traffic in its three airport system is important to the advancement of this interest.[40]

The District Court next discussed the similarities between *City of Houston* and *Western*. Both cases involved perimeter rules imposed for the purpose of constraining one airport's growth within a multi-airport system. The effect of both perimeter rules was also identical: the diversion of air traffic from one airport to another within the respective multi-airport systems. The effect was not, the Court made clear, to close all runways in a metropolitan area to air traffic from points outside the perimeter. The Court saw no apparent distinction in the cases between the FAA's interest as a proprietor in managing its airport congestion problems at National by use of a perimeter rule, and the Port Authority's interest, as proprietor of LaGuardia, JFK, and Newark, to do the same.

Finally, the District Court addressed whether LaGuardia's perimeter rule met requirements set forth in both *British Airways Bd. v. Port Authority of N.Y. ("Concorde I")* and *Concorde II* regarding the limitations on an airport proprietor's rules.[41] According to these cases, an airport proprietor may issue only reasonable, nonarbitrary, and nondiscriminatory rules that "advance the local interest." Furthermore, interstate commerce may not be burdened, and the accomplishment of legitimate national goals must not be inhibited.[42]

The District Court found that LaGuardia's perimeter rule passed muster under *Concorde*. The perimeter rule was reasonable, since the Port

38. *Id.* at 957.

39. *Id.* (quoting Judge Weinfield in *Midway Airlines, supra* note 23).

40. *Id.*

41. British Airways Bd. v. Port Auth. of N.Y. ("Concorde I"), 558 F.2d 75 (2d Cir. 1977). *Concorde II, supra* note 20.

42. Although the Concorde I and II limitations applied to noise levels, the District Court applied them to perimeter rules. Concorde II stated, "[t]he maintenance of a fair and efficient system of air commerce, of course, mandates that each airport operator be circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules defining the permissible level of noise which can be created by aircraft using the airport." *Concorde II, supra* note 20 at 1011.

Authority's reasons for implementing the perimeter rule were supported by numerous studies and questionnaires it had prepared.[43] The studies indicated, *inter alia*, that if LaGuardia's perimeter rule had been discarded, some 27 daily round trip flights to and from cities beyond the perimeter would likely have been introduced. Such flights would have added to existing overcapacity at LaGuardia. Furthermore, the perimeter rule was reasonable in view of LaGuardia's limited physical facilities and other inherent limitations and the larger capacities of nearby JFK and Newark.

On the issue of discrimination, the District Court found that the perimeter rule did not discriminate in light of the legitimate objectives sought. Adopting the Fifth Circuit's language from *City of Houston*, the Court reasoned that an "accident of geography" underlies LaGuardia's perimeter rule, not any deliberate discrimination against certain states.[44] Nor did the perimeter rule declare that Utah residents could not fly non-stop to LaGuardia from Salt Lake City. Rather, it merely set a limit of 1,500 miles on non-stop flights.

Western's last contentions were that reducing the perimeter from 2,000 to 1,500 miles was a purely arbitrary act and that the perimeter rule did not achieve its purpose. The District Court disposed of these arguments by referring once more to the Port Authority's "careful" studies, which concluded that the 1,500-mile perimeter was necessary to solve increasing congestion problems. The Court noted that it was not unreasonable for LaGuardia to impose the perimeter rule in light of these problems, especially since access to the New York City area remained unimpeded at both Kennedy and Newark.

In short, the District Court clearly believed that control of airport congestion, a matter of inherently local concern, was most effectively left to the airport operator.

Subsequently, the U.S. Court of Appeals, Second Circuit, unanimously affirmed the District Court's "well-reasoned opinion" in all respects.[45] The Second Circuit noted that while "the perimeter rule may be a regulation 'relating to . . . routes' within the meaning of Section 1305(a)(1) [Section 105(a)(1) of the ADA], we agree with [the District Court's] conclusion that the rule, at least when enacted by a multi-airport authority, falls within the proprietary powers of airport operators exempted from preemption by Section 1305(b)(1) [Section 105(b)(1) of the

43. The Port Authority conducted studies of LaGuardia's ground and airside capacity. In addition, the Port Authority circulated questionnaires to airlines, the FAA, the DOT, and the State Department regarding its proposed perimeter rule. *See Western*, *supra* note 1, at 959.

44. *Id.* at 958.

45. *Western*, *supra* note 1.

ADA]."[46]

## VI. CONCLUSION

Although federal law preempts virtually the entire field of aviation, it is clear that a multi-airport proprietor may impose reasonable regulations regarding matters of local concern such as airport congestion. It is not so clear; however, whether a local airport proprietor, not included within a multi-airport system, may impose such regulations.

The types of regulation accepted to date by the courts include airport noise regulations, which limit either the decibel level of individual takeoffs and landings or the cumulative level of noise exposure; takeoff and landing fees;[47] airport capacity regulations; and airport perimeter rules in con-

46. *Id.* at 226.

47. Traditionally, landing fees throughout the United States have been based on aircraft weight. Here, the total amount of landing fee assessed for any landing operation varies only according to the size of the aircraft. The philosophy behind weight-based landing fees is that landings of large, heavy aircraft impose greater costs upon an airport proprietor than do landings of small aircraft.

On March 16, 1988, the Massachusetts Port Authority ("Massport") adopted a new, controversial landing fee structure for Boston's Logan International Airport ("Logan") that departs from the traditional weight-based landing fee structure. The new composite fee structure, purporting to reduce excess airport congestion by reducing the number of operations conducted by small aircraft and regional commuter aircraft, represents the first phase of a comprehensive plan called the Program for Airport Capacity Efficiency ("PACE"). The second phase of PACE may involve additional peak hour pricing and a slot reservation and auction program. An additional fee (somewhere between $25.00 and $65.00) for use of the general aviation terminal is being considered by Massport as well.

Under PACE, the costs of owning and operating Logan are divided into two categories: those costs associated with aircraft landing weight (effective October 1, 1988, $0.51-$0.55 per thousand pounds), and those costs associated with landing operations (effective October 1, 1988, $100-$105 per operation). The second category of the fee structure represents a "fixed cost" charge that remains the same regardless of aircraft size or weight. PACE recognizes the fact that, irrespective of aircraft size or weight, various costs are attributable to both individual aircraft operations as well as aircraft size or weight.

Prior to PACE, Massport based 100% of the assessed landing fees on aircraft weight. Under PACE, however, only 37% of the assessed landing fees are based on aircraft weight; the majority (63%) are now assessed according to the landing operation "fixed cost charge." As a result, there exists an almost four-fold increase in landing fees for small aircraft and a substantial decrease in landing fees for large aircraft. For example, the cost of landing a Beechcraft 1900 commuter aircraft at Logan has increased from $25.00 to $101.47. This represents a 306% increase in landing fees. However, for a large aircraft such as a Boeing 747-300, the landing fee under PACE has decreased from $823.99 to $450.31. This represents a 45% decrease in landing fees. Investigation Into Massport's Landing Fees, Brief of Regional Air Carrier Parties, FAA Docket 13-88-2, September 30, 1988.

Suit was filed in federal district court in Boston on April 19, 1988, challenging PACE. Various parties alleged that the new fees were unlawful in that they violated the Supremacy Clause, the Commerce Clause, the Anti-Head Tax Act, Section 511(a) of the Airport and Airway Improvement Act, Section 307 of the Federal Aviation Act of 1958 ("the Act"), and Section 105(a) of the Act, in that the fees are a state action "relating to" the rates, routes or services of air carriers.

junction with a multi-airport system.

With regard to airport perimeter rules, the courts have analogized this type of regulation to airport noise regulation. Like noise regulation, perimeter rules are a matter of inherent local concern that "can be most effectively left to the airport operator, as the unitary local authority who controls airport access."[48]

The second and fifth circuits agree that, even though airport perimeter rules may "relat[e] to . . . routes" within the meaning of Section 105(a)(1) of the ADA, such rules are among the proprietary powers exempted from preemption by Section 105(b)(1) when "enacted by a multi-airport proprietor."[49]

Allowing the multi-airport proprietor to take such an active role in controlling airport growth is vitally important in the present deregulation environment. So long as deregulation (and therefore liberal route entry and exit) persists, the imposition of airport perimeter rules at the local-proprietor level is clearly a most effective method of controlling resulting airport overcapacity, shortening lengthy delays, decreasing congestion at gates and on taxiways, and easing the strain on restricted physical facilities.

## VII. POSTSCRIPT

In August, 1987, Delta Air Lines, Inc., following its merger with West-

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The court entered summary judgment for Massport on June 29, 1988, and appeals have been taken to the First Circuit Court of Appeals. The case may be ripe for argument as early as February, 1989.

In a parallel proceeding, complaints were filed by similar parties with the FAA in March 1988. By notice of April 29, 1988, the Secretary of Transportation assumed direct responsibility for reviewing the complaints. On November 10, 1988, DOT Administrative Law Judge Burton S. Kolko issued a recommended decision finding PACE to be violative of: 1) Section 511 of the Airport and Airway Improvement Act of 1982 (49 U.S.C. § 2210) and the grant assurances entered into by Massport (the fees are not "fair and reasonable" and are "unjustly discriminatory"); 2) the Anti-Head Tax Act (49 U.S.C. § 1513) (the fees are not "reasonable"); 3) Section 307 of the Act (49 U.S.C. § 1348) (the fees "invade the authority of the DOT"); 4) Section 105 of the Act (49 U.S.C. § 1305) ("Reserved proprietary rights do not include the regulation of federally preempted matter, or interference with federal objectives, or the right to set unreasonable or unjustly discriminatory fees."); and 5) the Commerce Clause of the U.S. Constitution. Investigation Into Massport's Landing Fees, F.A.A. Docket 13-88-2, Recommended Decision of Administrative Law Judge Burton S. Kolko, U.S. Department of Transportation, Nov. 10, 1988.

Pursuant to H.R. 4794, Congress directed that the DOT issue its decision not later than December 17, 1988 (DOT may affirm, limit, or reverse the ALJ's recommended decision). If Massport's fee structure remains in effect more than seven days after a determination by the DOT that PACE is inconsistent with the Act, the Airport and Airway Improvement Act of 1982, or with the National Transportation Policy, the Massport would be denied any subsequent federal grants-in-aid funding. Pub. L. 100-457.

48. *Western, supra* note 34, at 958.

49. *Western, supra* note 1, at 226.

ern, petitioned the U.S. Supreme Court for a writ of *certiorari* in the *Western* case.[50] On October 15, 1987, the Air Transport Association of America submitted a brief *amicus curiae* in support of Delta's petition.[51] The Port Authority responded, on October 29, 1987, with a brief in opposition to the petition.[52] In November, 1987, the Court invited the U.S. Solicitor General to file a brief *amicus curiae* expressing the views of the United States. This brief was completed on March 29, 1988.[53]

In his brief, the Solicitor General agreed with the Port Authority that review by the U.S. Supreme Court is not warranted. The Solicitor General argued three points. First, the perimeter rule in question is properly viewed as an exercise of a proprietary power, protected from preemption by Section 105(b)(1) of the ADA, rather than as relating to "routes" within the meaning of Section 105(a)(1) of the ADA. Second, if Congress had intended in Section 105(b)(1) to protect only the proprietary power to regulate noise and other potential sources of direct financial liability, then Congress presumably would have more narrowly drafted the provision. Nothing in the ADA's legislative history suggests such a narrow interpretation. Third, *Western* is expressly limited to cases involving a multiple airport proprietor and therefore involves a question of extremely limited applicability. Thus, it is unlikely that *Western* will have any significant impact upon the national air transportation system.

On April 18, 1988, the U.S. Supreme Court denied Delta's petition for *certiorari*.

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50. Petition for a Writ of Certiorari to the U.S. Court of Appeals of the Second Circuit, Delta Air Lines v. Port Authority of N.Y. & N.J., 108 S. Ct. 1467 (1988).

51. Brief Amicus Curiae of the Air Transport Association of America in Support of the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit, Delta Air Lines v. Port Authority of N.Y. & N.J., *id.*

52. Brief for the Respondent in Opposition to Petition for Writ of Certiorari, Delta Air Lines v. Port Authority of N.Y. & N.J., *id.*

53. Brief for the United States as Amicus Curiae, Delta Air Lines v. Port Authority of N.Y. & N.J., *id.*