UNITED STATES COURT OF APPEALS

For the Second Circuit

Cal. No. 234 October Term 1955

Argued January 12, 1956 Decided January 26, 1956.

Docket No. 23850

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ELLA FITZGERALD, JOHN LEWIS, GEORGIANA HENRY and NORMAN GRANZ,

Appellants,

-v-

PAN AMERICAN WORLD AIRWAYS, INC.,

Appellee

.....

Before: CLARK, Chief Judge, and

FRANK and LUMBARD, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, entered by Judge Bicks. REVERSED and REMANDED.

Bergerman & Hourwich (Joseph Calderon, of counsel) for appellants

Haight, Gardner, Poor & Havens (Douglas B. Bowring, of counsel) for appellee

Plaintiffs' complaint alleged the following: Plaintiffs Fitzgerald, Lewis and Henry are negroes. Miss Fitzgerald has achieved an international reputation as a singer. Lewis is a pianist and Miss Fitzgerald's accompanist. Miss Henry is Miss Fitzgerald's secretary. Plaintiff Granz is Miss Fitzgerald's manager and representative. The first three had made reservations on a plane operated by defendant, which is a common carrier subject to the provisions of the Civil Aeronautics Act, 49 U.S.C. Section 401 et seq. The defendant issued plaintiffs tickets for first-class transportation from San Francisco,

California, to Sydney, Australia, and defendant reserved seats for them on a flight leaving San Francisco on July 19, 1954. Granz joined them in Honolulu, Hawaii, and was to continue with the others to Sydney; defendant had issued him a ticket and a reserved seat for that flight. The plane "descended at Honolulu, Hawaii and July 19, 1954, for a temporary stop. When the aircraft was about to continue its flight to Sydney, Australia, the agents of the defendant in Honolulu, Hawaii refused to allow the plaintiffs to reboard the said plane and to continue on the flight to Sydney, in their assigned first-class seats, and the said aircraft departed from Honolulu without the plaintiffs. The said refusal was willful and malicious and was motivated by prejudice against the plaintiffs Fitzgerald, Lewis and Henry because of their race and color, and the said conduct subjected plaintiffs to unjust discrimination and undue and unreasonable prejudice and disadvantage, in violation of Section 404, Subdivision (b) of the Civil Aeronautics Act of 1938, 52 Stat. 883, U.S.C. 49, Section 484(b)."

The complaint asked a judgment for money damages exceeding, as to each plaintiff, the jurisdictional amount. No diversity of citizenship was alleged.

Defendant moved to dismiss the complaint. Accompanying its motion was an affidavit stating that plaintiffs and defendant are citizens of New York. Plaintiffs did not dispute this sworn assertion. The district judge entered an order which dismissed the complaint for want of federal jurisdiction. Plaintiffs have appealed.

The opinion of the judge is reported in 132 F. Supp. 798.

49 U.S.C. Section 484(b) reads as follows:

> "(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 403 Provides:

> "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States."

Section 622(a) makes it a federal crime to violate, knowingly and wilfully, designated sections of the Act, including Section 484(b).

Section 642(a),(b) and (c) read as follows:

> "(a) Any person may file with the Board a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Board to investigate the matter complained of. Whenever the Board is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing.
>
> "(b) The Board is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is authorized to be made to or before the Board by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Board shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint.
>
> "(c) If the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provisions of this chapter or any requirement established pursuant thereto, the Board shall issue an appropriate order to compel such person to comply therewith."

Section 676 reads as follows:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

FRANK, Circuit Judge:

Section 622(a) makes it a federal crime to violate, inter alia, Section 484(b). The latter section is for the benefit of persons, including passengers, using the facilities of air carriers. Consequently, by implication, its violation creates an actionable civil right for the vindication of which a civil action may be maintained by any such person who has been harmed by the violation. As we said in Reitmeister v. Reitmeister, 162 F.(2d) 691, 694 (C.A.2); "Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal." See also Fischman v. Raytheon Manufacturing Co., 188 F.(2d) 783, 787 (C.A.2); Goldstein v. Groesbeck, 142 F.(2d) 472, 427 (C.A.2); Restatement of Torts, Section 286; Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. (1933) 453; Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. (1932) 361.

Defendant, however, argues that Section 484(b) merely states the common-law rule existing in all states and territories, and, therefore, especially as Section 676 preserves all remedies at common law, there is here no basis for federal jurisdiction, absent diversity of citizenship, i.e., that this is not a case "arising under" a "federal law." In support of this argument, defendant relies chiefly on cases involving the Safety Appliance Act, 45 U.S.C. Section 1 et seq.[1] Those cases hold that that legislation did not create a right but merely imposed a higher standard of care in suits based upon a state common-law right.[2]

That is not true of the Act here involved. We think it created a new federal right.[3] Although the right created by a federal statute covers the same ground as a right already

existing under the common law of the states and territories, a suit based on that federal statute is one "arising under" a law of the United States, so that a federal district court has jurisdiction under 28 U.S.C. Section 1331.[4] See, e.g., Bell v. Hood, 327 U.S. 678; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 213; Reitmeister v. Reitmeister, 162 F.(2d) 691, 694 (C.A.2); Note, 48 Col. L. Rev. (1948) 1090. ~~Absent a federal statute~~ No federal common law of torts exists; when Congress enacts legislation rendering it tortious to do what is already a state common-law tort, a suit based on that legislation is within 28 U.S.C. Section 1331.[5]

Although we regard it as not controlling, we note also the following: Congress sought uniformity in the practices of those subject to this Act. It is by no means clear that, in all states and territories, the common-law rules would render unlawful racial differentiations in accord with the "separate but equal doctrine,"[5a] whereas, in the light of recent Supreme Court decisions,[6] we must construe Section 484(b) so that that doctrine will not apply.

Defendant also contends that the sole non-criminal federal remedy for a violation of any provisions of the Act is to be found in Section 642, i.e., a complaint to the Civil Aeronautics Board which must investigate the complaint and, if the facts warrant, must issue an order compelling compliance with the violated provisions of the Act. We cannot agree. As such an order must look to the future, obviously it cannot afford redress to one harmed by a violation of Section 484(b). For, whatever may be true of the flight of a plane, undeniably (outside of fiction or "pure" physics) the flight of time -- despite the poet Hood's earnest prayer -- is always, alas for us mortals, irreversible. Indeed, Aristotle remarked that "Agathon is right in saying, 'For this alone is lacking even to God, To make undone things that have once been done.'"[7] At any rate, no order of the Board can compel the defendant in

Footnotes

4 See also 28 U.S.C. Section 1337.

5 Or Section 1337, if, as here, the statute regulates interstate commerce.

The effect of 49 U.S.C. Section 676 avoids the contention that the provisions of the Act nullify rights under state laws.

5a See, e.g., Brumfield v. Consolidated Coach Corp., 240 Ky. 1, 40 S.W.(2d) 356; Day v. Owen, 5 Mich. 520.

6 Brown v. Board of Education of Topeka, 349 U.S. 294; Henderson v. United States, 339 U.S. 816.

7 Nicomachean Ethics, 1139b, 10-11.

1956 to permit the plaintiffs to board defendant's plane on July 19, 1954.

This is not a case where the Board has "exclusive primary jurisdiction": (1) The Civil Aeronautics Act, unlike the Interstate Commerce Act[8] or the Shipping Act,[9] confers no power on the administrative agency to grant reparation in money for past misconduct of the carrier. (2) The Board has no power to approve violations of Section 484(b). (3) Nor has it purported to do so.[10]

REVERSED and REMANDED.