


Summer 1962

Employment Discrimination and Interstate Carriers

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Recommended Citation

(1962) "Employment Discrimination and Interstate Carriers," *Indiana Law Journal*: Vol. 37: Iss. 4, Article 3.
Available at: <http://www.repository.law.indiana.edu/ilj/vol37/iss4/3>

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NOTES

EMPLOYMENT DISCRIMINATION AND INTERSTATE CARRIERS

In 1957, Marlon Green, a former United States Air Force pilot and a Negro, filed an application for employment with Continental Air Lines, an interstate corporation whose flight operations extend to eight states. Green was tested and interviewed but not hired.¹ He filed a complaint with the Colorado Anti-Discrimination Commission and, after a hearing, the Commission found that Continental Air Lines had violated the Anti-Discrimination Act of 1957.² Finding that Green was the best qualified applicant,³ the Commission ordered the airline to enroll him in their training school.⁴ On appeal, the Commission's order was reversed and the complaint dismissed. The trial judge held that the application of the fair employment act to interstate carriers resulted in a substantial burden on commerce and that the area had been preempted by congressional action and executive orders. This ruling was affirmed by the Supreme Court of Colorado which held that the Commission has no jurisdiction over employers engaged in interstate commerce. The Commission has indicated that it will appeal to the United States Supreme Court.⁵

Although the federal government has taken the initiative in the area of civil rights, it has not acted significantly with respect to employment discrimination. State and municipal governments, however, have accepted this responsibility and have created agencies to deal with the problem. To date, twenty-four northern and western states have enacted legislation aimed at employment discrimination.⁶

1. Green was interviewed with fourteen other applicants and was one of six found to be qualified. The other five applicants were selected by Continental Air Lines to enter its training program.

2. COLO. REV. STAT. ANN. §§ 80-24-1—80-24-8 (Supp. 1957).

3. The Commission found that Continental had violated the Anti-Discrimination Act, (1) by refusing to employ Green as a pilot because he was a negro, (2) by failing to advise the applicant as to the action taken on his employment application and (3) by requiring an applicant to submit a photograph and an indication of his race.

4. Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 143 Colo. 590, 355 P.2d 83 (1960).

5. Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 30 U.S.L. Week 1141 (U.S. Mar. 13, 1962); Denver Post, Mar. 13, 1962, p. 1.

6. ALASKA COMP. LAWS ANN. §§ 43-5-1—43-5-10 (Supp. 1958); ARIZ. REV. STAT. ANN. §§ 23-371—23-375 (1956); CAL. LAB. CODE §§ 1410-1432 (Supp. 1961); COLO. REV. STAT. ANN. §§ 80-24-1—8 (Supp. 1957). CONN. GEN. STAT. REV. §§ 31-122—31-128 (1958); DEL. CODE ANN. tit. 19 §§ 710-713 (Supp. 1960); ILL. ANN. STAT. ch. 19 §§ 17-24 (Smith-Hurd 1935), ch. 19 §§ 24a-24g (Smith-Hurd Supp. 1961); IND. ANN. STAT. §§ 40-2307—40-2317 (Burns Supp. 1961); Iowa Senate Concurrent Resolution,

New York enacted the first fair employment act in 1945, creating a model State Commission Against Discrimination.⁷ The New York legislation has served as the pattern for the comprehensive codes containing enforcement procedure⁸ and aimed at employment discrimination. The Indiana statute is a comprehensive code but it relies solely upon persuasion and education rather than a specific enforcement procedure.⁹ Other statutes are very narrow, applying only to certain fields, such as public works and state employment. For example, the Iowa fair employment policy consists of a Senate Resolution expressing that state legislature's disapproval of discrimination.¹⁰

Congress has not enacted a fair employment act though attempts to do so began as early as 1942.¹¹ All federal disapproval of employment discrimination has been expressed by the president through his executive powers, free from congressional interference. Shortly before America's entry into World War II, President Roosevelt created the Fair Employment Practices Committee.¹² The committee was authorized to investigate complaints originating from employment discrimination but was not empowered to rectify abuses. In order to maximize America's war effort, President Roosevelt took the most extensive action in this field to date. He authorized the Fair Employment Practices Committee to investigate charges of discrimination occurring in occupations essential to the war effort and ordered that all government contracts contain a clause prohibiting employment discrimination.¹³

April 25, 1955, CCH LAB. L. REP., 1 State Laws § 47,500; KAN. GEN. STAT. ANN. §§ 44-1001—44-1008 (Supp. 1957); MASS. ANN. LAWS ch. 151 §§ 1-10 (1957); MICH. STAT. ANN. §§ 17.458(1)—17.458(11) (1960); MINN. STAT. ANN. §§ 363.01-363.13 (1957); NEB. REV. STAT. §§ 48.215-48.216 (Reissue 1960); NEV. REV. STAT. § 338.125 (1959); N.J. STAT. ANN. §§ 18:25-1—18:25-28 (Supp. 1960); N.M. STAT. ANN. §§ 59-4-1—59-4-14 (1953); N.Y. EXECUTIVE LAW §§ 290-301 (1951); OHIO REV. CODE ANN. §§ 4112.02—4112.99 (Page Supp. 1961); ORE. REV. STAT. §§ 659.010—659.990 (1961); PA. STAT. ANN. tit. 43 §§ 951-963 (Supp. 1961); R.I. GEN. LAWS ANN. §§ 28-5-1—28-5-39 (1956); WASH. REV. CODE §§ 49.60.040—49.60.230 (Supp. 1959); WIS. STAT. ANN. §§ 111.31—11.36 (Supp. 1961).

7. N.Y. EXECUTIVE LAW §§ 290-301 (1951).

8. Alaska, California, Colorado, Connecticut, Delaware, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin.

9. See Carter, *Practical Considerations of Anti-Discrimination Legislation—Experience Under the New York Law Against Discrimination*, 40 CORNELL L.Q. 40 (1954), for a discussion of the New York commission's use of persuasion.

10. See Note, 35 NOTRE DAME LAW. 443 (1960), for an excellent discussion of the state fair employment laws and Note, 74 HARV. L. REV. 526 (1961) for a good discussion of the operation of the state anti-discrimination commissions.

11. Since 1942, Congress has attempted to enact a fair employment law in every congressional session but such attempts have failed for lack of effective party support.

12. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

13. Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943).

Shortly after becoming president, Harry S. Truman extended the life of F.E.P.C.¹⁴ but he rendered the committee powerless by negating its enforcement authority. The executive order procluded the committee from issuing cease and desist orders and within a year after the war the committee was disbanded. No further executive action was taken against employment discrimination until the election year of 1948. Following the Democratic convention, the president ordered personnel officers in the government to make all appointments and promotions solely on the basis of merit and ordered an end to discrimination based on race, color, religion and national origin.¹⁵ President Truman created the Committee on Government Contract Compliance in 1951, authorizing the committee to scrutinize government contracts and to insure that discrimination was eliminated in work performed under such contracts.¹⁶

President Dwight D. Eisenhower revamped the federal system of handling employment discrimination by transforming the contract compliance committee into a study group.¹⁷ Similarly, he created the Committee on Government Employment Policy in 1955 to reduce discrimination in federal employment.¹⁸

Soon after his inauguration, John F. Kennedy created the President's Committee on Equal Employment Opportunity and commissioned that body to execute the policy of non-discrimination within the executive branch of the government.¹⁹ The president reaffirmed the policy of non-discrimination in government contracts and ordered the termination of business with all contractors and sub-contractors who refused to adhere to the anti-discrimination clause in their contracts.

The executive orders indicate a national interest in the problem of employment discrimination. But, in the twenty years of presidential activity in this field each chief executive has found it necessary to issue orders concerning the same two subjects signifying a lack of success for the federal program.

The Supreme Court has yet to consider the validity of state fair employment laws. It has been the states' administrative policy to rely upon persuasion for a solution to this problem and to keep such cases out of court. They have been successful for there has been a dearth of

14. Exec. Order No. 9664, 10 Fed. Reg. 15301 (1945).

15. Exec. Order No. 9980, 13 Fed. Reg. 4311 (1948). President Truman created the Fair Employment Board within the Civil Service Commission to review decisions made by any department head in an effort to enforce the presidential order.

16. Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951).

17. Exec. Order No. 10479, 18 Fed. Reg. 4641 (1953) establishing the President's Committee on government contracts.

18. Exec. Order No. 10590, 20 Fed. Reg. 409 (1955).

19. Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

adjudication in this field. In the cases that have reached the courts, the validity of state fair employment laws has been assumed on the basis of the constitutionality of other civil rights legislation. However, the decisions supporting the constitutionality of state civil rights laws have been confined to the protection of members of the public seeking services and not to laws prohibiting racial and religious considerations in individual employment.²⁰

It is unquestionably within the police power of the states to enact legislation prohibiting racial discrimination in the use of facilities serving a public function.²¹ But in *Hall v. DeCuir*, the Supreme Court invalidated the application of a discrimination ban to interstate carriers.²² The Supreme Court of Colorado, in affirming the lower court's decision in *Colorado Anti-Discrimination Commission v. Continental Air Lines*,²³ relied upon the eighty-five year old *Hall* decision. The basis for the decision in *Hall* was that the contested Louisiana Anti-Discrimination Statute conflicted with statutes in the neighboring ports serviced by the carried which required segregation of the races. At that time segregation was a legally recognized institution, but this situation does not exist today. A state statute expressing a policy contrary to that of the Colorado Anti-Discrimination Act would not be respected today but would be invalidated by the Supreme Court as a violation of the equal protection clause of the Fourteenth Amendment.²⁴

In *Railway Mail Association v. Corsi*,²⁵ a New York statute prohibiting discrimination in labor union membership was upheld as a constitutional exercise of that state's police power. This opinion indicates that the Court considers the Fourteenth Amendment to establish the minimum standards, and that the Court favorably views state legislation seeking to extend prohibitions against discrimination.²⁶

20. *District of Columbia v. Thompson*, 346 U.S. 100 (1953).

21. *Pickett v. Kuchan*, 323 Ill. 138, 153 N.E. 667 (1926); *Bayliss v. Curry*, 128 Ill. 287, 21 N.E. 595 (1889); *Donnell v. State*, 48 Miss. 661, 12 Am. Rep. 375 (1873).

22. 95 U.S. 485 (1878).

23. 30 U.S.L. WEEK 1141 (U.S. Mar. 13, 1962).

24. *Truax v. Raich*, 239 U.S. 33 (1915).

25. 326 U.S. 88 (1945).

26. In his concurring opinion, Mr. Justice Frankfurter said:

[A] state may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such state power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a state to extend the area of non-discrimination beyond that which the Constitution itself exacts.

Id. at 90.

There are three major issues involved in the application of state fair employment laws to interstate carriers. First, it is necessary to determine whether the state fair employment laws constitute a burden on interstate commerce. Second, it is necessary to determine whether the national government has occupied the field to the exclusion of the states. Third, it must be considered whether there is an actual or potential conflict between the fair employment laws and existing federal regulations. The purpose of this note is to examine these issues and to consider the constitutional problems involved in the application of fair employment laws to interstate carriers.

The Supreme Court has consistently defined a burden on commerce as those activities of a state which directly impair the usefulness of facilities for such traffic.²⁷ In the absence of preemptive legislation, however, a state may regulate interstate commerce for the protection of reasonable local interests if the regulation does not materially obstruct the flow of commerce.²⁸ A burden on commerce is, in effect, an illegal embargo which will not be tolerated.²⁹

It may conceivably be argued that fair employment laws increase operational costs, but a state regulation which merely increases the operational costs of interstate carriers is not a burden on commerce if it is reasonable and can be justified by a valid state purpose.³⁰ The Supreme Court has upheld reasonable taxation of interstate carriers³¹ for the purpose of defraying inspection and administrative costs.³² Rather than increasing operational costs, however, the anti-discrimination laws are potential cost decreaseers. There is no requirement that any employer hire a number of a minority group but only that he employ the most qualified work force. This will inevitably reduce labor and repair costs.

27. *Morgan v. Virginia*, 328 U.S. 373 (1946).

28. *Breard v. Alexander*, 341 U.S. 622 (1951).

29. *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950); *California v. Thompson*, 313 U.S. 109 (1941).

30. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935).

31. *Kane v. New Jersey*, 242 U.S. 160 (1916); *Clark v. Poor*, 274 U.S. 554 (1927).

32. The Supreme Court has upheld many state statutes affecting interstate commerce, e.g., *Smith v. Alabama*, 124 U.S. 465 (1888) (state statute requiring vision and color blindness tests for railroad employees); *Morris v. Durby*, 274 U.S. 135 (1927) (Oregon weight restriction of motor carriers); *Sproles v. Binford*, 286 U.S. 374 (1932) (size and weight restrictions on trucks using Texas highways); *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1933) (restriction on size and weight of motor carriers); *Maurer v. Hamilton*, 309 U.S. 598 (1940) (Pennsylvania statute forbidding the use of its highways to any vehicle carrying any other vehicle over the head of the driver of the first vehicle); *Terminal R.R. Ass'n v. Trainman*, 318 U.S. 1 (1943) (Illinois requirement that freight trains have cabooses); *Missouri Pac. R.R. v. Kansas*, 248 U.S. 276 (1919) (statute requiring interstate carriers to provide local service); *Chicago, R.I. & P. R.R. v. Arkansas*, 219 U.S. 453 (1911) (statute requiring full crews); *South Covington & C. R.R. v. Covington*, 235 U.S. 537 (1915) (statute regulating the number of passengers and cars on railroad trains).

The state fair employment laws are applicable to all employers within the state, whether interstate or intrastate. They were enacted to promote equal employment opportunities, not to discriminate against interstate business within their jurisdiction. The fair employment laws do not impose upon a carrier any burden which would make it more difficult to compete with carriers operating in other states and they are not invalid merely because another state, in the exercise of a similar power, does not impose the regulation.³³

State fair employment laws apply only to carriers using the state as a base to recruit employees or as a principal place of business. A state could not impose its regulation upon a carrier whose only contact with the state is the use of its highways, railroad stations or airports. If mere usage of state facilities required a carrier to conform to the state employment regulations, the carrier would have to observe the strictest fair employment law. Indirectly, this would create a uniform national policy thereby infringing upon the responsibility of the federal government. Such application of the law would be unreasonable and constitute a burden on commerce. It is not, however, the jurisdictional ground upon which the states have enacted other employment regulations nor is it the case with fair employment laws.

Notwithstanding the decision of the Colorado court in *Colorado Anti-Discrimination Commission v. Continental Air Lines*, extension of state fair employment legislation to interstate carriers should not, in itself, constitute a burden on interstate commerce. The issuance of affirmative orders as a remedial procedure, however, may be such an unreasonable interference with the regulated business as to constitute a burden on commerce. State commissions operating under comprehensive codes are authorized to order the promotion, reinstatement or employment of specific individuals in cases where the employer has engaged in discriminatory practices. Although the anti-discrimination commissions are charged with the enforcement of legislative policy, they are, nevertheless, inadequately qualified to determine the best applicant for jobs requiring administrative or technical qualifications. They are likely to be staffed with local personnel chosen merely on the basis of geographical location or membership in interested pressure groups and the variety of occupations subject to fair employment laws prevent the commissions from specializing in the employment procedure of any single enterprise. This consideration becomes less significant, however, with respect to occupations not demanding highly skilled and technical abilities.

33. *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

The Colorado Anti-Discrimination Commission ordered Continental Air Lines to give Green an opportunity to enroll in its training program. This was an interference with Continental's employment discretion because enrollment in the training program was tantamount to hiring him as a pilot. Once a state dictates whom an employer must place in the cockpit of an airplane, it has greatly affected interstate commerce. The commission, in determining Green's qualifications, exercised jurisdiction over a subject demanding greater technical knowledge than it possessed. Furthermore, in a business where the lives of so many people depend upon the competence of the employees, the employer's discretion in hiring is essential and an affirmative order, which does not take account of intangible factors, may amount to a severe burden on commerce.

What may not be done in one way, however, may be accomplished in another. Issuance of affirmative orders does not constitute the sole remedial process. The commission may discharge its statutory responsibility by issuing a cease and desist order, specifically restraining the offender from discriminating in future hiring. Such orders do not become effective until approved and issued by a court whereupon they become enforceable by contempt proceedings.³⁴ In states where the anti-discrimination laws are more than mere policy utterances, the commissions possess follow-up authority to insure that the employer does not resume his discriminatory practices. Pursuant to this authority, the commission can investigate later employment practices and determine whether the employer has complied with the court order. In the event that Continental Air Lines should continue to require the submission of a photograph or an indication of race with an employment application, it would not only violate the fair employment law but would also be in contempt of the enjoining order. The burden would be upon Continental to explain its actions to the court if once again Green is rejected when he ostensibly satisfies the airline's employment qualifications. Such a remedial scheme does not unreasonably usurp the employer's hiring discretion yet it guarantees future compliance with the fair employment laws. Subject to the sole admonition to avoid discrimination, an employer is completely free to exercise his own judgment on the qualifications of applicants. A negative order may not be as direct as an affirmative order in effectuating the statute but its virtue lies in the avoidance of constitutional problems.

In the *Colorado Anti-Discrimination Commission* case, the trial judge held that the state was preempted from applying its fair employ-

34. *Dal Maso v. Bd. of Comm'rs of Prince George's County*, 182 Md. 200, 34 A.2d 464 (1943).

ment act to interstate carriers because the national government had occupied the field. The court specifically relied upon the Railway Labor Act³⁵ and presidential executive orders as a ground of federal preemption.

The Railway Labor Act does prohibit certain types of discrimination but it has never been applied to cases of employment discrimination where the employer has refused to hire a particular applicant for reasons of race or religion. The act has been primarily enforced to prevent union discrimination against non-members³⁶ and the Supreme Court has required majority unions to represent all members of the bargaining unit, regardless of their union affiliation.³⁷ In *Steele v. Louisville and Nashville Railway Co.*,³⁸ the majority union, which barred negroes from membership, entered into a contract with the railroad discriminating against negro firemen. The court held that the contract was illegal and enjoined the carrier from fulfilling the contract because it could not benefit from an agreement which the union was prohibiting from making. The court failed to find a statutory prohibition against employer discrimination but based its injunction on a condemnation of the union's conduct.

The Federal Aviation Act enjoins air carriers from causing "any undue or unreasonable preference or advantage to any particular person, port, [or] locality . . . or to subject any particular person . . . to any unjust discrimination or any unreasonable prejudice or disadvantage in any respect whatsoever."³⁹ This statutory duty has been applied to freight handling and passenger service, but never to employment discrimination.⁴⁰

The prohibitions against discrimination in the Federal Aviation Act and the Interstate Commerce Act are not broad enough to include employment discrimination. The limitation is contained in the phrase "person, port, locality, or description of traffic. . . ." These are descriptive terms of classes affected by, or enjoying, the services of the carrier. Applying the rule of *ejusdem generis*, this is the only thing they have in common and the only reason for them to be grouped together. It

35. 64 Stat. 1238 (1951), 45 U.S.C. § 152 (1958), made applicable to air carriers by 49 Stat. 1189 (1936), 45 U.S.C. § 181 (1958).

36. *Steele v. L. & N. R.R.*, 323 U.S. 192 (1944).

37. *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 332 (1949); *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Conley v. Gibson*, 355 U.S. 41 (1957).

38. 323 U.S. 192 (1944).

39. 72 Stat. 763 (1958), 49 U.S.C. § 1374(b) (Supp. 1961); identical prohibition in Interstate Commerce Act, 54 Stat. 902 (1940), 49 U.S.C. § 3(1) (1958).

40. *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956). The same provision is in the Interstate Commerce act. See *Henderson v. United States*, 339 U.S. 816 (1950) and *Boynton v. Virginia*, 364 U.S. 454 (1960).

would require a strained reading to interpret the statute as applying to cases of employment discrimination.

The fact that the federal government has regulated some phases of interstate transportation, and even some phases of carrier employment, does not exclude state regulation. There is no sharp distinction between national and state regulation of interstate commerce. Of course, once Congress has acted on a problem and has evinced an intention to occupy the field, state regulation is prohibited.⁴¹ The Court is solicitous of state regulations enacted under the reserved police power but the mere labeling of a regulation as a police power will not save it in an area completely occupied by the federal government.⁴²

State regulations will not be invalidated if the state can show that they are the expression of a reasonable concern, that they do not conflict with a national law, that they do not establish a standard lower than that fixed by Congress and that Congress has not expressed a desire for exclusive occupation of the field.⁴³

In *Kelly v. Washington*,⁴⁴ the Supreme Court upheld a state inspection requirement of tugboat hulls and machinery even though federal agencies were authorized to inspect other parts of the tug. Congress must clearly manifest an intention to preclude reasonable state regulation in order to constitute federal preemption.⁴⁵ That intent will not be inferred merely because Congress has entered the field. There is no indication, from existing federal law, of congressional intent to preempt the application of state fair employment laws to interstate carriers.

In the absence of preemptive intent, the opponent of a state law must clearly show that its provisions are inconsistent with national law in order to avoid the state regulation.⁴⁷ There is no conflict between the state fair employment laws and federal policy. The executive orders of Presidents Roosevelt, Truman, Eisenhower, and Kennedy indicate that the federal policy and the state fair employment laws do not conflict, but are born of a common goal.

Presidential executive orders, applicable through government contracts, constitute the only federal law regulating discriminatory hiring

41. *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

42. *Charleston & W.C. Ry. v. Varnville Furniture Co.*, 237 U.S. 597 (1951).

43. *Gilbert v. Minnesota*, 254 U.S. 325 (1920); *Missouri, K. & T. Ry. v. Haber*, 169 U.S. 613 (1898); *Deveau v. Braisted*, 363 U.S. 144 (1960); *California v. Zook*, 336 U.S. 725 (1949); *Reid v. Colorado*, 187 U.S. 137 (1902).

44. 302 U.S. 1 (1937).

45. *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

46. *Missouri, K. & T. Ry. v. Harris*, 234 U.S. 412 (1914).

47. *California v. Zook*, 336 U.S. 725 (1949).

practices.⁴⁸ Executive orders have the force and effect of statutes and are a part of the law of the land. Thus if the statutory duty to carry mail is comparable to having a government contract, all of the airlines are subject to the presidential prohibitions against discrimination.⁴⁹ This would still not preclude similar state action. There is no conflict between the fair employment laws and executive orders⁵⁰ nor was there any manifestation of intent on the part of the chief executives to exclude similar state regulation.⁵¹

There is no conflict between the state fair employment laws and the federal regulation of interstate carriers because they work in separate areas. There has been no congressional regulation of carrier employment discrimination. Congress' concern with the employment policy has been limited to regulations for safety.

Authorized by Congress to license pilots and other airline employees, the Federal Aviation Agency has promulgated extensive requirements for certification.⁵² F.A.A. standards cover the gamut from health,⁵³ age,⁵⁴ moral character,⁵⁵ ability to read and write English,⁵⁶ schooling,⁵⁷ to aeronautical knowledge⁵⁸ and skill,⁵⁹ but do not bar discrimination by the carrier. It is plausible to read into these rigid standards an implied requirement that the airlines employ the best qualified pilots. The state fair employment laws are consistent with this policy because they insure that the best qualified applicant will not be rejected because of race, religion or national origin. These laws do not narrow the carrier's choice of employees but broaden his base of recruitment to the entire community, thereby insuring the employment of the most qualified persons.

If Congress enacts a fair employment law, state regulations which do not equal the federal standard must yield, but absent preemptive intent

48. The airlines have a statutory duty to carry mail. 72 Stat. 764 (1958), 49 U.S.C. 1375 (Supp. 1961). The post office department determines when and where the mail will be carried.

49. Judge William Black, in the Denver court, held that Continental Air Lines was covered by Executive Orders No. 10590, *supra* note 18 and No. 10925, *supra* note 19 because Continental held government contracts to carry the mail. This finding was erroneous. Continental has not contracted to carry the mail but is under a statutory duty to do so.

50. *California v. Zook*, 336 U.S. 725 (1949).

51. *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

52. 14 C.F.R. §§ 20—22.45 (1961).

53. 14 C.F.R. § 29 (1961).

54. 14 C.F.R. § 21.10 (1961).

55. 14 C.F.R. § 21.11 (1961).

56. 14 C.F.R. § 1.13 (1961).

57. *Ibid.*

58. 14 C.F.R. § 21.15 (1961).

59. 14 C.F.R. § 21.16-1 (1961).

state laws equaling the federal standard or exceeding it will survive.⁶⁰

The states might possibly attempt to expand the fair employment laws by requiring employers to hire on a quota system to make their labor force representative of the population. This would be invalidated by the Supreme Court, however, as a violation of the Fourteenth Amendment. A quota system, which was instituted to protect the employment opportunities of American citizens in Arizona at the expense of the foreign born minority, was invalidated by the court in *Truax v. Raich*.⁶¹ While the equal protection clause was invoked in the *Truax* case to protect the rights of minority groups, they do not have a monopoly on the protections afforded by the Fourteenth Amendment. State enforced quota systems are repugnant to the Fourteenth Amendment whether they infringe upon minority or majority rights.

The quota system of employment would also conflict with the F.A.A.'s implied directive to air carriers to employ the best qualified applicants. An employer, filling the state quota requirements, could not rely solely upon the ability of his applicants. Rather than effectuating the fair employment laws, it would obstruct their operation because the goal of the anti-discrimination laws is to insure equal opportunity for all citizens based on ability and to eliminate the racial or ethnic consideration in the selection of employees. A statute requiring a percentage of employees to be selected from minority groups would reintroduce the racial and ethnic factors to a degree previously unknown and would require the employer to keep records of the race, religion and color of his employees. This would entirely defeat the spirit of the laws.

States providing an enforcement procedure authorize the anti-discrimination commissions to issue affirmative orders. An affirmative order is the last resort, issued only after an extensive hearing and when all conciliatory attempts have failed. The affirmative order has proven to be an effective method for enforcing the anti-discrimination laws against intrastate business and this procedure has been upheld by the courts.⁶² The criminal penalties provided by the fair employment statutes, however, have been found to be too harsh and have never been imposed. Without the power inherent in the affirmative order, compliance with the law would be totally dependent upon the offending employer and the fair employment laws would be ineffective. But affirmative orders present the greatest opportunity for conflict between a state fair employment law and federal law. Not only is the application of an affirma-

60. *California v. Zook*, 336 U.S. 725 (1949).

61. 239 U.S. 33 (1915).

62. *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d (1954).

tive order to interstate carriers a burden on commerce, it also presents a potential conflict with federal safety regulations.

For example, when a commission orders an employer to hire a specific applicant, if the qualifications for that job have been established by a federal agency, the employer may have to choose between being in contempt of the commission's order or violating the federal standards. When the Colorado commission ordered Continental Air Lines to employ Green he may have been the most qualified applicant but his qualifications may be suspect when the time for actual hiring arrives. If Green were no longer the best qualified applicant, compliance with the commission's order would be a violation of the F.A.A. directive to employ the best qualified applicants in airline positions.

Just as the application of the anti-discrimination acts need not constitute a burden on commerce, their potential conflict with federal regulations can also be avoided. A negative order directing the offending employer not to discriminate presents no such conflict because it leaves the actual employment decision to the employer. Thus if the federal standards are to be violated the responsibility lies with the employer and is not the result of a commission directive. The commission should then follow up its order to insure that the employer does not perpetuate his discriminatory hiring practices.

The decision now rests with the Supreme Court. The ruling of the Colorado court frees interstate businesses from state fair employment regulations. If the Colorado decision is sustained the only prohibition against interstate employment discrimination will be the executive orders which, at present, only apply to government contractors. The easiest solution to this problem would be the adoption of a federal prohibition against interstate employment discrimination, either through congressional extension of existing legislation or a sweeping executive order. Neither approach, however, appears likely in the near future though the need for fair employment regulation is apparent and has been met at the state level with varying degrees of success.

The difficulty has arisen where the states have attempted to fill the vacuum created by the absence of a federal prohibition of interstate employment discrimination. There is no existing conflict, however, between the state fair employment laws and federal law, nor does the extension of these laws to interstate carriers constitute a burden on commerce. The potential burden and conflict exist in the manner in which these laws are administered. It has been shown that this may be remedied by the issuance of cease and desist orders demanding an end to employment discrimination. This will effectuate the policy of the fair em-

ployment laws without creating a burden on commerce or a conflict with federal standards and will provide a constitutional application of these laws to interstate carriers.