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Supreme Court of the United States

October Term 1971

No. 56 Original

COMMONWEALTH OF VIRGINIA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER STATES SIMILARLY SITUATED,
Plaintiff,

v.

INTERNATIONAL AIR TRANSPORT ASSOCIATION, ET AL,
Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

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STATEMENT OF GROUNDS ON WHICH ORIGINAL JURISDICTION IS INVOKED

The original jurisdiction of this Court is invoked under Article III, § 2, of the Constitution of the United States and 28 U.S.C. § 1251(b)(3) as an original action by the Commonwealth of Virginia, individually and on behalf of

all other States similarly situated, against the defendants International Air Transport Association and the 37 domestic and alien air carrier corporations listed in the Complaint, none of which are citizens of the Commonwealth of Virginia.

Article III, § 2, of the Constitution states as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;— to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

28 U.S.C. § 1251(b)(3) states as follows:

> "The Supreme Court shall have original but not exclusive jurisdiction of:
>
> All actions or proceedings by a State against the citizens of another State or against aliens." June 25, 1948, c. 648, 62 Stat. 927.

QUESTION PRESENTED

Should the Supreme Court exercise its original jurisdiction over a class action brought by one State as sovereign, *parens patriae,* quasi sovereign, and proprietor on behalf of all other States in similar capacities seeking relief from an international conspiracy to retard the development of those States, where there is no other suitable forum in which

this case can be tried in the interest of all parties hereto and in the interests of convenience, efficiency and justice?

STATEMENT OF THE CASE

Count I of the Complaint alleges a violation of Section 1 of the Sherman Act in the agreement by the defendant corporations to fix transatlantic air cargo rates in such a way as to unduly prefer Kennedy Airport in New York and to discourage shipping at all other U.S. airports, the effect of which has been to retard the development of the economy of the Plaintiff and other States which could readily serve as international gateways were it not for the discriminatory rate scheme. The relief demanded is a mandatory injunction under Section 16 of the Clayton Act against the conspiracy itself which would permit and require the individual airlines to base their rates on justifiable mileage differentials and costs. Also demanded are damages for the entire class of States who have actually paid exorbitant rates as shippers in their proprietary capacities.

Count II alleges the same conspiracy to be a common law restraint by the defendants of the trade of the plaintiff State, her citizens, and the other States and their citizens who have been similarly hindered in the development of their economies.

The evidence which would have to be taken for the adjudication of these issues would be mostly documentary in nature and could readily and quickly be compiled by a Special Master since very little, if any, of the factual evidence is likely to be in dispute. Under the circumstances, the original jurisdiction of this Court provides the most efficient and convenient means for disposing of a case of major public concern.

ARGUMENT

I.

The Court Should Take Jurisdiction

The nature of the complaint in the instant case is, quite obviously, nearly identical to the complaint in the case of *Georgia* v. *Pennsylvania R.Co.*, 324 U.S. 439 (1945). In that case this Court recognized the right of a sovereign State to sue, as *parens patriae* and as a proprietor of various institutions, to remedy injuries sustained in both capacities arising out of the agreement by the nation's railroads to fix rates for interstate shipment of goods where the rates so fixed resulted in an undue preference to the Northeast and undue discrimination against the remainder of the country. More recently, the case of *Hawaii* v. *Standard Oil Co. of California,* 405 U.S. 251 (1972), held that while injunctive relief continued to be available to the State in both capacities, damages could properly be awarded only for the injuries suffered by the State in its proprietary capacity as a consumer in the marketplace.

The instant suit seeks such relief against domestic and foreign air carriers who provide cargo service on the North Atlantic, whether by direct single-carrier service or by participation in through service pursuant to joint rate agreements. Some of these carrier corporations are American citizens; some are citizens of foreign countries. All, or nearly all, are members of the International Air Transport Association (IATA), a trade association one of whose chief functions is to serve as a ratemaking conference for international air rates, both passenger and cargo. Only the cargo rates are the subject of this action.

The rates fixed at IATA conferences are filed with the Civil Aeronautics Board ("the Board") as tariffs of the

individual carriers under § 403 of the Federal Aviation Act of 1958 ("the Act"), 49 U.S.C. § 1373. Section 404 of the Act, 49 U.S.C. § 1374, prohibits the creation of any undue preference or prejudice to any carrier, person, port or locality. Section 412 of the Act, 49 U.S.C. § 1382, requires the submission to the Board of any contract or agreement between carriers and the disapproval by the Board of any such contract or agreement it finds to be adverse to the public interest or in violation of the Act; however, any person affected by an order approving such agreements is relieved from the operation of the antitrust laws by § 414, 49 U.S.C. § 1384. Section 411 of the Act, 49 U.S.C. § 1381, permits the Board to issue cease and desist orders to any carrier it finds to be engaging in unfair methods of competition. There is no provision in the Act for an award of damages by the Board where it finds such unfair competition to have occurred.

The allegations of the complaint are, as in the *Georgia* case, that the economy of Virginia and her citizens (and other States and their citizens) has suffered from the effects of the discriminatory rates fixed by the defendants which have, in the words of that case, arrested the development of Virginia and put her at a decided disadvantage in competitive markets. Specifically, the IATA rates are designed to encourage shippers to use John F. Kennedy Airport in New York and to discourage the use of all other airports in the United States, including Dulles, National, Friendship, etc., as gateways for transatlantic air cargo shipments. This is done through the imposition of arbitrary add-ons for shipments to and from points other than New York and a 3 cents per pound increase in the minimum rate at such other points, together with the common rating of many European cities which are substantial distances apart for shipments to and from New York. The result in most cases

is, for example, a rate from Dulles to European cities which is significantly higher than the rate from New York for the same quantity or commodity, not only for the same distance but for significantly greater distances. This unjustifiable rate prejudice, in turn, makes it impossible for Dulles to attract shipping and for Virginia to attract new industry.

Thus it is clear that, in the absence of any supervening authority, *Georgia* v. *Pennsylvania R.Co.* is ample precedent for the maintenance of this suit in this Court. Plaintiff is not unaware of the Court's decision in *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963), wherein the Court noted that the Civil Aeronautics Board was vested with exclusive jurisdiction under § 411 over the antitrust facets of many agreements between air carriers, and that the antitrust laws were repealed *pro tanto* as to those agreements. *Georgia* v. *Pennsylvania R. Co., supra,* was distinguished on the ground that at the time of that case the Interstate Commerce Commission had no power to grant relief against such combinations, 371 U.S. at 305-306, although subsequent legislation had conferred that power on it. The specific holding of the *Pan American* case, however, was only that § 411 gave the board exclusive jurisdiction over questions of injunctive relief against (1) the division of territories, (2) the allocation of routes, and (3) combinations between common carriers and air carriers. These three types of agreements, which were in issue in varying degrees in *Pan American,* are those specifically covered by §§ 408, 409 and 412 of the Act and exempted from the antitrust laws by § 414. Hence the Court properly held that the Board's powers under § 414 were ample to deal with any illegal combinations which resulted in violations of these sections through cease and desist orders. The Court was careful to note, 371 U.S. at 311-312, that the

Board does not have jurisdiction over *every* antitrust violation by air carriers, and that there was no need at that time to determine the ultimate scope of the Board's power under § 411 since it clearly had authority over the particular problems involved. Mr. Justice Brennan in his dissent from the holding of exclusive jurisdiction also noted that, while the Court had withdrawn questions of route allocation, territorial division, and combinations between common carriers and air carriers from judicial cognizance, it had left unaffected questions of rate fixing, combinations between air carriers *simpliciter,* and other serious anticompetitive practices. 371 U.S. at 325.

Shortly after the *Pan American* decision, this Court let stand a decision of the Second Circuit Court of Appeals in which that court held the limits of exclusive jurisdiction of the CAB to be very narrow. *Trans World Airlines, Inc.* v. *Hughes,* 332 F.2d 602 (2nd Cir. 1964), *cert. granted* 379 U.S. 912 (1964), *cert. dismissed* 380 U.S. 248 (1965). In that case the court specifically relied on this Court's emphasis that the antitrust problems entrusted by the Act to the Board "encompass only a fraction of the total." 332 F.2d at 609. At issue in the *Hughes* case was the alleged antitrust violation by Hughes Tool Co. in forcing TWA, its subsidiary, to purchase jet aircraft from it. Hughes claimed in defense that the CAB had approved its acquisition of TWA under § 408, thereby exempting the acts complained of from the antitrust laws. In rejecting this defense, the court held that Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction into which the acquiring party might enter. 332 F.2d at 608. Similarly, in the instant case, it cannot be said that Congress contemplated that CAB approval of rates would carry with it approval of an underlying conspiracy to fix those rates in such a manner as to

give an undue preference to one airport and one State to the prejudice of all others.

Plaintiff seriously urges that the time has now come for further examination of the judicial role in air carrier antitrust litigation. The magnitude of the instant case, involving as it does practically every major air carrier in the Western Hemisphere, by itself suggests that Congress did not intend to relegate to an administrative agency exclusive power over a worldwide conspiracy among giant corporations and, to some degree, foreign governments who own certain airlines. Moreover, the special expertise of the Board is not necessary to the resolution of this case because the issues are startling in their simplicity—a classic antitrust case in which the uncontroverted facts will clearly show an undue preference as well as undue prejudice.

II.

The Doctrine of Primary Jurisdiction

Closely linked to the doctrine of exclusive jurisdiction, referred to above, is that of primary jurisdiction, which is often invoked where issues are raised involving a regulatory scheme within the special competence of a regulatory agency. See Note, *Recent Developments,* 63 Colum L. Rev. 923 (1963); Note, *Antitrust and the Regulated Industries: The Panagra Decision and its Ramifications,* 38 N.Y.U. L. Rev. 593 (1963). Indeed, at the time of the filing of this brief, the transatlantic cargo rates referred to in the Complaint are under consideration by the Civil Aeronautics Board in a proceeding entitled *Agreements Adopted By IATA Relating To North Atlantic Cargo Rates,* Docket #20522. Plaintiff repeats, however, that the issues raised herein are not resolved by the determination that a particular rate is fair or unfair, since as the Court held in *Georgia* v.

Pennsylvania R.Co., supra at p. 460, the fact that the rates which have been fixed may or may not be held unlawful by the Board is immaterial. Nor is any special expertise of the Board necessary to maintain uniform regulation. This Complaint, like that in *Georgia,* seeks to remove discriminatory collusion from the rate-making field and permit individual carriers to perform their duty to provide fair rates. The Complaint specifically charges that the air carriers who belong to IATA have agreed among themselves to submit in their tariffs only those rates which have been approved by an IATA conference. By definition, then, the mere adjudication by the CAB that existing rates are discriminatory or otherwise unfair will not remove the pervasive influence of IATA from the rate-making field and permit individual airlines to file tariffs based only on their own costs. What is necessary is an appropriate judicial order, as demanded by the Complaint, enjoining the defendant air carriers from agreeing on transatlantic cargo rates among themselves and directing them to provide independent tariffs for such service. No such issue is raised in the current proceeding before the Board, nor is it likely to be, yet such relief is absolutely essential to the development of alternate gateways for transatlantic traffic to the overcrowded situation now existing at Kennedy Airport.

Furthermore, relief that the Civil Aeronautics Board clearly has no authority to give is demanded by the Complaint in the form of damages for past practices which have resulted in the payment of exorbitant and unjustifiable cargo rates by Plaintiff and other States as proprietors of State lands and agencies. Plaintiff is aware of the holding in *Georgia* v. *Pennsylvania R.Co., supra* at p. 453, that to permit a shipper to recover damages resulting from excessive rates might operate to give him a preference over his trade competitors. It is for this reason that the action

is brought as a class action, so that appropriate relief can be given to *all* States who have been the victims of discrimination, and any improper preference can be avoided. In this regard, it should be noted that a sovereign State, even in its proprietary capacity, is not in competition with other States as one commercial shipper is with another, so the principles of *Keogh* v. *Chicago & N.W.R. Co.,* 260 U.S. 156 (1922), on which the holding in *Georgia* was based, should not apply in the same manner.

III.

The Propriety Of A Class Action

The Complaint herein is brought by Virginia on her own behalf and on behalf of her sister States who are similarly victimized by the effects of the defendants' conspiracy. The class action in this instance is the vehicle most suited to this type of case since it will avoid the necessity of duplicative suits by other States with essentially the same substantive grievance. Furthermore, like most major antitrust cases involving overpayment, it should be a simple matter for those States which desire to remain a part of the class, after appropriate notice under Rule 23(c)(2), to compute their proprietary damages. Extensive analysis is certainly not necessary to see that the class is sufficiently numerous, that the questions of law and fact are common to the class, that the claims of Virginia are typical of the class, and that Virginia as Plaintiff will adequately represent the class. In this regard it should be pointed out that the location of an international airport within a State is by no means a prerequisite for inclusion in the plaintiff class. Dulles Airport in Virginia serves states such as Maryland, West Virginia, Pennsylvania, North Carolina as well as the District of Columbia in varying degrees and, if permitted to enjoy

fair rates, could serve as a gateway for the industrial development of an entire region. The same is true of airports in Atlanta, Georgia; Philadelphia, Pennsylvania; Miami, Florida; Cleveland, Ohio; Chicago, Illinois; and Baltimore, Maryland, just to name a few. All of these airports serve the "hinterlands" of the several States nearby, which would find them to be a natural gateway to international markets if only the cargo rates did not raise an economic barrier. The removal of this barrier would enable States outside the immediate vicinity of Kennedy Airport to attract new industry as well as to permit their citizens to compete on a fair basis with New Yorkers for European trade.

As to the defendants, once again there cannot be serious doubt that they have acted, or refused to act, on grounds generally applicable to all States, making relief for the class as a whole appropriate under Rule 23(b)(2). Similarly, the questions of law common to the class clearly predominate over any individual questions and, most importantly, the class action is superior to any other method for the management of this case. Rule 23(b)(3). The class format for this case, brought as it is in this Court, will result in a significant conservation of judicial resources since the classic antitrust issues in a case of major public importance can be disposed of once and for all by one Court with the final authority to do what must be done: the Supreme Court of the United States.

IV.

No Other Forum Is Available Or Convenient

As in *Georgia* v. *Pennsylvania R.Co., supra,* none of the defendants is a resident of the plaintiff State. Although some of the defendant corporations transact business in Virginia by providing service at Dulles Airport, many of

them, especially the alien corporations, do not. (Indeed, many of these corporations do not provide service to Dulles for the very reason that the unfavorable rates there have discouraged shipping so as to make such service unprofitable.) Consequently, there is no judicial district in Virginia in which all of the defendants could be found. While it may be that many of the defendants could be "found" transacting business in New York, or in the District of Columbia, Plaintiff submits that she should not have to go "forum shopping" in a case of this importance. As this Court said in *Georgia:*

> "... [W]e cannot take judicial notice of the district or districts wherein all of the defendants are 'found' or 'transact business.' We would not be warranted in depriving Georgia of the original jurisdiction of this Court merely because each of the defendants could be found in some judicial district. Unless it were clear that all of them could be found in some convenient forum we could not say that Georgia had a 'proper and adequate remedy' apart from the original jurisdiction of this Court. (Citing case.) No such showing has been made. Once a state makes out a case which comes within our original jurisdiction, its right to come here is established. There is no requirement in the Constitution that it go further and show that no other forum is available to it." 324 U.S. at 466.

Again, Plaintiff urges that the factual issues involved in the instant case are not likely to be in dispute, so the reference of the case to a Special Master should involve no more than an orderly preparation of the record. The legal, social and economic issues, however, are of such magnitude and importance that this case must ultimately be decided by this Court. Even if a judicial district could be found in which all defendants might be served, it is, therefore,

simply not conceivable that the resources of this Court, the parties, and the lower courts would be efficiently utilized by the remission of this case to such a district court.

CONCLUSION

This Court clearly has original jurisdiction of this suit under Article III, Section 2, of the Constitution and under 28 U.S.C. § 1251(b)(3). This is the same case, for all practical purposes, as *Georgia* v. *Pennsylvania R. Co., supra,* except that airlines are involved instead of railroads. For the same reasons the Court exercised its original jurisdiction in that case it should do so here. This Court can provide a final result in a case of extreme importance to the people of the United States with a minimum of procedural difficulty and without the time-consuming journey through the lower courts from which States, under our Constitution, are exempted. Only this Court has the power to act so decisively, and it is cases such as this in which the exercise of original jurisdiction is most appropriate.

Respectfully submitted,

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