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.

BRIEF ON BEHALF OF DEFENDANT, OLYMPIC AIRWAYS, S. A.

WILLIAM R. JOYCE, JR.
1701 Pennsylvania Avenue, N. W.
Washington, D. C. 20006
Counsel for Olympic Airways, S. A.

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.

BRIEF ON BEHALF OF DEFENDANT, OLYMPIC AIRWAYS, S. A.

Olympic Airways submits this brief in opposition to the Motion of the Commonwealth of Virginia for Leave to File its Complaint against the International Air Transport Association (IATA) and Olympic Airways and other named defendants.

Olympic Airways is a privately-owned corporation organized under the laws of the Kingdom of Greece and provides air transportation service of passengers and cargo between Greece and New York pursuant to a Foreign Air Carrier Permit issued by the Civil Aeronautics Board on May 23, 1966, as amended on December 29, 1966 and between Greece and Chicago by a Foreign Air Carrier Permit issued on May 29, 1969. Olympic Airways does not serve Dulles International Airport or any other point in the Commonwealth of Virginia nor does it maintain any office in the Commonwealth of Virginia.

ARGUMENT

I.

Failure to Exhaust Administrative Remedies

While conceding that the Supreme Court of the United States can take jurisdiction of this case under Section 2 of Article III of the Constitution of the United States and that the Supreme Court of the United States could entertain such an action under 28 U.S.C. §1251(b)(3), the taking of such jurisdiction by this Court at this time would be inappropriate in view of the fact that the Plaintiff has not exhausted its administrative remedies in seeking the relief it requests before invoking this Court's jurisdiction.

It would appear that the Commonwealth of Virginia has not availed itself of the administrative remedies which are available to it in the proceeding presently pending before the Civil Aeronautics Board at Docket 20522, *Agreements Adopted by IATA Relating to North Atlantic Cargo Rates.* It further appears that the Commonwealth of Virginia has not intervened in such proceeding before the Civil Aeronautics Board to state its Complaint of "an international conspiracy to retard [its] development" (Plaintiff's Brief, p. 2). Although the Virginia Airports Authority and Fairfax County Industrial Authority did intervene and participate in the proceeding, Dulles International Airport, which is located in Virginia and is owned and operated by the Federal Government, did not intervene. The cities of Baltimore, Chicago, Cleveland, Philadelphia and Memphis, the Detroit Aviation Commission, the Massachusetts Port Authority and the Port of New York Authority, however, did intervene. There was ample opportunity for the Commonwealth of Virginia to have intervened and participate

in that proceeding before the Civil Aeronautics Board but it did not.

It is submitted that the question raised by the Complaint of the Commonwealth of Virginia is one which should be considered by the Civil Aeronautics Board and not burden the Supreme Court of the United States with such a case not only when the expertise of the Civil Aeronautics Board is available to consider the Complaint of the Commonwealth of Virginia but the very proceeding concerning alleged discrimination in the North Atlantic cargo rates is presently being held before that agency. The Civil Aeronautics Board has before it the question whether these cargo rates filed with it violate the provisions of Section 1002(f) of the Federal Aviation Act (49 U.S.C. 1002(f)) by granting an undue preference for New York and an undue prejudice against the other East Coast cities, including Dulles International Airport.

II.

The International Rate-Making "Conspiracy".

Plaintiff charges that the cargo rates on file with the Civil Aeronautics Board pursuant to the agreements reached at the International Air Transport Association (IATA) conferences are the result of a ". . . world-wide conspiracy among giant corporations and, to some degree, foreign governments who own certain airlines" (Plaintiff's Brief, p. 8).

Nothing could be further from the truth because the whole subject of international air rates involves the interest and sovereignty of more than eighty countries. IATA was created when the attempt to establish international air rates through multilateral government agreements would not work. It was found by these governments that international air service involved a complex matrix of extremely

intricate international implications, differing government national as well as airline interests, dissimilar flight equipment, route structures, marketing theories, many different languages and customs, to say nothing of reconciling the different but applicable laws of each country. The governments came to the conclusion that while air routes would be negotiated bilaterally or on a government to government basis, the only way to handle the enormous problem of agreeing on tariff levels would be through the type of machinery as was set up in forming what is now known as IATA. This procedure has been accomplished in many bilateral agreements entered into by the United States and in over 500 such agreements throughout the world. There are 54 bilateral agreements to which the United States is a party and which contain a tariff clause. Fifty of these refer directly to IATA. No IATA rate may be established unless it is unanimously approved by IATA members and subsequently approved by the governments concerned. Moreover, each sovereign government can condition IATA tariffs to include a tariff required by that government.

In 1946 the Civil Aeronautics Board gave temporary approval to the first resolution establishing IATA Traffic Conferences and such approval was later confirmed by the Civil Aeronautics Board indefinitely in 1955. Later approval of IATA by the United States government in 1970 was referred to in Senate hearings wherein it was stated that IATA ". . . serves as the primary instrument for establishing and maintaining a highly complex structure on international fares and rates. In the field of international rate-making, it substitutes industry conferences for extensive multilateral negotiations between governments" and that ". . . that multiple mechanism, though it has some drawbacks, seems to be the most practical one we can achieve and it should be maintained" (Hearings on S. 2423 Before

the Subcommittee on Aviation of the Senate Committee on Commerce, 92nd Cong. 1st Sess., ser. no. 92-40 at 135 (1971)).

In addition, the Interational Air Transport Policy statement issued by the White House on June 22, 1970 stated:

> "It (the policy) must take into account legitimate air transport interests of other countries and recognize that in the final analysis the policy cannot be viable without international acceptance."

United States air carriers are permitted by the Civil Aeronautics Board to participate in these IATA conferences with foreign air carriers and as the Plaintiff points out, they are relieved thereby by such permission from the operation of the antitrust laws. The reports of the IATA meetings are made available to the Civil Aeronautics Board by IATA itself. Therefore, it is difficult to see how Plaintiff can admit that by law the Civil Aeronautics Board can relieve a U. S. air carrier from the operation of the antitrust laws so as to attend an IATA conference to determine fares and rates, yet claim the fares and rates agreed upon by both U.S. and foreign air carriers at such conference and accepted for filing by the Civil Aeronautics Board are in violation of the antitrust laws.

Furthermore, the fact that cargo rates to New York may appear to the Plaintiff to be preferential as against the rates to Dulles International Airport overlooks the fact of the natural geographic advantage of New York and any differential is not due to a conspiracy among the Defendants but in fact is due to the reality of rate-making procedures for air carriers. In addition, there is more than the cargo rates themselves involved. Unlike the railroads which Plaintiff relies on in citing *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945), this case involves cargo rates between the United States and foreign countries which are charged

by both U.S. and foreign air carriers pursuant to tariffs rooted in bilateral agreements between the United States and many foreign governments and constitute a significant part of our foreign relations.

III.

Right to Jury Trial

Count II of Plaintiff's Complaint alleges that the conspiracy charged herein is ". . . a common law restraint by Defendants of the trade of the plaintiff State. . ." (Plaintiff's Brief, p. 3). The common law complaint of restraint of trade filed by the Commonwealth of Virginia against the various Defendants herein would appear therefor to be an information charging a common law crime of fixing prices for a necessity of life and therefore a criminal conspiracy. The common law conspiracy of restraint of trade was spelled out in the decision of the King's Bench in 1758, *King* v. *Norris,* 96 Eng. Rep. 1189, wherein the Court stated succinctly that an agreement to fix prices for a necessity of life (in that case salt) was a criminal conspiracy at common law.

> "This was a motion for leave to file an information against the defendants, who were separate proprietors of salt-works in Droitwich, for a conspiracy to raise the price of salt there, by entering into an article, whereby they bound themselves, under a penalty of £200, not to sell salt under a certain price, which exceeded the price then received for it.
>
> The articles were now cancelled, and destroyed: but, notwithstanding that, the Court were unanimous for making the rule absolute and Lord Mansfield declared, that if any agreement was made to fix the price of salt, or any other necessary of life (which salt emphatically was), by people dealing in that

> commodity, the Court would be glad to lay hold of an opportunity, from what quarter soever the complaint came, to shew their sense of the crime; and that at what rate soever the price was fixed, high or low, made no difference, for all such agreements were of bad consequence, and ought to be discountenanced."

In view of the fact that Count II of the Complaint herein is in the nature of an information charging restraint of trade, which is considered in common law to be criminal in nature, it would appear that the Defendants are entitled to a trial by jury.

CONCLUSION

This Court should deny plaintiff's motion for leave to file its complaint because plaintiff has not exhausted its administrative remedies and that the Plaintiff has not stated a violation of the antitrust laws either statutory or at common law. In any event, the Defendants are entitled to a trial by jury on the charge of common law conspiracy of restraint of trade.

Respectfully submitted,

WILLIAM R. JOYCE, JR.
Counsel for Olympic Airways

WILLIAM R. JOYCE JR.
1701 Pennsylvania Avenue, N. W.
Washington, D. C. 20006