

In the
Supreme Court of the United States

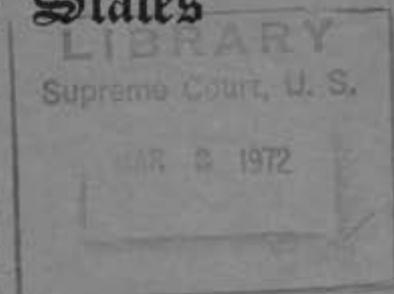
NORTHEAST AIRLINES, INC., et al.,)

Appellants,)

vs.)

NEW HAMPSHIRE AERONAUTICS)
COMMISSION, et al.,)

Appellees.)



No. 70-212

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Pages 1 thru 41

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IN THE SUPREME COURT OF THE UNITED STATES

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 NORTHEAST AIRLINES, INC., et al., :
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 Appellants, :
 :
 v. : No. 70-212
 :
 NEW HAMPSHIRE AERONAUTICS :
 COMMISSION, et al., :
 :
 Appellees. :
 :
 ----- X

Washington, D. C.,

Thursday, February 24, 1972.

The above-entitled matter came on for argument at
 10:48 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 WILLIAM O. DOUGLAS, Associate Justice
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice
 HARRY A. BLACKMUN, Associate Justice
 WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN K. MALLORY, JR., ESQ., Cleary, Gottlieb, Steen
 & Hamilton, 1250 Connecticut Avenue, N. W.,
 Washington, D. C. 20036; for the Appellants.

W. MICHAEL DUNN, ESQ., Assistant Attorney General,
 The State of New Hampshire, State House Annex,
 Concord, New Hampshire 03301; for the Appellees.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 70-212, Northeast Airlines against New Hampshire Aeronautics Commission.

Mr. Mallory, you may proceed whenever you're ready.

OPAL ARGUMENT OF JOHN K. MALLORY, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

MR. MALLORY: Mr. Chief Justice, may it please the Court:

This case, somewhat similar to the case just argued, is here on appeal from the judgment of the Supreme Court of New Hampshire, holding constitutional a New Hampshire State statute.

The appellant airlines sought to enjoin enforcement of the statute, which imposes on the airlines -- this tax is imposed on the airline, not the passenger -- imposes on the airline the charge of one dollar per passenger enplaning from New Hampshire Airports. The airlines contended that the statute was unconstitutional under the constitutional right to travel, the commerce clause, and the equal protection clause.

The trial court in New Hampshire transferred the case, including the stipulated facts, to the Supreme Court without determining any issues, as it can do.

The Supreme Court, on January 29, 1971, held that the charge was a charge on the airline not the passenger, and

that it is not "a service fee on common carriers of passengers for hire on a regular schedule". It held also that the incidence of the charge is on the enplanement of passengers, but it held that enplanement is a wholly intrastate event. It held the statute constitutional.

The statute in New Hampshire, as I said, imposes on the airline the charge of one dollar per passenger for all passengers enplaning from a New Hampshire airport. If, however, a scheduled airline uses planes with a gross weight of less than 12,500 pounds, the charge is fifty cents per enplaning passenger.

Charter carriers, contract carrier is a charter carrier, not scheduled airline, of over 12,500 pounds are similarly taxed, and charter carriers with planes of less than 12,500 pounds do not pay.

The charge, the tax on charter carriers ends when the funds contributed by the State of New Hampshire to the airport has been repaid.

The charge on scheduled carriers has no terminal time or date.

The collections from this charge or tax are remitted to the Aeronautics Commission, the State Aeronautics Commission, which distributes 50 percent of the funds to the State aeronautical fund, and the remaining 50 percent to the municipality or airport authority owning the landing area.

There is no requirement that the municipalities spend the moneys received on airport facilities. The municipalities must place in aeronautical funds the funds collected under Chapter 423 of the New Hampshire laws, but the revenue collected under this particular section that we're talking about is not collected under 423, it's collected under 122.

Q Mr. Mallory, --

MR. MALLORY: Yes, Your Honor.

Q -- am I correct in my impression that the New Hampshire Supreme Court made no reference to this allocation of 50 percent to the general fund?

MR. MALLORY: That is correct.

Q Was it argued below?

MR. MALLORY: It was argued on the motion for rehearing, Your Honor. And it's --

Q Where?

MR. MALLORY: -- it's in the Appendix, as I recall, at the very end, starts at page 36a and runs over to page 42. The particular argument is --

Q Well, it wasn't raised prior to the motion for rehearing?

MR. MALLORY: That is correct, Your Honor. It was not raised prior to the motion for rehearing.

Q So that except for the denial of the motion, it

wasn't treated in any depth at all by the New Hampshire court?

MR. MALLORY: No. The New Hampshire court simply says that the money goes to the aeronautics fund, which is making the statement appear that 100 percent goes to the aeronautics fund. That just isn't accurate under the terms of the statute itself, which lays out that 50 percent goes to the aeronautics fund and 50 percent to the municipality.

Again --

Q Does the record have in it how the facilities are financed?

MR. MALLORY: There is in the record just the statement about landing fees and rentals and that type of thing, but not in detail, Your Honor.

Q Does the municipality contribute any funds to the airport itself?

MR. MALLORY: Oh, yes, I think it does. I think that's clear, that it does.

Q Does the record show that?

MR. MALLORY: I do not -- I cannot say that the record specifically shows it. I think it's just --

Q Does the State aeronautical fund finance anything at the airport?

MR. MALLORY: The State aeronautical fund, under the 1959 statute, which I'll come to in a minute, it's an older statute, did earmark the funds received under that statute for

paying off bonds and notes incurred at the various airports. The 1969 statute, which is the one we're talking about now, does not have that same provision; and the State Aeronautical Commission can expend its funds for general aviation or for improving navigational facilities throughout the State, that type of expenditure.

It does not have to spend the money on any particular airport, or the airport from which the funds were received.

Q How many -- what are there, three airports in New Hampshire? Lebanon, Keene, and Manchester?

MR. MALLORY: No -- then there's Berlin, in addition to that, Berlin and Laconia.

Q Laconia?

MR. MALLORY: Yes, Your Honor.

Q And Berlin has one, too?

MR. MALLORY: Yes, Your Honor.

Q "Berl-in" they call it up there.

MR. MALLORY: Yes, sir.

The court in New Hampshire, the Supreme Court, refused to follow Crandall v. Nevada and the Passenger cases, specifically stated that its reasons for not following those were that those involved a tax directly on the passenger and not on the carrier, as the Court said was the case here.

It also refused to follow the Montana case, and distinguished the Indiana case that we've just argued, the

Evansville case, again on the ground that there the tax was on the passenger and here it's on the carrier. And it distinguished the New Jersey case, which had been decided by the trial court and the State withdrew its appeal, on the ground that there the statute allowed the moneys collected to go into the general funds of the cities which didn't own the airport.

The Court noted that in 1959 it had rendered an advisory opinion on a similar statute, but one applicable only to carriers engaged in intrastate commerce. It had upheld that statute and had noted, in its opinion, in its advisory opinion, that objection by anyone to the effect on interstate commerce was unlikely in view of the Aero Mayflower Transit case, 332 U.S., and Pirrell v. Johnston, 86 New Hampshire.

We contend here that the New Hampshire Supreme Court erred in holding that the right-to-travel cases, including Crandall, do not apply because the tax in New Hampshire is on the carrier rather than on the passengers. We contend that that is an error of law in determining that the tax in New Hampshire was on the carrier not the passenger.

We contend that it also erred in failing to follow the Crandall line of cases, because of its view that those cases were merely based on the theory that the power to tax is the power to destroy.

We submit that it erred in holding that the act of emplacement, which it found was the incidence of taxation, is

wholly an intrastate event.

Q Mr. Mallory.

MR. MALLORY: Yes, Your Honor.

Q You, I take it, at least in the Indiana case, concede that the State can impose a use tax to make interstate commerce pay its fair share?

MR. MALLORY: I -- yes, sir.

Q And yet you object that the type of taxes we're dealing with here are on the act of enplanement or on the commerce, and, I grant you, you can find that sort of distinction in some of our prior cases. It seems to me a very metaphysical kind of distinction.

MR. MALLORY: I would submit, Your Honor, that it -- that where that, what I conceive to be the right to travel is involved, that it isn't that metaphysical. That here the State, in imposing a tax that, in this case on the carrier, is measured by the number of passengers; but I think that it's to be considered as one directly on the passenger, where it's a head tax of this kind. Where it can do that, I think that it clearly has the power, that it is exercising the power to control and, to some extent, suppress the right to travel, which is a right that I believe has more than just a -- is based on more than just the commerce clause.

Q Yet, you concede that a passenger doesn't have the right to travel at the State's expense?

MR. MALLORY: Oh, I concede that it doesn't have the right to travel at the State's expense, yes.

Q I thought you had virtually conceded that there were probably a good many ways in which the State or the local authority could do exactly what they're doing here, in the same amount, without a constitutional problem?

MR. MALLORY: Indeed, Your Honor, I urge that they can. Now, they think that the cases cited in all of the briefs that have been filed show the vast number of ways in which the State or community can raise money.

Yesterday the question of landing fees came up. The -- clearly the State or the airport can impose landing fees, that will raise a substantial amount of money. The rentals can certainly be increased and raise money. They --

Q Do you think --

MR. MALLORY: --- have gross-receipts taxes.

Q -- these other ways of accomplishing the same and would be less burdensome on the right to travel?

MR. MALLORY: Yes, Your Honor, I certainly do. I certainly do.

Q Even if it's ultimately taxed onto each individual passenger by the airline?

MR. MALLORY: It's bound to be ultimately attached onto the -- in some fashion, to the price of transportation. But it is not attached, sort of dollar-for-dollar, or penny-for-

penny on the head of the person traveling from, for example, Laconia to Boston. The Laconia airport, with which I'm fairly familiar, is a very small airport, it could stand, I'm sure, a great deal of improvement, and could probably, with a fair small amount of traffic there, could justify a very high enplanement charge without that charge being excessive.

But it would certainly burden travel between Laconia and Boston if it did that.

Now, a gross receipts, a properly apportioned gross-receipts tax or properly apportioned income tax, some other type of personal property tax on airlines, that would be borne by passengers traveling throughout the United States instead of simply borne by those traveling, seeking to leave Laconia and get to Boston would be a very different thing. It would also be under the regulatory control of the Civil Aeronautics board, which has the obligation and the power to allocate routes and to regulate fees so they can carry out its purpose in seeing that the nation is served by commercial carriers rather than just a particular route.

Q Well, why isn't a landing fee, which, I take it, under your line of reasoning, would be a tax on the act of landing, just as much of a burden on commerce or a tax on commerce as this head tax on the act of enplanement?

MR. MALLORY: Well, Your Honor, I view a landing fee as a fee for the use of the airport, and I think that

basically that's what it is, rather than --

Q Well, isn't the act of enplanement one of the acts that people do when they're using an airport?

MR. MALLORY: It is certainly one of the acts that people do after they have used the airport, but -- after they've used the terminal, they're using the runway --

Q But they're using it when they enplane?

MR. MALLORY: Yes, sir; they are using it.

Q What is enplanement? It's getting on the airplane, isn't it?

MR. MALLORY: Enplanement, by definition, is the act of boarding the airplane with the intent to depart.

Q Yes, and --

MR. MALLORY: For the purpose of departure, not with the intent to depart; the purpose of departure.

Q -- once your flight is called and you go to the -- to a certain point and you sit around there, you're probably engaged in enplanement.

MR. MALLORY: I think you're engaged in enplanement when you board the aircraft, Your Honor, for the purpose of departure.

Q And you're using the airport at that time?

MR. MALLORY: Yes, sir, you are.

Q And you're using the airport when you land?

MR. MALLORY: You are. Indeed, you are. You're using

it when you -- when you go there for any purpose. If you -- under these taxes, if you go to the airport, have your ticket, sit and wait, and the plane is cancelled for some reason, there is no tax. If the plane -- if you board the plane and it takes off, there is a tax.

It's uncertain in my mind whether, if you board the plane and the plane doesn't take off, I don't know what happens to the tax under those conditions.

Q Well, what about some of the trips on the Eastern Coast where you take off and come back to the same airport? What would happen then?

[Laughter.] [Gesture by Mr. Mallory.]

Q What was the significance of your comment, prior to the last few questions, about CAB allocating funds for the benefit of national travel as a whole? Are you suggesting that all this be underwritten by Federal funds?

MR. MALLORY: I didn't -- I didn't mean to say, Your Honor, that the CAB allocates funds; they allocate routes and have the obligation of determining rates that will result in airline service throughout the country rather than the local government being able or the State Government being able to impose a tax or a charge that will influence, or that can influence the fares to such an extent that it restrict the right to travel from that State.

Q Let me rephrase my question. You're here

representing a number of airlines in these two cases?

MR. MALLOY: Yes, Your Honor.

Q What do the airlines suggest is the solution for these cost problems?

MR. MALLOY: I think the airlines suggest some type of uniform charge.

Q By the facilities?

MR. MALLOY: By -- well, or by a uniform charge that would be imposed that would flow back to facilities that need the money rather than -- probably rather than a uniform charge by the facilities themselves.

That would avoid the problem of the differing amounts and the differing incidence of taxation.

Q So you say they might be satisfied with higher landing fees?

MR. MALLOY: Your Honor, I say the higher landing fees are a way in which the airports can raise money without, in my judgment, violating the Constitution.

Q So if they just raise the landing fees, charge it to the airlines, you would say -- they may not like it, but you wouldn't have a constitutional question.

MR. MALLOY: I don't think I'd have a constitutional argument, Your Honor.

Q And of course airlines just don't like landing fees, anyway, do they?

MR. MALLORY: They certainly do not, Your Honor.

Q Going back to my other question, though, where would you impose that charge that you speak of, are you saying again -- I guess I'm repeating -- are you suggesting all of this be underwritten by Federal taxation?

MR. MALLORY: When you say I'm suggesting that there be a -- if it be deemed desirable to do it this way, that the Federal Government -- indeed, the Secretary of Transportation, Secretary Volpe, at one point suggested to the House Ways and Means Committee a bill under which Congress would authorize the States to impose a reasonable charge on enplaning passengers if they could get the airlines serving that airport to agree to that charge.

He talked in terms of a one-dollar charge, and it would be a uniform charge.

Now, I think that the question of obtaining uniformity here is extremely important in this, in any way of raising money through any kind of an enplaning tax.

Q You mean that, of necessity, the same charge should be made for using San Francisco International Airport as for the Evansville Airport or the Laconia Airport?

MR. MALLORY: Under my proposal it would be, yes; the charge would be the same.

Q Even though the cost of construction per passenger might vary greatly?

MR. MALLORY: It may vary very greatly, and the amount of money that would then flow back to the San Francisco Airport would vary, would definitely vary greatly from that which flows to Laconia.

To go back to the New Hampshire Court's refusal to follow Crandall, because it stated that here the tax is on the carrier not the passenger, we believe that the Court -- the Court also found in New Hampshire that there was a service charge, as I said. And I think a fair reading of the Court's opinion indicates that its finding that it was a service charge depends in substantial measure on its finding that the act of enplanement is a wholly intrastate act, which we contend is wrong under the cases.

Now, the stipulation in New Hampshire again shows that a majority of the users are not taxed, and it also shows that the use by the minority who are taxed is substantially no different from that of the majority who are not taxed.

Q Well, I would think you would have -- if your fundamental objection here, or part of it, is that this kind of a tax loads onto passengers and hence onto air travel generally, the cost of expanding an airport rather than spreading the cost on to other users likewise; I don't know how you could -- why you wouldn't have the same objection to higher landing fees?

MR. MALLORY: Because higher landing fees at all

airports would simply go into the cost of operating an airline.

Q Well, I understand, but you'd have the same --

MR. MALLORY: They do not -- I'm sorry; excuse me.

Q But if the airport authority determined, Well, we have to have so much money to finance an expansion and we're going to increase landing fees so we can pay for them, so we can pay off the bonds we're going to issue; and they're don't -- they're stuck with their long-term leases on all the other facilities in the airport, and so they have to load it on to air travel, and they decide they'll do it by landing fees.

MR. MALLORY: That goes into the general costs of operating the airlines --

Q Well, I understand, but it's certainly --

MR. MALLORY: -- and the fee -- the fare from Laconia to Boston is not based entirely, or even in large measure, on the landing fee at the Laconia Airport. Those costs are then -- you adjust your fares to recoup those costs.

Q But sooner or later, sooner or later it's going to cost people more to travel?

MR. MALLORY: It's going to cost people more to travel, but it's not going to cost -- it's not going to be a direct burden on the passenger from Laconia to Boston, --

Q Well, that even comes --

MR. MALLORY: -- by the --

Q -- that even compounds the error, doesn't it?

MR. MALLORY: I'm sorry?

Q That compounds the error, doesn't it? It means that you're loading on to a lot of people that shouldn't be paying it the cost of the Laconia facility?

MR. MALLORY: I'm not -- well, once you make the judgment that they shouldn't be paying it, I think that it would follow -- your conclusion would follow. I think that any of the costs -- right now the costs at Laconia on landing fees are \$50 for a Fairchild-327, and \$75 for a DC-9.

Those costs are not just divided by the number of passengers carried from the airport in New Hampshire. If that's wrong, it's wrong. But it's certainly not done that way.

Q Well, Mr. Mallory, suppose you combine the Evansville one with this one, in this one in New Hampshire every dollar that was collected went into the airport? Do you have any problem with that?

MR. MALLORY: Yes, I do, Your Honor. I think that --

Q I still can't see the difference between the landing fee and this.

MR. MALLORY: Perhaps another --

Q Except that this --

MR. MALLORY: -- lawyer will be arguing landing fees, I'm not prepared to --

Q Well, I understand that your argument is on the word "enplaning", that one word.

MR. MALLORY: That the tax on -- no, it's -- well, it's more than that one word, Your Honor.

Q What else?

MR. MALLORY: The fact that it's a tax on enplanement, I think takes it out of the use tax category in the Indiana case. The fact that the taxable event is the act of enplanement, I submit, brings it under Crandall v. Nevada, the Passenger cases, and a number of other cases --

Q Well, --

MR. MALLORY: -- and, indeed, brings into play the -- the --

Q Well, the landing fee, you land for what purpose? Two purposes: to let somebody off and to let somebody, quote, "enplane". But that's all right.

MR. MALLORY: The landing fee?

Q Use.

MR. MALLORY: As far as I'm prepared to say today is, as I view the landing fee, it's all right, yes. Now, as I say, some other lawyer may be here arguing the constitutionality of the landing fee with you at some time, but I'm prepared to say that the landing fee is all right in my view of the Constitution.

Q But the landing fee is paid for the use of the facilities at the airport?

MR. MALLORY: That is correct, Your Honor. It's not

a direct head tax --

Q: And what is --

MR. MALLORY: -- it's not a direct tax on the passenger.

Q: And what is the enplaning fee?

MR. MALLORY: The enplaning fee is a direct tax on the passenger.

Q: Well, I thought --

MR. MALLORY: For traveling.

Q: I thought here they collected it from Northeast?

MR. MALLORY: Well, I'm coming to that, if I may, Your Honor. In the Passenger cases, in Crandall, in Henderson v. Mayor of New York, all of those were taxes in which it was argued that the tax was on the carrier. There's no -- in the Crandall case, the tax in fact was on the passengers, but it was argued that it was a tax on the carrier.

In the Passenger cases it was a tax on the master or the owner. In Henderson v. Mayor of New York, it was a tax on the master or the owner. In the Chy Lung case, it was a tax on the master. In People vs. Compagnie Generale Transatlantique, it was a tax on the owner.

In each one of those cases the Court was met with the argument that here's a tax on the carrier, it's not on the passenger. It's a use tax or it's a tax on the privilege of doing business. In each one of those cases the Court looked

through that and specifically held that as a legal matter, as a constitutional matter, a tax of this type on the carrier, measured by a flat rate per-head on the passenger, is to be viewed for constitutional purposes as a tax directly on the passenger.

Now, the Supreme Court of New Hampshire ignored those cases. It didn't -- they were briefed, it did not discuss them at all in its opinion.

In the Passenger cases, Chief Justice Taney, in dissenting, but in discussing the interstate tax, a tax on citizens moving from one State to another -- which was also covered in those statutes; and finding that that was unconstitutional, specifically dealt with whether or not a tax of this type was one to be viewed as on the carrier or the passenger. And he held that it was -- stated that, wasn't holding, that it was to be viewed as a tax on the passengers.

In Henderson v. New York, the State was specifically trying to avoid the holding in the Passenger cases, and they made it absolutely clear that the charge was not on the passenger but on the master, and gave them an alternative, to post a bond or pay a dollar-fifty for each passenger.

New York argued in that case that the tax -- the act, I'm sorry, the Act to be passed upon now by the Court does not impose a tax on the passenger. The State also argued that the Act cannot be tortured into an indirect mode of

imposing a tax or duty upon the passenger as such. The Court noted that argument and specifically stated: In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. And if it is apparent that the object of this statute is judged by that criteria, is to compel the owners of vessels to pay a sum of money for each passenger brought by them from a foreign shore and landed at the Port of New York, it is as much a tax on the passengers, if collected from them, or a tax on the vessel owner for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger cases.

In Crandell v. Nevada, the same argument was made, that it was a tax on the carrier. In fact, there, the statute, I think, was fairly clear that it was --

Q Well, suppose the statute --

MR. MALLOY: -- fairly clear that it was on the carrier not the passenger.

Q --- or ordinance said everybody that uses our runways shall pay a dollar. Everybody. That includes the pilot, co-pilot, baggage handler; everybody.

MR. MALLOY: And private aviation as well, and so on?

Q Yes.

MR. MALLOY: Everything. Well, I would suspect that under these views the tax would probably be excessive, in that amount. Once you impose a tax generally, it's going to be in a

much smaller amount.

In Indiana, for example, you had 85,000 takeoffs and landings by civil aviation and only 14 by commercial aviation.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Mallory.

MR. MALLOY: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Dunn.

ORAL ARGUMENT OF W. MICHAEL DUNN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. DUNN: Mr. Chief Justice, may it please the Court:

This particular case which we are discussing now, the New Hampshire Statute, Chapter 391, is different from the previous case, at least in form; and, in fact, I think it's different in substance.

Chapter 391 levies against the scheduled air passenger carrier a service fee for the use of the State's facilities.

Now, I'd like to make one point here: that our airports in New Hampshire are very similar, apparently, to the Indiana airport. We have three Airport Authorities with which we are concerned here, and two municipalities. But, for the most part, the expense of the airport, the operating expense and, to a large extent, the capital improvement expense is carried directly by the municipality or by the Airport Authority by some sort of -- inadequate in this particular

situation -- property tax, for the most part.

The Aeronautics Commission, through the Legislature, does appropriate money for various activities at the airport, and the Aeronautics Commission has money that it receives through fees and so forth, which is expended to these airports.

Q And that's Statewide, the Aeronautics Commission?

MR. DUNN: That's right, that's Statewide.

However, this fee only affects, at the present time, five airports, and before a fee is collected at the airports there's a condition precedent: that both the State and the municipality or the Airport Authority contribute money to the operating expenses or construction expenses. Not just one of them.

The statute, as set out, is a levy against the carrier in its terms. The Attorney General is authorized, in a civil suit, to sue the carrier if the carrier does not remit the service fee; returns are made by the carrier. The proceeds are to go 50 percent to the Airport Authority or municipality, from which the fee is measured, and 50 percent to the Aeronautics Commission or to the Treasurer to be covered into the Aeronautical fund.

Now, this Aeronautical fund can only be used for air navigational aids. Now, the money that goes to the municipality or the Airport Authority, for the most part -- I tend to agree there is not a restriction that it must be used

for air navigational aids as such, but, as you look at the total picture, they are paying most of the bill for the airport anyway, and the fee would never replenish the amount that they are paying out.

Q Now, is that fact a weakness in your case, in the structure of the tax?

MR. DUNN: No, not in my opinion. Because the --

Q Well, is that statement of yours supported by the record in this case?

MR. DUNN: Well, unfortunately, the tax was not -- the landing aid service fee was not a tax on the basis that it was excessive, so there was no record whatsoever, nor did we come in and prove that it was not. It was never attacked. I think, without doubt, we could show that it's not excessive at all.

Q That both the municipality and the State Aeronautics Board contribute to this airport or to each airport more than they're getting out of the tax?

MR. DUNN: Well, they certainly contributed more than they were receiving before, and it is certainly true with regard to the municipality, that they are contributing more than they're going to get out of this tax.

With regard to the Aeronautical fund, perhaps there might be some money that would come in, but it must be used to maintain or operate, if there is any surplus it must be

used for air navigational aids.

Q But we're just in no position on this record to --

MR. DUNN: No.

Q -- to moot that question, I take it?

MR. DUNN: No, not really. And the reason is it was not attacked as excessive, and the State had no burden, in my opinion, of showing how the money was actually used and proving, in fact, that it is not excessive.

Now, the fee -- under the New Hampshire statute, the fee is against the air carrier for the use of State and municipally funded facilities, and it is measured by two criteria. The weight of the aircraft and the benefit provided the carrier in terms of the number of enplanements or the number of people that get on it.

I'd like to go back to the question that was posed by Mr. Justice White and discussed further by Mr. Justice Blackmun yesterday, with regard to the Indiana case. And the question was: Why not simply increase the landing fee?

Now, the New Hampshire answer to that question, because it does seem like a far more simple thing to do, without perhaps any constitutional problem, was posed to the Commission and the answer was this:

This would be an inequitable burden against the air carrier to simply double or triple the landing fee.

Now, the fact that we are opposing each other here, and the fact that the State indicates that the fee is constitutional, the airlines indicate that it is not, does not mean that there is not some harmony with regard to the Aeronautics Commission and the airlines. We do not want to burden the airlines to such an extent they cannot do business in New Hampshire.

Q But you say it would be inequitable, but why would it be an inequitable way of raising this money?

MR. DUNN: Because the airlines, as the Aeronautics Commission has looked at it, cannot afford to have their landing fee doubled or tripled, at this point.

Therefore, they, instead, indicated that they would rather have this sort of a use fee which would allow the airlines to grow. It would not immediately, tomorrow, or a year ago, double the cost of doing business in Laconia.

Q This would just obviate the necessity of getting a rate increase?

MR. DUNN: That's right.

Q I mean this is --

MR. DUNN: Perhaps impractical.

Q -- this is, rather than increasing their expenses and making less profit under the existing rate, this would be an alternative way of raising the money and charging the passenger?

MR. DUNN: Well, now --

Q Without affecting either rates or profits?

MR. DUNN: Now, there's no doubt that under the New Hampshire statute --

Q Well, is that right?

MR. DUNN: Right.

I'm now speaking for the Commission, and I'm not a member of the Commission; but the answer that was given to me was that it would be too burdensome on the carrier to double or triple the fee.

Q Well, Mr. Dunn, are you trying to convince me that it's easier for me to pay the dollar than Northeast Airlines?

[Laughter.]

MR. DUNN: No, I think not. It's no easier for you to pay the dollar than Northeast Airlines. However, in the end, I think you would be --

Q But the real problem is you're afraid if you raise them, they will overfly your airport -- is the real reason?

MR. DUNN: Well, I think the real problem is the fact that the landing fees are negotiated, they are apparently in an extremely touchy subject. They are frequently re-negotiated, as the certified air carrier relinquishes its commitment to a lower class carrier, and they are extremely

touchy. And the practical problem is that service -- they fear the service will diminish considerably if a double or triple landing fee is imposed.

It's a very, very touchy area.

Q But if you're talking about raising the same amount of money by two alternative ways, one by increasing the landing fee, and one by imposing the type of tax that New Hampshire imposed; isn't the ultimate burden on the airline going to be the same?

MR. DUNN: The ultimate burden on the airline, I think ultimately will be the same. However, under the New Hampshire statutory scheme, as more people use the airline the burden will become somewhat -- somewhat greater.

Q Well, yes, but didn't your law say that the airline may pass it onto the customer?

MR. DUNN: Yes, now, the statute --

Q So that it doesn't increase the burden on the airline?

MR. DUNN: Oh, no.

Q If they pass it onto the customer?

MR. DUNN: No. Our law says: 'Nothing herein shall prohibit such fee from being passed on to the customer.'

Q And it is being passed on, isn't it?

MR. DUNN: Well, now, that's -- the two appellants are passing it on, yes; but with regard to the other air

carrier that are not litigating this matter, one air carrier is not passing it on, and one air carrier is.

Now, as far as passing on this particular dollar fee, the statute simply levies a charge, measured by two items now, the weight of the carrier and the number of people that get on. Now, they may very well pass it on, or they might not pass it on.

I think after --

Q But if they do pass it on, there is a difference between a landing fee and this kind of a tax?

MR. DUNN: As to the --

Q In terms of the burden on the airline?

MR. DUNN: Yes, I would agree with --

Q Quite a bit.

MR. DUNN: -- if they do pass it on. However, if their expenses are going to increase necessarily for a short time and their profits will diminish if there is a landing fee; however, it will be raised, and I think that it will go on --

Q If they can get a rate increase out of the CAB.

MR. DUNN: Now, it would -- perhaps so. But I think that's -- they certainly may get a rate increase out of CAB, that is beyond -- we can't control that.

Q But that's the only way they can pass on a landing fee basically, is to get a rate increase out of the CAB?

MR. DUNN: I would agree with that.

With regard to the fact that this tax is levied against the air passenger carrier and against the contract carrier, which is not in litigation here, there is a particularly good reason for this.

No. 1, that the carriers derive their livelihood, they use regularity of routes, they're in and out all the time; and, secondly all of the expansion in the New Hampshire airports can almost be traced directly to the change of facilities of the air carrier. For instance, the DC-3 was changed to the DC-6, it needed a longer runway, and now I believe they're changing to a DC-9.

The change of facilities of the air carriers appears to be one step ahead of the change of the airport. So most of the capital expense, and a great deal of the operating expense is directly due to the fact that these airports are used by commercial air carriers. No. 2, whether the safety devices that must be maintained, because the cargo here is passengers. Although some safety devices of course would be there even if they had noncommercial flights. I think it's definitely increased by the fact they have commercial flights.

I think when this statute is analyzed, it is possible to look at it as a correct and proper use fee levied against the carrier, measured by the weight -- measured by two criteria: the weight of the carrier, that is the wear and tear presumptively on the runway; and, No. 2, the benefit

provided by the use of the facility.

Now, the benefit might not necessarily be equivalent to the number of times they land, particularly in New Hampshire, at Laconia or Berlin, they may very well land and take off with no one. They may not have received a terrific benefit, they may land in Manchester and pick up more people. So the benefit here is, in effect, No. 1, the use, the wear and tear, and the weight of the aircraft; and the benefit is reflected by actually the number of people that they pick up.

Q This is a takeoff fee, not a landing fee, isn't it? It's a takeoff fee --

MR. DUNN: Yes. Well, --

Q -- imposed on the carrier depending on two things: the weight of the aircraft and how many people got aboard at that airport. Right?

MR. DUNN: That's right. Yes, you're right.

However, I would like to make one comment about the characterization as a takeoff fee. It is our opinion and contention that this is a simple way to measure the benefit derived, and it would be immaterial, for instance, whether we called it a deplaning fee or an enplaning fee or a takeoff fee, or whatever, because we're only using it as a yardstick to measure the benefit. Therefore, in my opinion, it would be excessive, for instance; whereas to tax the enplanements and then turn around and tax the deplanements and so forth, because

the benefit would then doubled and it would be out of proportion.

Q Well, I was just trying to understand your theory that this is a use tax imposed on the carrier, and the incident is takeoff, and the measure of the tax is two things: the weight of the plane and how many people got aboard at that airport. Is that right?

MR. DUNN: That is our contention, yes.

Q And the carrier has the option of passing on the tax to the -- spreading it among the people who got aboard at that airport at a dollar-a-head; is that it?

MR. DUNN: That's right.

Q And these carriers do, the common carriers do, as I understand it, Mohawk and Northeast?

MR. DUNN: That's right, the two of them.

Q And does Executive still run up there?

MR. DUNN: I'm uncertain, it's a week-to-week basis.

Q I know it was the last time I flew them.

MR. DUNN: I think Executive --

Q But there are contract carriers, are there?

MR. DUNN: There are contract carriers, and they are -- there is a change in the -- however, they are not taxed, or the use fee does not apply if they're under a certain weight.

Q Right.

MR. DUNN: But if they are a large contract carrier, it applies, and they pay use fee.

Q Right.

MR. DUNN: Some absorb the fee and some do not.

Q Has there been any suggestion by any of the airlines that this kind of a tax is forbidden as inconsistent with the rate-making authority, the CAB?

MR. DUNN: No. I don't think -- there was a suggestion in the brief that -- maybe perhaps I should say yes. There was a suggestion in the brief that Congress, because of the need for uniformity, has a right to speak, and even though they haven't spoken in the sense that they can make the rates, or demand that they be made for all.

Q Well, why couldn't an airline pass on a landing fee?

MR. DUNN: As with regards to State law and, in my opinion, certainly with regard to the constitutional --

Q How about statute --

MR. DUNN: -- I think they could pass it.

Q Well, how about statutory, though? How about -- that's normally been considered an expense that is taken into consideration in setting a fare, hasn't it?

MR. DUNN: That's right.

Now, the answer is, I do not know if they have been forbidden by the CAB to pass on; no.

Q Wouldn't you be surprised if that was permissible, for the carrier to have an authorized rate and then suddenly take some of their expenses on which the rate is based and start charging it direct to the passenger?

MR. DUNN: Yes, I would.

Q Wouldn't you think that would be very odd?

MR. DUNN: I would.

Q How about a takeoff fee?

MR. DUNN: Rather than a landing fee, or other than an enplanement fee?

Q Yes.

MR. DUNN: You mean an enplanement fee as we're discussing here?

Q Yes. Any time you charge an air carrier something for the use of an airport, it seems to me like it would be charging in the same -- it's the same sort of thing as a landing fee. It's an expense for the air carrier.

MR. DUNN: Yes, I agree. I agree. It's an --

Q Well, then, what business does the airline company have in passing it onto the passenger? If it's an expense that's supposed to be reflected in the fare?

MR. DUNN: No, I could --

Q Some of the airlines aren't doing it, are they?

MR. DUNN: That's right.

Q Why?

MR. DUNN: I don't know if it's an administrative problem or if it's a legal problem.

Q Well, I would think they will probably go to the -- that whatever it is they're absorbing, they will say is part of their expense for the next go-around on rates.

MR. DUNN: I'm certain they will. They certainly will.

Now, I think it could be argued, perhaps by someone who was in a position to do so, that they shouldn't pass it on to the passenger.

Now, our statute in no way tells them --

Q Well, then, again I --

MR. DUNN: -- or demands that they do pass it on.

Q All right. But again I say -- again I just wonder if -- there just hasn't been any question that the airline -- that this kind of a tax which requires the airline to charge a customer more than its published fares, is it consistent with the Federal statute?

MR. DUNN: No. My answer is I do not know if it is or is not consistent.

Q Of course it isn't exactly accurate to say this tax requires the airline to tax the passengers.

Q But it authorizes them to.

MR. DUNN: Well, in the sense -- no, I would even say no, it does not authorize them to. It says, nothing here shall

prevent them from doing it. It's as if nothing was said whatsoever, under the New Hampshire law.

Q I agree. I agree. You can increase your landing fee without interfering with anything the Congress is doing?

MR. DUNN: Right.

Q And you are -- here you're charging an airline more?

MR. DUNN: We are.

Q For using the airport?

MR. DUNN: That's right. Absolutely right.

Q Now, the airline is free to do what it wants to do with it?

MR. DUNN: Yes.

Well, we say that it is --

Q It may or it may not be, yes.

Q It is free until the CAB tells them they can't do it.

MR. DUNN: Yes.

Q Is that about it?

MR. DUNN: Yes, that is our position. We are not demanding that they pass it on, and we don't restrict the fact that they --

Q So in this respect you are different from the Indiana case?

MR. DUNN: Oh, yes. In my opinion we're considerably different from the Indiana case.

Q And presumably no part of the New Hampshire statute is violated if it turns out that the CAB says the airline can't pass on the fee?

MR. DUNN: That's true. That would be my opinion.

The New Hampshire statute, and the statutory scheme, which we attempted, or the Legislature attempted to pass, simply is a use fee against the carrier, nondiscriminately imposed, as against all carriers whether they are intrastate or interstate, whether the flight is intrastate or whether the flight is interstate, for the benefits they have received and will receive.

All of the funds that the State receives must go to air navigational aids, and with regard to the funds that go to the municipality, that simply either goes to air navigational aid or replaces money that has been spend for air navigational aids.

Q Could I ask just a question: Are the airlines who are represented here all passing the tax on or not?

MR. DUNN: It is my opinion that they are passing the tax on. And my assumption from the last time -- from the case.

The New Hampshire position simply is this is a use fee against the airline, nondiscriminately imposed, and it is not excessive, and it is not necessarily a fee against

the passenger. However, we do --

Q And it's none of your business whether it's passed on or not.

MR. DUNN: That's right.

Q You couldn't stop them from passing it on?

MR. DUNN: No. In my opinion, we couldn't.

Q And you couldn't force them to pass it on?

MR. DUNN: Not under the statute, no. And we do not force them to pass it on.

Q Are there any other facilities at the airport for which a charge is made, an observation platform, is this practiced in New Hampshire?

MR. DUNN: Well, we have, in my opinion, what I know about fixed-base operators at some of the airports, and they have -- they do work on airplanes, they pay a fee.

We have a fee with regard to landing of general aviation. Now, that fee is --

Q You mean private planes?

MR. DUNN: Private planes. Now, that fee, as remarkably as it seems, is about eight times greater at some airports than the landing fee with regard to the commercial aviation. It's quite a bit more to land a general private plane, per landing.

Q The only thing that prevents the State or a local airport from raising the landing fee is the process of

negotiation with the airlines and the risk that they may curtail their service; isn't that a problem?

MR. DUNN: Now, this -- I agree. Now, this is not necessarily a legal point, and I don't think it's a constitutional point, by any stretch of the imagination. But it's an extremely valid, practical point that these are negotiated, and they are terrifically afraid of terrifically poor service if the landing fee is too high. Now, this is just a fact of life, with which the Aeronautics Commission and the municipalities and the airport authorities are faced with.

With regard to other fees at the airport, there are rentals at some airports, which is no different than any other building which rents space. But the interesting point is that when, for instance, at Lebanon a landing fee for a scheduled air passenger carrier might be approximately \$1.67 per landing; it would be for the same carrier over \$12,500 pounds, \$12 for general aviation aircraft to land.

So that there is a certain amount of harmony between the municipalities and the air carriers. We want their business, we need their facilities. We're trying to provide facilities for them.

This is not necessarily a strictly adversary thing when you get out to the airport. This is strictly a use fee levied against the carrier for facilities provided.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dunn.

Thank you, Mr. Mallory.

The case is submitted.

[Whereupon, at 11:42 o'clock, a.m., the case was
submitted.]

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