In the

Supreme Court of the United States

EVANSVILLE-VANDERBURG AIRPORT AUTHORITY DISTRICT, et al.,

Petitioners,

vs.

DELTA AIRLINES, INC., et al.,

Respondents.

No. 70-99

Washington, D. C.
February 23, 1972

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT, et al., Petitioners,	:	
v.	:	No. 70-99
DELTA AIRLINES, INC., et al., Respondents.	:	

Washington, D. C.,

Wednesday, February 23, 1972.

The above-entitled matter came on for argument at 2:26 o'clock, p.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:

HOWARD P. TROCKMAN, ESQ., 20 N. W. Sixth Street, Evansville, Indiana 47708; for Petitioners.

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

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 70-99, Evansville-Vanderburgh Airport Authority against Delta Airlines.

Mr. Trockman, just so that you and Mr. Mallory can plan your time, we will probably complete your argument, and perhaps, if it's feasible, open some phase of your friend's argument.

ORAL ARGUMENT OF HOWARD P. TROCKMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. TROCKMAN: Yes, Your Honor.

Mr. Chief Justice, and may it please the Court:

This is a review of a decision of the Indiana Supreme Court, rendered on December 23, 1970, declaring the ordinance involved in this prodeeding unconstitutional under the commerce clause of the Constitution.

The petitioner, Evansville-Vanderburgh Airport Authority District, is a regional airport. By that I mean it lies in the southwestern tip of Indiana, and it is utilized by not only the residents of Vanderburgh County, Indiana, where it is located, but by many people residing outside of the area.

The District was created by a State statute. It has both legislative and taxing powers, and it was created specifically to operate Dress Regional Airport.

As I stated, it is the primary airport which serves Illinois, Kentucky, as well as southern Indiana residents. Approximately 300,000 people move through this airport per year, using commercial aircraft. Forty percent of these users, as shown by the stipulated facts in this cause, of Dress Airport reside outside the city.

The yearly operating deficits to which I will allude later in this argument are supported, up until now, only by tax levies on Vanderburgh County property owners.

The stipulated facts which I referred to --

Q When you make that statement, don't you charge landing fees at all?

MR. TROCKMAN: Yes, Your Honor, there are landing fees charged by contract to each of the commercial airlines serving the airport.

Q And you have rental for space within the airport?

MR. TROCKMAN: We have rental space within the airport, which is used, on a per-quare-foot basis, by each of the airlines.

During the course of this appeal, Your Honor, and I have pointed this out in the reply brief, the charges which we are attempting to establish by this use and service charge ordinance were excepted from the contract of renewal of all of these lease agreements, and therefore the question has been left open pending the outcome of this review.

Q I take it the deficit you refer to is the failure of the kind of charges that Justice Blackmun has referred to, to cover the operating expenses of the airport?

MR. TROCKMAN: Exactly.

Q Isn't that a disease that afflicts all airports?

MR. TROCKMAN: I don't think it afflicts all airports, Mr. Justice Blackmun. I feel that some of the larger airports enjoy a very handsome revenue. But it is the type of airport that comes from the midwestern part of the United States, such as the small or medium-size hub airports, which we represent that are faced and perplexed with this financial problem.

And this is what caused, I might add, the passage of the use and service charge ordinance, which I will outline to you.

Q Is there anything to prevent them from raising their landing fees, except that it might drive the airlines out?

MR. TROCKMAN: There is nothing to prevent the raising of the landing fees, Mr. Chief Justice, but we do know that if the landing fees were raised, that this type of raise in the levy would be passed along to the passenger in some way: either the air fares would be increased, or the passenger would be paying for this charge in some manner.

It's obvious to me, and I think it probably should be to the Court, that whatever charges are paid by the airlines,

they're passed along to the ultimate consumer. And this, of course, is the purpose of the use and service charge ordinance in this particular case. It is designed to be passed along to the consumer on a user basis, not on the basis of a property tax that just affects Vanderburgh County residents, many of whom never use the airport.

But when we have some 120,000 people residing outside the perimeter of Vanderburgh County using this airport, and do not support it directly through any property tax, we feel that a much more equitable and broader base support should be made. And thus the formulation of the user tax.

The preamble of the ordinance in question recites the need for revenue to support existing and future facilities at the airport.

Q What are the other sources of revenue? Are there any other sources of tax revenue for the airport?

MR. TROCKMAN: There are no other sources of tax revenue, other than the Vanderburgh County property tax, an ad valorem tax.

Q And is part of that allocated to the airport?

MR. TROCKMAN: Yes, the airport has, up until this legislation, it had a 12-cent limitation on each $100 of assessed valuation on property in Vanderburgh County.

Q So all the residents paying that property tax are contributing to the --

MR. TROCKMAN: Yes, sir.

Q -- maintenance of the airport to a certain extent?

MR. TROCKMAN: Yes, that is correct.

Q So the Airport District is larger than the city of Evansville itself?

MR. TROCKMAN: The Airport District, is co-terminus, in accordance with the statute, with the boundary lines of Vanderburgh County. So that the ad valorem tax, which is levied to support the deficit, to raise the deficit to keep the airport in existence, is levied only on the Vanderburgh County residents.

Recognizing the need for revenue to support existing and future facilities, and, by the way, I will refer later to Exhibit D, which is a part of the stipulations, where the consultant's report requires an estimated expenditure of local funds of $6.9 million of airport improvements. The airport board passed this ordinance on February 26, 1968. It notified the airlines of the passage of this ordinance in advance, and notified it that it would become effective on July 1, 1968.

As I stated, it was designed in part to defray the cost of providing commercial airport facilities for use by commercial aircraft and commercial passengers.

The ordinance establishes a one dollar per enplaning passenger charge and, as I say, it is on the passenger, to be

collected by the airline and remitted twice yearly. It applies without distinction whatsoever to whether the passenger travels in interstate or intrastate commerce. Each passenger is treated the same.

And the fact that these respondent airlines might subsequently refer to the fact that there are 88 percent, more or less, of people who are traveling outside of the airport to locations beyond the State of Indiana is unimportant and I don't think relevant to the proceeding, as long as interstate and intrastate passengers are taxed, are charged equally.

Q The tax is imposed only on passengers whose trips originate at Dress Memorial Airport, is that right?

MR. TROCKMAN: That is correct, Your Honor, and you will find a stipulation to the effect that the enplaning passenger is, by identity, the deplaning passenger, because most people who start one leg of a journey are either completing a journey which had its origin in Evansville or are completing a journey which had its origin in a locality other than Evansville.

So it's our position that by saying enplaning passenger we are reaching all the commercial airline passengers.

Q But it's the passenger who's -- what is taxed is the passenger whose present trip originates in Evansville?

MR. TROCKMAN: That's correct. Regardless of his residence.

Q Yes.

Q You have a stipulation, do you not, as to 145,000 versus 146? That's a very close equivalent between enplaning and deplaning.

MR. TROCKMAN: Yes. The stipulation, I believe, is the very first stipulation upon which we rely, found at page 53 of the Appendix, at the bottom, paragraph 10 -- I'm sorry, that is not the stipulation.

I think it's on 43, Your Honor.

At any rate there are some 146,000 enplaning passengers at Dress Memorial Airport in 1967, and this is pointed out in the stipulation -- I cannot find the exact location -- this is paragraph 12, page 46 of the Appendix, Your Honor.

And there is a like number, or a substantially like number of deplaning passengers at the airport for the same period.

Now, for the first time in any use tax statute that's been passed by any State or local municipality, the airlines are allowed by the terms of this ordinance a six percent deduction for its administrative cost of collecting the per-passenger enplanement charge.

I don't know of any other statute, sales tax, gross income tax, highway use tax statute -- at least I have not found any to this date -- which gives to the airlines or gives

to the motor carrier an allowance for this administrative charge.

And there are cases, of course, which state that no such requirement need be made in a statute, but we have made such an allowance.

The ordinance does provide that the proceeds are appropriated for the capital improvements at the airport.

Now, the question involved in this proceeding is of grave and vital concern to the preservation of State and local governing bodies to provide and improve facilities for use of commerce and to charge reasonably therefor.

Q But didn't the Supreme Court of Indiana just say it wasn't a use tax, because the only people that got taxed were those that flew in the airplanes, not those that used it?

MR. TROCKMAN: Yes, Your Honor. There was a statement to this effect --

Q What's your answer to that?

MR. TROCKMAN: -- and I am prepared to respond to that statement.

Q Go ahead.

MR. TROCKMAN: The use of the facilities of Dress Regional Airport are enjoyed primarily by the commercial airline passengers. The stipulations involved in our Appendix are very replete with statements to the effect that the existing facilities at Dress Memorial Airport -- Dress

Regional Airport would not be essential except for the required use by interstate commerce or by persons traveling commercial aircraft.

And I'd like to refer, in response to your question, to pages 53, 54, and 55 of the Appendix, where these stipulations are shown.

At paragraph 10, found at the bottom of page 53 of the Appendix, the stipulation was -- and this was agreed to by the airlines -- that the terminal building itself would not be essential except for the required use by commercial airlines and their passengers, and also in reference to the terminal building, most of the facilities constituting the terminal building would likewise not be necessary, except for the required use by commercial airlines and their passengers.

In other words, it would not be required for noncommercial or private aviation.

There is a stipulation also, Your Honor, to the effect that the runway lengths, approach areas, rampways, taxiways, the instrument approach lighting systems, and the safety aids at the airport would not even be necessary to accommodate private or noncommercial aircraft. Thus, they are provided for the use of commercial airlines.

And the comparison which we have made, which I think is very interesting, at paragraph 14 of the Appendix -- or paragraph 14, page 54 of the Appendix, is that in order to have

a noncommercial, private aviation type airport, there would only be required some two runways, possibly even a grass strip, of 3500 to 4,000 feet. Which would cost some $20 or $25 per lineal foot to construct.

But in order to accommodate commercial airlines and their aircraft, and the passengers who travel on these aircraft, as shown at paragraph 15, page 55 of the stipulations, the present construction requirements would require a $200 per lineal foot expenditure.

Making a comparison of the costs involved for noncommercial as opposed to commercial aviation, the two runways that I mentioned for private aircraft would only cost some $200,000; 8,000 feet, $25 per lineal foot.

The required cost for commercial airlines using these same runways, which we now have at the airport, some 16,000 feet of runways, is $3.2 million.

And I submit this is a substantial variation in cost, in order to accommodate commercial airlines and their passengers, whether they be intrastate or interstate.

Q Of course all that difference isn't paid by the airport facility, is it?

MR. TROCKMAN: I don't believe I understand your question, Mr. Justice Blackmun.

Q Well, you're making a point of the difference in cost between runways, for example, in a private, noncommercial

airport and that of a more commercial one. Am I not correct in my impression that most of these costs, the bulk of them are supplied by Federal grants?

MR. TROCKMAN: No, they are not, Your Honor. Under the Aviation Facilities Act, which was recently amended in 1970, the most funds which could be contributed in a grant-in-aid towards airport improvements is some 50 percent of the project cost.

As a matter of fact, in the Airport Facilities Act there was a statement to the effect that a substantial expansion of the local airports was needed to provide the necessary improvements to accommodate commercial aircraft and commercial airlines.

And in order to supply these improvements, our consultants came up with Exhibit D, which is shown in the Appendix, some $6.9 million worth of expenditures, solely of local funds after deducting all possible Federal grants-in-aid which would be available. In other words, the project would be of a cost substantially more extensive than $6.9 million, in order to comply with the needed improvements at this airport.

And this consultant's report, Your Honor, was adopted by the board of the Airport Authority formally.

Q Do you have State grants in Indiana?

MR. TROCKMAN: Do we have State grounds?

Q Grants. Do you have State aid --

MR. TROCKMAN: No State grants are allotted to us. We work through the State Aeronautics Commission, but to the present date no funds have been allotted or received by the Evansville Regional Airport for construction funds.

Q In some States such funds are available from the State.

MR. TROCKMAN: Through some type of Statewide tax levy. But not yet through the State of Indiana.

Q You referred to the 1970 statute. This airport was constructed prior to 1970, I take it?

MR. TROCKMAN: It was constructed some time before that, it was actually constructed and substantially erected during the war, in order to accommodate aircraft using the airport who were using local military industry. But the funds for this airport, Yor Honor, have primarily and substantially been provided at the cost and expense of Vanderburgh County residents; and this is shown definitely by the stipulations.

Q When you say primarily and substantially, do you mean the vast majority of it?

MR. TROCKMAN: Yes, Your Honor.

Q This is a most unusual situation, is it not?

MR. TROCKMAN: Well, no, it is not unusual. For instance, when it comes to the terminal building, up at least until recently, our recent expansion of the terminal building

did not result in any receipt of Federal funds.

We recently had a $980,000 bond issue, which is also recited in the stipulations, for the purpose of financing a construction of an addition to our terminal building.

Federal grants-in-aid don't reach terminal buildings or roadways leading to the terminal building, for instance. The Federal grants-in-aid do reach runways and taxiways, to which Federal grants will supply approximately 50 percent of the funds.

But the Congress nor the Federal Aviation Administration has not undertaken the burden of financing improvements at Dress Airport. That is on the local airport and, until now, on the local county residents.

Q As a practical matter, how do airlines pay their way in connection with using the airport, as airlines? They pay rent for their facilities --

MR. TROCKMAN: They pay a square-footage charge --

Q -- do they pay landing fees?

MR. TROCKMAN: -- for the office spaces which they utilize, and at most airports, including Dress, they pay an enplanement -- not an enplanement charge, but a charge which is based upon the gross landing weight of a particular aircraft.

Q Now, I suppose both charges the passengers end up paying?

MR. TROCKMAN: There's no question about it. If they

don't, the airline is operated at a substantial deficit, as we've been.

Q Yes. And what, as a practical matter, keeps the Airport Authority from simply raising the landing fee, so that it would be spread over everybody who is using that particular airline and that particular airport?

MR. TROCKMAN: Well, I think, Your Honor, this is what we have done by passing Ordinance No. 33. Rather than funneling it through the airline, by charging the airline a dollar per enplanement passenger fee, which we know ultimately will be passed along to the consumers, the commercial airline passenger.

We have taxed and have established a use and service charge for the airline passenger, which is designed to be --

Q Well, why did you do it that way rather than just raising the landing fees?

MR. TROCKMAN: Well, at the time we did have a contract with the airlines which did specify a certain gross landing weight. This was one consideration, but the board's explanation of this was that if it was going to be passed along to the consumer, if the airport is going to be used on a user basis, if they want to have a more equitable use of the facilities and to let the people pay for it according to the use, then why not pass it along to the passengers, since they're going to pay for it anyway. This is the rationale.

Q But you don't tax the deplaning passenger.

MR. TROCKMAN: We do. We do, Mr. Justice White, because the deplaning passenger also is an enplaning passenger.

Q So you think he's either already paid it when he left or he's going to pay it when he does leave?

MR. TROCKMAN: That's right. When I depart Dress Regional Airport for Washington, D. C., I'm not going to be driving back, normally, unless the weather does not permit me to fly, I'm going to be returning to Dress Regional Airport by aircraft.

And the same is true for anyone who is traveling to Evansville. They are going to board an airplane and to complete the second leg of their journey after they arrive there and transact whatever business they might have.

Q But you don't tax anybody who comes out to eat at the restaurant?

MR. TROCKMAN: Well, yes, we do. And the stipulations do show that --

Q How do you tax them? You charge them --

MR. TROCKMAN: Our airport concessionnaires pay us --

Q Pay you rent?

MR. TROCKMAN: Pay us rent, and pay us on the basis of a gross percentage of the food prices charged to the consumers who eat in the restaurant, for instance. The charge is 7.5 percent, as shown by the stipulation. We get 7.5 percent for

every item of food, 12.5 percent for every item of drink, alcoholic beverage, which is consumed on the premises.

The airport parking is gauged on a similar method. We receive up to 80 percent of the parking fees.

Q But there's just a lot of the terminal building that isn't out for rent, that's a cost that has to be borne by the Authority itself, I gather?

MR. TROCKMAN: That is correct.

And a lot of this we attempt to pass along to the airlines, but we have not yet had a fair return to support this facility. And if we are going to support this facility in accordance with the way our consultants tell us that it needs to be supported, by the construction of additional capital improvements, as is shown by the stipulations, we're going to run out of tax money to pay for these improvements. And we need another method, to wit: we need the method of the enplanement service charge to help us finance these improvements.

Q Mr. Trockman, --

MR. TROCKMAN: Yes, sir.

Q -- I suppose there's some equity in favor of a dollar-a-head enplaning passenger tax as opposed to just raising the landing fee, because your dollar-a-head tax enables you to tax more heavily the Delta flight that comes in with 120 passengers on it than the Delta flight that comes in with 10 passengers on it?

MR. TROCKMAN: That's correct. Theoretically, the weight of the aircraft and the use of the facilities is more with the use of more per-place-per-passenger plane movement, and we feel by having such a charge is a much more equitable method of measuring our revenues and in arriving at an equitable charge.

Q Following through on the practicalities, landing fees and space rentals are a matter primarily of negotiation with the airlines, are they not?

MR. TROCKMAN: That is correct.

Q And do I assume correctly that they'll all join together to resist your attempts to raise?

MR. TROCKMAN: No question about that. They have done so in the past.

Q And do I also assume correctly that they threaten at times to overfly if you get too high?

MR. TROCKMAN: To be fair, I don't think the airlines have ever made such a statement. I know they have probably thought it. But they have never made such a statement.

Q Wouldn't the CAB control that, anyway?

MR. TROCKMAN: Well, under the CAB regulations, they are required, under their certificated routes, to fly between certain points. For instance, we have in our stipulations that some 88 percent of the people fly outside the airport to locations beyond the State of Indiana.

Since the appeal of this case, Allegheny, for instance, has added another flight, which has a flight terminating in Indianapolis, Indiana. So that the percentages are constantly going to be changing. And it may be 88/12 one year and it might be 60/40 the next.

But I think this aspect of it is immaterial so long as we reach both the enplaning passenger, who arrives and departs in Indianapolis or Evansville, and the passenger who goes beyond the State of Indiana.

Q What about the private aircraft?

MR. TROCKMAN: Private aircraft --

Q Just pay landing fees?

MR. TROCKMAN: -- is based on the -- we receive revenues from private aircraft indirectly through our fixed-base operators who maintain hangar facilities and repair facilities for these aircraft. Any gasoline which is sold to private aircraft at the airport, we receive five cents per gallon revenue. And this is a substantial amount of money.

Q So you wrap up any -- the equivalent of any landing fees or enplaning fees in that five cents?

MR. TROCKMAN: Unquestionably, we do derive revenue, substantial revenue, from our flowage fees.

Q Don't you have a tie-down fee for private aircraft?

MR. TROCKMAN: Tie-down fees are actually charged

by the fixed-base operators. Now, they also pay on a square-footage space contract which they have. But the actual revenue, the substantial revenue which we derive is through the flowage fee that's paid by the private aircraft owners.

But we submit that the use and service charge in question is, in essence, no different from the Federal excise tax of 8 percent which is levied by the Federal Government in order to help finance their 50 percent share of some of the grants-in-aid improvements which are made; and it's certainly no different than the charges that are made by the airlines for the use of the aircraft. Because it's all designed and gauged by the use of the facilities given and offered to the passengers for its use.

Article 1, Section 8, Clause 3 of the Federal Constitution grants to Congress the power to regulate commerce. But we contend, and the cases show this, that it does not give it the exclusive power; only the power to regulate it in its entirety if it sees fit.

The Congress has not shown fit to preclude the States from any reasonable regulations. And, as I say, the question involved in this proceeding is whether we can require commerce to pay its own way for the use of valuable facilities which we have furnished to commerce; and, secondarily, whether the dollar charge is reasonable.

In the Braniff Airlines case in 1954, the Civil

Aeronautics Act of 1938 was called into question, and this Court stated that this Act did not exclude or preempt the States from passing or enacting reasonable regulations; and until an Act of Congress overrides all conflicting legislation, the States can pass reasonable regulations for the use of its facilities.

As I stated, the Aviation Facilities Act has already made the demands on local government to improve its airport system.

And the Act further requires minimum standards that have to be established by local airports in order to serve as commercial airports.

In the General Motors case, and we feel that this is very pertinent on the subject, decided in 1965, and quoted in our brief, it is not whether a State or whether commerce can be taxed, it is how it can be taxed.

Now, the first significant case we feel was decided on the use of valuable facilities furnished to commerce was back in 1886 in the case of Huse vs. Glover. This involved a tax for the use of artificially constructed navigational facilities. And while I'm not going to quote extensively from this case, I think the rationale of this case applies as much today as it did in 1886.

The Court said: How the highways of a State, whether on land or by water, may be best improved is a matter for

State determination, and it is not the purpose of the commerce clause, the Court goes on to say, to relieve those engaged in interstate commerce of their just share of the State tax burden.

This Court stated, and it has repeatedly held, that the private inconvenience must yield to the public good.

Significantly, we say that the only bridge that needs to be gapped between 1886 and 1972, the date that we argue this case, is the fact that the highways -- that the runways of our airport are indeed the highways of our airport.

Q Let's assume that this dollar-a-head just went into the general revenue of the county or of the State, and wasn't allocated for use -- for the use of airport facilities.

MR. TROCKMAN: I think, Your Honor, that would make a very large difference. But we have appropriated this for --

Q You think you might be stuck with Crandall then?

MR. TROCKMAN: We might be stuck with Crandall, but Crandall, as the respondents have vigorously argued, is a mere departure tax, it's a mere tax for leaving the State.

Q It's just a revenue, isn't it?

MR. TROCKMAN: It's not even based upon the use of facilities.

Q That's right.

Q Even if you leave on your own road, you would be taxed in Crandall.

MR. TROCKMAN: That is correct.

Q So it was just a wholly revenue measure?

MR. TROCKMAN: That is correct. In almost case that is found throughout the airlines briefs, Your Honor, that involves discrimination or national uniformity, is either based upon the fact that interstate commerce is taxed in an unequal manner to that of interstate commerce. Local intra-state users were not being taxed under these use tax statutes.

Q Or it's being charged more than was necessary to pay its way?

MR. TROCKMAN: That is correct.

Now, we have in our stipulations a statement to the effect that the revenues to be derived by the maximum tax levies of Vanderburgh County, Indiana, plus the revenue which we intend to derive from this use and service charge ordinance, will not even then be sufficient to complete our over-all improvement program in order to comply with the consultant's report and what we have determined the Aviation Facilities Act demands that we make at the airport.

Q Well, let's -- I suppose arguably you'd get the same answer, even if this tax went into the general revenues of the county or the State, and the county or the State was the one that had to make up the deficit at the airport?

MR. TROCKMAN: That is so, yes. But there are cases

that I have read to the effect that such a tax is not constitutional, it is not appropriated for the purpose of providing the improvements needed and enjoyed by commerce.

Q Well, if the State could show that every year it appropriated more than the amount of the tax to the airport --

MR. TROCKMAN: That could be done, yes, sir. No question about it.

Now, the Aero Mayflower case, vs. Railroad Commissioners, decided in 1947, cited at page 28 of our brief, held that even where a State has received Federal aid, and this runs to the question that you asked me, Mr. Justice Blackmun, that even where a State receives Federal funds, that a gross receipts tax on motor carriers was valid. And the Court went on to say that the State was not required to furnish facilities to commerce free of charge.

And this holding has been held by this Court, it has been repeated by this Court in the Aero Mayflower case, the Sprout case, the Binghamton case, all of which we have cited in our brief.

So we say the instance of the charge, as the respondents argue, is not on the act of enplanement but is on the valuable use of airport facilities furnished at a great burden and expense to the Vanderburgh County taxpayers.

We submit, Your Honor, that the use and service charge of this nature is not only constitutional but equitable

in nature.

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

We'll not ask you to divide your argument for the minute and a half remaining. We'll resume in the morning.

[Whereupon, at 2:58 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Thursday, February 24, 1972.]

IN THE SUPREME COURT OF THE UNITED STATES

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT, et al., Petitioners,	:	
v.	:	No. 70-99
DELTA AIRLINES, INC., et al., Respondents.	:	

Washington, D. C.,

Thursday, February 24, 1972.

The above-entitled matter was resumed for argument at 10:10 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:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume argument in Evansville-Vanderburgh Airport Authority against Delta Airlines.

Mr. Mallory.

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

ON BEHALF OF THE RESPONDENTS

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

The Supreme Court of Indiana, in this case, rested their decision entirely on the commerce clause and declared the ordinance invalid under the commerce clause.

It found invalidity there and stated that it didn't therefore reach the other constitutional issues in the case that had been decided by the trial court.

The trial court had decided the ordinance invalid under the constitutional right to travel, the Fourteenth Amendment privileges, and immunities clause, and equal protection clause; and it also found it invalid under the Indiana Constitution.

We contend unconstitutionality under all of these and particularly under the constitutional right to travel. However, since I move affirmance of the Indiana Supreme Court decision, I intend to limit or to rely principally or discuss principally the commerce clause decision by it.

The crucial issue, I submit, under the commerce clause

is whether or not this is a use tax. The case has been argued and, I think it's fair to say, briefed by the other side on the assumption that it is a use tax. The cases it cites, the highway use cases principally, are use tax cases.

It is my submission to this Court that the tax is not a use tax case. It is not a use charge. It is not a service charge. Rather, it is a charge or a tax on the passenger for the act of enplanement. That is, it is a charge on the passenger for the act of boarding the aircraft for the purpose of departure; some 88 percent of the people who are enplaning at this airport or enplaning for an out-of-State place.

The question, the issue of whether or not this is a use tax has been before the courts of four States, and has been present in these cases since these ordinances gained popularity some four years ago.

It has been -- was discussed directly before the trial court and the Indiana Supreme Court in this case, they decided that it was not a use tax, it was not a charge for use, and that it was dependent solely on the act of enplanement.

It was before the Montana Supreme Court in a very similar case, except that in the Montana case the charge was nominally levied on the air carrier rather than on the passenger.

Q Mr. Mallory.

MR. MALLORY: Yes, sir.

Q Is the distinction you're drawing between the use tax and the kind of tax you say this is one that depends on intent, I mean of the Legislature?

MR. MALLORY: No, Mr. Justice Rehnquist, it depends on the incidence of the tax, the taxable event set forth in the ordinance or the statute. And the taxable event set forth here is not use of the airport facilities by the passenger, it's the act of enplanement; that is, boarding the aircraft for the purpose of departure, under the ordinance itself.

Q Would you concede that the Airport District could have somehow passed along some of its costs to the passenger by a similar tax if it were not made incidental to the enplanement?

MR. MALLORY: Well, when you say similar tax, I have some problems. But certainly one can conceive of the Airport Board putting up turnstiles as you enter the airport terminal. So that all users have to put in a dime or twenty-five cents or whatever and walk through the turnstile, to use the airport terminal.

I think I would have a much difference argument and a much harder argument than I have here.

Q Mr. Mallory, if --

MR. MALLORY: Yes, Mr. Chief Justice.

Q -- if the statute or regulation under which

they're imposing this charge also required them to pay one dollar for every passenger sitting in the plane when it landed, how would that affect your view of the situation?

MR. MALLORY: I would think that that would be quite clearly unconstitutional, Your Honor, under the large number of cases that say that the State cannot tax the act of transportation, which is really the basis of the cases we rely on here. Under the commerce clause.

Q Well, I raise that because you were emphasizing, I thought, quite heavily the act of enplaning.

MR. MALLORY: No, I would not differentiate that from the act of deplaning, Your Honor. I am differentiating it from the act of the passenger using the airport terminal, on which this tax is not levied.

Q Well, in my hypothetical I wasn't limiting it to the deplaning. All the people who are sitting on the airplane when it hits the runway, whether they're getting off or continuing, --

MR. MALLORY: I don't --

Q -- then it would be, certainly, for the use of the airport more clearly, would it not?

MR. MALLORY: I would want to see the ordinance. I don't think that it would be for the use of the airport more clearly; I think that it would be then for the act of landing in an aircraft. It would depend on the statute, on the ordin-

ance, obviously. But I think it would be for the act of landing in an aircraft there.

This raises -- I think these questions raise a point that should be emphasized here.

In arguing the unconstitutionality of this ordinance or of the statute similar to this, I am not contending -- I don't want to be misunderstood -- that there's no way that the Airport Board can increase its income or can make, as the other side says, can make interstate commerce pay its fair share.

The cases are legion under which States and localities have made interstate commerce pay its fair share. There are properly apportioned gross-receipts taxes, properly apportioned net-income taxes; in this case we have landing fees, in this case we have rentals, and there are privilege taxes. There are any number of ways that the State can make interstate commerce pay its fair share.

So I am contending that these ordinances, with the incidence on the tax on enplanement, are invalid as a tax on interstate -- direct tax on interstate commerce, and that the dangers of such a tax in multiple taxation emphasize the burden that will be put on interstate commerce.

Q Well, isn't your real complaint the lack of apportionment between other users? Because if you're saying an enplaning passenger had to pay 50 cents as he went through

the turnstile of the airport, as opposed to having to pay a dollar fifteen minutes later, that would make almost no difference if the apportionment was fair, would it?

MR. MALLORY: Your Honor, you're saying that the State can -- let's see -- with all respect, it seems to me you're saying that the amount of money that the State can raise would be the same under the two circumstances. But it seems to me the first question -- and it seems to me Spector teaches this, and a number of other, Freeman v. Hewit, and McLeod v. Dilworth case, that the first thing that one has to consider is not whether the State may validly raise money in some fashion on interstate commerce, but what the constitutional channel, through which it attempts to raise it, is, and whether that constitutional channel is in fact constitutional, or unconstitutional.

And what I -- my statement about the turnstiles was not that enplaning passengers would have to drop the dime or quarter in the turnstile, it was that all users would have to do it, and that the act of taxation, the taxable event was not enplaning in interstate commerce; but on the use of the airport.

Q But the enplaning passengers would have to go through the turnstile, too?

MR. MALLORY: Oh, yes. Yes, Your Honor, they would have to go through the turnstile. And they would have to pay for the use of the airport terminal.

Q Mr. Mallory, what would happen if they raised the regular fees for landing and taking off, which they now have, by one dollar per passenger?

MR. MALLORY: In other words, Your Honor, you would -- if the ordinance read that landing fees will be increased by one dollar per enplaning passenger?

Q Yes.

MR. MALLORY: I think that there, I think I come back, that the taxable event is the act of enplanement; and under the -- basically from Crandall v. Nevada, to the extent that that may be viewed as a commerce clause case, right up to the present.

Q What about the fact that one of the measures of the landing fee is the weight of the plane?

MR. MALLORY: Then there is --

Q So, I mean, the more passengers you have the more weight you have.

MR. MALLORY: Yes, Your Honor. So long as the landing fee depends on the weight of the plane, I have no problem with it. That's the type of use tax that has been upheld where the use of the highways, the truck, depends on the weight -- the amount paid by the trucker depends on the weight of the truck and so on.

Q Well, my --

MR. MALLORY: But any time the tax is a tax that is

on the passenger, as this one is, measured -- or on the carrier, measured by a flat amount per head, of the passengers --

Q I understood Mr. Trockman to say it made no difference if you raised it a dollar-a-head, then you would charge it to the passenger anyhow, so they just --

MR. MALLORY: Your Honor, that gets into the -- obviously the airlines pass on charges. But where the charge is a dollar or two-dollars-a-head, or whatever it may be from a particular airport, that is passed on direct from that airport and it removes the ability of the carrier and from the CAB the idea of apportioning its rates --

Q Right.

MR. MALLORY: -- in such a way as to serve aviation generally.

Q Now, my final question is: If there was nothing in the airport except the airline booths and toilet facilities, no, nothing else, and you had a one-dollar turnstile outside, what would your position be?

MR. MALLORY: I suppose that one could argue that that would be excessive, and I suppose that one could argue that it was in fact a tax on enplanement and therefore unconstitutional.

As I said to Mr. Justice Rehnquist on the turnstile question, I don't concede -- I do not say that that is clearly constitutional. All I say on that is that I have a very

different argument and a very, what I would conceive to be a much more difficult argument than I have in this case.

Q And it would even be more difficult if you had it out at the parking lot?

MR. MALLORY: Yes, Your Honor, it certainly would. Or if you had the charge, if you had a toll charge on an access road that one has to use to get into the airport.

Q Right.

MR. MALLORY: Clearly that's a harder, much harder case, and a much different case.

Now, on the question of the operating need, Mr. Trockman yesterday stated that the airport board had an operating deficit, and I do not contest that. I think it might be well to put it in some perspective.

The total operating income in 1967, of the board, was some $268,900. That was raised about equally by -- this is exclusive of tax, of property taxes in the area. That's about equally from aviation sources and nonaviation sources rentals to earn this amount of dollars.

That was the total operating. The total operating disbursements, exclusive of bond retirement, were $166,000, leaving a profit, an operating profit, exclusive of bond retirement, of approximately $100,000.

The bond retirement cost was $182,000.

Incidentally, this is shown -- these figures are

taken from paragraph 25 on Appendix page 59 and from Exhibit 5 to the stipulation of facts which was not printed.

The only figure taken from Exhibit 5 is the operating disbursements and the breakdown of the income between aviation and nonaviation sources.

As I say, the bond retirement costs were $182,000; the operating profit, exclusive of bond retirement, was about $100,000. You had a deficit of something less than $100,000, including the bond retirement, in the operating expenses.

The 19 -- I do not have the figure in the record, but the 1970 report, Annual Report of the Airport Board, shows that about 20.56 percent of the general fund revenues come from property taxes. Now, that does not include the amount of property taxes that goes into the building fund for the airport.

Q During this period that they had the $100,000 deficit, approximately, including the bond amortization, is there a stipulated fact as to how much was raised from the dollar-a-head tax?

MR. MALLORY: Nothing has been raised from the dollar-a-head tax, sir, and the court, the lower court enjoined -- the trial court enjoined that, the collection, and the Supreme Court of Indiana of course affirmed the trial court's decision.

Q Well, Mr. Mallory, what is your point about

the deficit only after the --

MR. MALLORY: I have none -- the Court raised questions about it yesterday, my brother made a response, saying there was an operating deficit, and I said that --

Q It's still a deficit?

MR. MALLORY: It's still a deficit after bond retirement, yes, Your Honor. Of something less than $100,000.

Coming back to the question of whether or not this is a use tax and therefore, in a sense, governed or controlled by the highway use tax cases, the Indiana Supreme Court responded quite directly to the Airport Board's argument that this charge is a service charge for the use of facilities, and stated that there is no question but that the incidence of the tax imposed by Ordinance 33 falls on interstate commerce.

And it also held that the tax is on the act of enplanement, focused quite squarely on the issue of whether the act of enplanement was reasonably related to the use of airport facilities and held that "It is clear that the tax imposed by Ordinance 33 is not reasonably related to the use of the facilities which benefit from the tax."

The trial court made similar findings, stating that: notwithstanding the name given the charge, nor the stated justification for the charge, its operating incidence is solely on the act of enplanement.

The trial court also made findings that the use of

the airport by the minority who were taxes was no different in quality or amount than the use by the majority who were not taxed.

That it does depend on the act of enplanement and not use, I think is clear from a reading of the ordinance itself. It imposes what is called in the ordinance a use and service charge of one dollar for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

It imposes on the airline the obligation to collect that tax, and remit it to the State, based on the number of enplaning passengers times the one-dollar charge.

The tax, as the trial court and the Supreme Court noted, is not imposed on all users, only on a minority.

While those findings on the discriminatory nature of the charge form the basis of the court's holding -- in part the basis of the court's holding under the equal protection clause of the Fourteenth Amendment, and also its holding of invalidity under the Nevada Constitution [sic], the arbitrary nature of the charge or selection of passengers, selection of users who were to be charged also formed its basis, or partly formed its basis for the finding that it was not a use charge.

Now, I submit that the fact that the funds collected under this tax go into the Airport Board funds for use on the airport does not make this a use tax. It's clearly a relevant consideration for the Court to consider in determining whether

or not it is a use tax. But it is not decisive.

And I think that McCarroll v. Dixie Greyhound, 309 U.S., points that out. The Court there stated that it is not enough that the tax, when collected, is expended upon the State's highways, it must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made.

If -- I'll go back a minute. On this question of what the funds are to be used for, that argument, indeed, was made in Crandall v. Nevada, there, at 6 Wall 38, page 38, the State argued it: that the State makes roads, keeps them in repair, must in some way be paid in order to be able to do all of this.

And what difference does it make whether it is to be paid by a tax of one dollar on each passenger or by the same sum collected at a toll gate or by a gross sum for a license?

The Court, in Crandall, indicated that it made a good bit of difference as to whether it was to be -- as to whether it was constitutional to tax the passenger at one-dollar-a-head for leaving the State, even though he had, obviously, used the roads the State had to build and keep in repair.

Q But wasn't the tax in Crandall imposed on any departing passenger, regardless of what means of transportation

was used?

MR. MALLORY: No, I don't believe that that's accurate, Your Honor. It was imposed on passengers departing, leaving the State, as I recall, by stagecoach, railroad -- and it had another list of things.

Q But supposing in Crandall the passenger left by railroad. There the State wouldn't have a fair claim to say, We're just asking you to pay your share for the cost of constructing a means of transportation.

MR. MALLORY: Because the State had not constructed the railroad there, yes, Your Honor, I think that's quite right.

But they clearly had constructed the roads over which the stagecoach passengers ran, and Crandall, it's my recollection, Your Honor, that Crandall was a stagecoach operator or owner who was contesting the statute.

Incidentally, the use of the proceeds was argued in the Henderson v. Mayor of New York case, where two-thirds of the funds went to the Commissioner of Immigration for inspection and to build wharves and warehouses; in the Passenger Cases, part of the funds went to a marine hospital; in People v. Compagnie Generale Transatlantique, the sums went to the Commissioner of Immigration for inspection expenses, and the remainder was remitted to the United States, to the United States Treasury.

The States at that time were seeking many ways to

validate these -- this type of tax. And in each one the argument would be made that the funds were being used to recompense the State for expenses made by it in carrying out its proper function.

Q Well, how do you deal with Huse v. Glover, on which Mr. Trockman relies?

MR. MALLORY: Well, I would deal with that in two ways, Your Honor. First, it's not a commerce clause question. But that I don't think is the most important ground. It's a question under Article 1, Section 10.

Secondly, I deal with it by saying that there the Court quite properly found that it was a use tax and was not a tax on a passenger for engaging in interstate commerce.

But I think that these passengers are engaging in interstate commerce, when they board the plane for the purpose of departure, I think is fairly obvious under the Michigan-Wisconsin Pipe Line case, where the gathering of gas was considered a -- the tax on the gathering of gas was considered a tax directly on interstate commerce. I think the same thing is present here.

I think in the Joseph v. Carter & Weeks, which was a loading of freight case, and Baltimore & Ohio v. Birch, which was the same type of case. The Richfield Oil case, where the Court said that commerce begins no later than delivery of oil into the vessel. All of those, I think, indicate very strongly

that the passenger boarding the plane for the purpose of departure, which is what enplanement means, that the passenger is engaged in interstate commerce and the tax that's being imposed on him is a tax imposed on him for the privilege of engaging in that act.

And to the cases that talk about a tax on a passenger engaged in interstate commerce, or on a passenger or on freight that's being loaded or has been loaded for interstate commerce, and striking down those statutes are extremely numerous. I think that basically you can probably start with -- under the commerce clause I think that basically you can start with the -- to some of the language in the Passenger cases, some of the language by two Justices in the Crandall case, Gloucester Ferry case, which just has a flat statement, saying that you can't tax passengers engaged -- people or persons engaged in interstate commerce.

I think that Chief Justice Taney's dissenting opinion in the Passenger cases, where he was talking about not aliens but persons who were traveling by ship from one State to another, and who were taxed at the rate of 25 cents a head for departing the vessel in the State of New York. His dissent, his comment about those passengers is very strong, in saying that the State cannot tax them. And that dissent was later, I believe, quoted in Crandall, and has been quoted in cases as recently as Gaston, and I think the Shapiro v. Thompson

case as well.

In the Minnesota Rate Cases, the Court said the State cannot tax interstate commerce, either by laying a tax upon the business which constitutes such commerce for the privilege of engaging in it, or upon persons or property in transit in interstate commerce.

I would also submit that the fact that here the incidence is the act of enplanement,rather than use by the passenger, lends itself to considerable multiple local taxation involving different incidence of travel, and also differing amounts.

As to the amount of the tax, the Evansville -- the Airport Board has stated here in their brief and in argument that even this one dollar is not enough to cover the cost of their planned improvements. I don't dispute that at all. Indeed, as the taxes grow, as this one dollar becomes more, the ingenuity of an Airport Board to plan other improvements can make a charge of almost any amount not excessive.

So I think that it's quite obvious to anticipate that there will be taxes, if this ordinance is allowed to stand, there will be taxes by most local, most airports in this country. The taxes, I think, will vary in amount; and I think that they will vary as to the incidence of taxation. I think some will be for deplaning passengers, some will be for stop-over passengers, some will be for in-transit passengers.

Q But the whole idea of an airport, I suppose, is to enplane and deplane passengers. That's its fundamental function.

MR. MALLORY: That's its fundamental function, Your Honor. I think some --

Q But you wouldn't --

MR. MALLORY: -- have gotten away from that a little bit, with fancy restaurants and things of that sort.

Q Yes, but would you say, as a general proposition, that a city that wants to maintain an airport could, as a general proposition, make the passengers pay for the airport, the construction of the airport?

As Mr. Justice Rehnquist says, let's assume that everybody who walks through -- who drives into or walks into the airport property is charged a fee, and that just happens to be enough to pay for all the facilities there?

MR. MALLORY: I'm not sure that they could, Your Honor. I have not -- I must confess that I can't, I probably can't answer your question.

Q You mean just because there might be interstate passengers --

MR. MALLORY: No, not just because there might be interstate passengers, --

Q Because there are.

MR. MALLORY: -- I think that it would depend on,

a great deal on the incidence of taxation.

Q Well, let's just --

MR. MALLORY: If it were done -- if it were done by a toll, say, for the access road into the airport, for the use of that road, --

Q No, let's just say --

MR. MALLORY: -- I may have --

Q -- anybody that walks into the airport terminal, pays it, and --

MR. MALLORY: And airfreight and so on doesn't bear any of the obligations, just passengers?

Q Just passengers.

MR. MALLORY: I would have some problem with that by excluding -- in excluding freight, I'm sure.

Q Because it's discriminatory on interstate commerce?

MR. MALLORY: No, no, not -- well, yes, because it discriminates against the passenger, as opposed to making interstate commerce pay for the freight that it's carrying as well.

Q Well, it is paying it.

MR. MALLORY: I'm sorry?

Q It is paying it, it pays the freight; it pays the freight bill.

MR. MALLORY: But it doesn't pay any tax to construct

the airport.

MR. CHIEF JUSTICE BURGER: Your time is up, Mr. Mallory.

MR. MALLORY: Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Trockman, you have about two and a half minutes left.

REBUTTAL ARGUMENT OF HOWARD P. TROCKMAN, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. TROCKMAN: I'll try to use them as usefully as I can.

First of all, I'd like to comment, Mr. Chief Justice and members of the Court, on Crandall vs. Nevada.

There is no mention in this case whatsoever that this is a tax upon the use of facilities. The tax upon the mere act of departure, upon the privilege of going from one State to the other. As a matter of fact in 1868 when this case was decided, I'm not even sure that there was a publicly maintained roadway for the use by stagecoach travel. Certainly the railroad tax applied to that case was not for the use of publicly supported facilities.

And as far as the application of that case is concerned, this was stricken and overruled by the case of Hendrick vs. Maryland, which was decided in 1915 by this Court. And in this case it said that with respect to the holding of Crandall vs. Nevada, involving a tax which was designed to

prevent persons from leaving the State of Nevada, that it does not uphold that rationale, because in Hendrick vs. Maryland, where a tax was levied upon the use of highways by commercial motor vehicles, that this involved the use of valuable facilities provided at public expense, and a burden to the taxpayers. And therefore the holding of Crandall was overruled.

And in Hendrick vs. Maryland, which is cited at pages 29 and 30 of our brief, the Court stated that the highways are public property, just like our runways are. It is within the power of the State to require those who make special use thereof to contribute to their cost and maintenance.

And this Court recognized, in Hendrick vs. Maryland, the distinction between commercial motor vehicles and pleasure cars, and upheld the tax.

The same application applied in the Capitol Greyhound Lines case. By the way, in that case, as we have in our Exhibit C, is a list of States which have use taxes.

Now, as the National Uniformity argument, which my colleague argues, I would like to say this: that the Panhandle Eastern case strikes down this argument by saying the power to tax is not power to destroy. And this we believe is a relevant holding, decided by this Court, and we feel that the use tax levied in this instance is fair and reasonable under the commerce clause.

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

Thank you, Mr. Mallory.

The case is submitted.

[Whereupon, at 10:47 o'clock, a.m., the case was submitted.]

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