In the

Supreme Court of the United States

UNITED AIR LINES, INC., Appellant,	)	
v.	)	No. 71-862
GEORGE E. MAHIN, et al., Appellees.	)	

Washington, D. C.
November 8, 1972

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Wednesday, November 8, 1972.

The above-entitled matter came on for argument at 1:00 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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MARK H. BERENS, ESQ., 231 South LaSalle Street, Chicago, Illinois, 60604; for the Appellant.

ROBERT J. O'ROURKE, ESQ., Chicago, Illinois; for the Appellees.

C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments in 71-862, United Air Lines, against Mahin.

Mr. Berens, you may proceed whenever you are ready.

ORAL ARGUMENT OF MARK H. BERENS, ESQ.,

ON BEHALF OF THE APPELLANT

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

This is a Commerce Clause case.

The question presented is whether Illinois, in conformance with that clause, may impose its use tax on all fuel loaded by United Air Lines aboard its aircraft about to leave the Chicago airports on interstate and foreign flights.

As found by the Trial Court and confirmed by the Illinois Supreme Court, the facts can be stated very briefly.

All of the fuel is purchased by United from Shell Oil Company at Shell Oil's terminal in Northern Indiana, at which point, delivery occurs and title and risk of loss transfers from Shell to United.

From there, United arranges transportation by common carriers, principally a pipeline, to O'Hare and Midway Airports in Chicago.

The fuel is stored at those airports on the average from two to six and one-half days, of which about two days is required to remove impurities accreted during the transportation

The fuel is then loaded into United's aircraft.

Q Is it brought from Indiana to Chicago airports by truck?

MR. BERENS: Mainly by pipe line for jet fuel.

There are trucking operations to Midway because the volume is much less there.

The truck-line,as well as the pipe line, is a common carrier, and the contracts are between those carriers and United.

The fuel is loaded into United's --

Q How long did you say it remained at the airport before it is loaded aboard - -

MR. BERENS: A minimum of two, a maximum of twelve days. The average is two to six and one-half.

Q And this is to clean impurities?

MR. BERENS: Approximately two days are required to settle the fuel and filter it.

The remainder of the time is merely coordinating transfers of the fuels, the scheduling of the transfer with the flight operations.

Q Meaning that there may be quantities more than aircraft?

MR. BERENS: They are several days on hand. They pump a large amount -- the jet fuel is pumped three times a month to O'Hare. The other fuel to Midway is carried by truck

on almost a daily basis.

Q And the quantity loaded on a particular aircraft differs, does it? Depending on how much --

MR. BERENS: A great amount. There is variation, depending on its destination and depending on how much fuel it came in with. It can range from -- and it is in poundage rather than gallons in the air industry -- from a couple thousand to sixty or seventy thousand pounds of fuel.

The fuel is loaded almost always immediately just prior to the departure of the aircraft.

None of the fuel involved in this litigation is used locally or in intrastate flights.

These arrangements have been followed by United continously since 1953, two years prior to the enactment of the Illinois Use Tax Act; and they are part of a nationwide contractual arrangement between Shell and United which covers delivery at 43 different points.

For example, United takes delivery at Shell's Northern Indiana terminal, not only for the Chicago airports but for other airports in the Midwestern States.

All of the fuel loaded is, as I said earlier, consumed on interstate and foreign flights and almost all of it outside of Illinois.

The reason for this is that, under the Federal Aviation Regulations, commercial carriers are required to carry

large amounts of reserve fuel, and they land,with this reserve fuel, at Chicago, according to the record, 99.9% of the time.

And it is this fuel that is principally first consumed as the plane leaves the State.

And keep in mind where Chicago is, in Illinois, up at the upper corner of the State, so that the distance traversed on many flights, particularly east and northbound, over Illinois, is 60 or less miles.

Q Would this be west --

MR. BERENS: Westbound it varies from 130 to 216 miles, Your Honor.

Q Depending, I suppose, on whether they are going due West or Southwest.

MR. BERENS: These are all due West on United's pattern. They have only one Southwest route that is only used in 3/10's of 1% of the time.

Q The situation might be different, I take it, for Braniff, or someone who is flying South out of Chicago to New Orleans?

MR. BERENS: Although not in the record, that's our understanding.

And, also, air lines that serve Saint Louis and the Southwest are covering a great deal of mileage --

Q Surely the issue here doesn't depend on whether a particular air line crosses a few more miles of Illinois than

United, does it?

MR. BERENS: We submit that in part it does, based on the very premise of the Use Tax Act, and in particular the Illinois statute that I will attempt to develop.

Q So this will be a decision for United only?

MR. BERENS: No, I believe it will apply, Your Honor, to all other air lines, but conceivably on a factual basis.

Q Well, I take it what you are saying is that if they use all the gasoline up, or whatever fuel this is, and make another stop in Illinois, you might have quite a different case.

MR. BERENS: In that case, Illinois has asserted tax and the air lines are paying the tax already when that occurs.

United, for one, has a flight from Moline to Chicago where they pay the Use Tax on the amount loaded aboard the flights.

Q It is on the amount loaded, not the amount consumed?

MR. BERENS: It is identical in that particular situation.

Q But I suppose normally they hope it is quite close.

MR. BERENS: Again, Mr. Chief Justice, it varies according to the destinations --

Q They don't want to carry excess fuel, but they certainly want to carry enough.

MR. BERENS: Well, under the FAA Regulations, they are required to carry what you might, and what I might, think is a great deal of excess, tens of thousands --

Q To meet weather problems --

MR. BERENS: This is to meet any contingency that can be conceived of.

Even when there are weather problems and they may have to land in another alternate airport, they schedule the fuel so that if they do land in the other airport, they have the same reserve as they would have had had they landed in the original scheduled airport.

Q I take it you argue that this is a necessary incident of the interstate commerce aspect?

MR. BERENS: This is compelled by common sense as well as the FAA and the CAB.

Not only is the fuel consumed outside of Illinois, except de minimus amounts, but depending on the type of aircraft, from 35 to 60% of the fuel loaded in Chicago is actually consumed after the plane has landed in another State, and is proceeding in the next leg of its interstate journey.

The Illinois Use Tax is a privilege tax imposed on the use of tangible property in Illinois. It is a general revenue tax, and its proceeds are not allocated to airport construction or maintenance.

The Act defines use in the usual broad way, to include

the exercise of any right of ownership over property.

But the Illinois Act then limits this definition by several exceptions intended, according to the explicit terms of the Act, to prevent, and I am quoting, "actual or likely multi-State taxation."

One of these exceptions is the so-called temporary storage provision, which excludes from the concept of a taxable use, the storage in Illinois of property purchased outside of the State, brought in by the owner and then used outside the State.

The construction placed on this provision by the Illinois Supreme Court in the decision below, raises the serious Commerce Clause issue that is appealed to this Court.

From 1955, when the Act was first enacted, until 1963, Illinois sought only to tax that portion of the Chicago laden fuel that was actually burned over Illinois by departing flights. This was known as the "burn-off rule," and United did not contest the constitutionality of the tax during that period because it considered it not unfair.

In 1963, the Illinois Department of Revenue issued a bulletin which took the position that this stored fuel becomes taxable, and I'll quote the words of the bulletin: "when it is placed into the tank of an airplane, railroad engine or truck," continuing to quote, "at this point, the fuel is converted into its ultimate use and therefore a

taxable use occurs in Illinois," end of quote.

The bulletin contrasted this with the situation where the fuel is hauled,as it called it, by separate facility, by which it meant a tank truck or a railroad tank car or a pipe line, in which case, the storage, the withdrawal, nor the transportation, was taxable.

In a four-three decision below, the Illinois Supreme Court upheld the position taken by the bulletin. And I want to point out that the majority below was composed of two two-judge opinions,a per curiam of two judges and a two-judge conferring opinion.

There was a three-judge dissent.

The concurring opinion was specific regarding the taxable incidents. It said, and I am quoting again: "Illinois may constitutionally collect the tax imposed on all of the fuel loaded on United's planes at the airports."

The per curiam opinion was much more complex.

Q Is there any evidence that the fuel was ever used for any other purpose than for these planes?

MR. BERENS: Not on this fuel in this litigation. There is no diversion of it whatsoever.

Q Well, then, I'll ask your friend to indicate what is the distinction in terms of its dedication for ultimate use, why that doesn't occur as soon as it gets in the storage tanks at the airport, but I think that's for him rather than you.

MR. BERENS: I will not answer that.

The per curiam opinion was much more complex.

First of all, as a preliminary conclusion, it held that the burn-off rule was unconstitutional under the Commerce Clause, citing Helson and Randolph v. Kentucky, Volume 279 of this Court's reports.

And this placed the per curiam judges in the anominous position that holding a tax on that part of the fuel loaded in Chicago that was actually consumed in Illinois was a burden on the commerce, but that if the State taxed all of the fuel loaded even though it was burned outside the State, it was not a burden, thereby making a tax on part more of a burden than tax on all.

But returning to the construction of the temporary storage provision, the Court discussed three events that applied to all the fuel, the storage, the withdrawal and the loading aboard the aircraft, and it spelled out a distinction.

It said that if the fuel were removed from the storage and taken by, again, separate facilities, or as it expressed it, in a vehicle which does not consume the fuel, to another State, neither the storage nor the withdrawal, nor the loading onto that vehicle, nor the transportation from the State, would be subject to tax.

It contrasted this with the situation where the fuel

is stored the same way, withdrawn the same way, but loaded on a vehicle which consumes it.

Q They were construing the State law here?

MR. BERENS: They were construing the State law which I am taking time, Your Honor, to do because it is the foundation of our argument.

And in that situation, which was identical in all respects to the other except onto what it was loaded, it found that a taxable use occurred.

Now, it attempted to relate the taxable use back to the storage but we submit that's a nonsequitor because the storage in both instances is the same, so is the withdrawal, but is decisive,and the taxable event, we submit, is the loading onto the vehicle which consumes it.

Thus,the per curiam, the concurring opinions and the bulletin of the Illinois Department of Revenue, all arrive in different language at the same point, that the taxable event is the loading of the fuel onto the aircraft.

This, we believe, takes us clearly into the authority of Michigan-Wisconsin Pipe Line Co. v. Calvert, Volume 347, and a number of other cases.

That case, which was a unanimous decision, held that Texas could not impose a severance tax on natural gas being transferred from a refinery pipe line in Texas to an interstate pipe line, and the Court said, in part, that the tax, and I am

quoting, "was on the taking off in appellant's carrier into commerce."

And, continuing, "in reality, the tax, therefore, is on the exit of the gas from the State. This economic process is inherently unsusceptible to the division to distinct local activity capable of forming a basis for the tax imposed on one hand and a separate movement in commerce on the other," unquote. From page 16--

Q That case again?

MR. BERENS: That's Michigan-Wisconsin Pipe Line Co. v. Calvert, Volume 347.

Q Mr. Berens, what if the Supreme Court of Illinois had said, instead of, as you say, at least by implication, that the taxable event was the loading, that the taxable event was the storage in immobile storage container for whatever period of time?

Would your case be any different?

MR. BERENS: We don't believe the Illinois Supreme Court could have said that in light of the statutory provisions they were construing which exempted the storage.

But taking your question one step further, if that temporary storage provision did not exist in the Illinois statute, we would concede that the storage and the withdrawal could have been taxable under the Commerce Clause under Edelman and Nashville v. Wallace

It is a statutory situation that makes the constitutional issue what it is.

Q I would mention Edelman. You are going to distinguish that case somewhat?

MR. BERENS: I hope to.

In Michigan-Wisconsin, the, quote, "The Court cited Joseph V. Carter and Weeks, which some years earlier had invalidated a New York City gross receipts tax on the income of a stevedoring company loading ships in New York Harbor and unloading them."

And that case stated -- the Carter and Weeks -- and I quote from page (inaudible), "Transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation, outside the taxing State, because those activities are not only preliminary to,but are an essential part of the transportation itself," end of quote.

To the same effect,are numerous cases cited in our brief. And we have found no authority in the regulatory area or the tax area that holds that loading is not an integral part of interstate transportation.

At least in its brief, the State bases and justifies this tax primarily on Nashville v. Wallace, 288 U.S., and Edelman v. Boeing Air Transport.

In both those cases, I should add, which respectively

involved the taxation by Tennessee and Wyoming of fuel that was eventually used in an interstate rail system and interstate air carrier -- in both those cases, this Court accepted the construction of the lower courts that the State tax involved was on the storage and on the -- or the withdrawal from the storage.

And based on that, this Court concluded that the taxable event was prior to the commencement of the interstate movement, prior to the (inaudible).

And I emphasize that in both of those States at the time of the litigation, there was nothing resembling a temporary storage provision as exists in Illinois, making the statutory situation fundamentally different, in our opinion.

Q Yet the Edelman statute had an exemption for gasoline exported or sold for exportation from the State.

MR. BERENS: It certainly did, Your Honor, and looking at the briefs and the record in the library here, there was no evidence that counsel for either side alluded to that to this Court.

Q Well, do I imply from that that that's meaningless in the Edelman statute then?

MR. BERENS: I don't know if it is meaningless, Your Honor, but I do submit that it had not been pressed to this Court as a provision that was relevant in the statute.

If it had been, I think it is conceivable that the

Court in Edelman may have distinguished the case a year earlier, that is the Wallace case, but the Court in this case, specifically said that the statute here construed is identical to that construed in the Wallace case.

Q You don't relate it to the temporary storage exemption in your Illinois structure? You don't relate the Edelman exemption?

MR. BERENS: Unfortunately, we are confronted with that exemption in the Edelman situation. It did not seem to be considered by the Court in its consideration.

If it had, I would have thought Edelman would have come out the same way we are urging the Court to come out in this situation, that because of the export provision there couldn't be any tax.

But also, I may add, in the Edelman, there seems to have been a mistake in applying the statute, rather than a constitutional issue.

The State also relies in Southern Pacific v. Gallagher, which, together with the other two cases I just mentioned, is specifically distinguished by Carter and Weeks at 330 US432, noted.

In both Michigan-Wisconsin and Carter and Weeks, this Court has stated that where the tax is on an integral part of the transportation, it is not necessary to show multi-State taxation, but that the mere possibility is sufficient.

Here, we have actual multi-State taxation.

The fuel purchased from Shell is subject to Indiana gross income tax measured by the sale price to United.

A few days later, Illinois will subject the same fuel to its Use Tax, based on the same sales price.

In addition, as pointed out in our reply brief, there is a potentiality of States downstream taxing the same fuel in situations where a flight lands, let us say, in Dayton, Ohio, and then proceeds to Columbus, where there is a segment within the State.

This applies to roughly one out of five of United's departures.

We don't want to rely entirely on authority, but we would like to relate to the fundamental purpose of the Commerce Clause.

I think this was well-stated in the Carter and Weeks case, at the very end.

Not only do these precedents outlaw taxes, but it has reason to support such outlawing in the likelihood that legislation will flourish more luxuriantly where most revenue will come from foreign or interstate commerce.

Thus, in port cities, and transportation or handling centers, without discrimination against out-of-State as compared with local business, larger proportions of necessary revenue could be obtained from the flow of

commerce.

The avoidance of such a toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause.

Now, we view this as a toll, not in the classical sense, but if you look at the Use Tax as the privilege of enjoying property, the enjoyment of a consumable good, such as fuel, is in its consumption, not in its storage.

But only a very small fraction of this fuel is actually consumed in Illinois and that only on about 4% of the departing flights of United. The rest is burned outside of Illinois, much of it in other States.

If you strip this of its formalism, Illinois seeks to impose a toll on fuel purchased outside of the State, temporarily stored here only, in the words of the Illinois Supreme Court, "to facilitate United's interstate operations from Chicago -- "

Q Let me interrupt. When you said: "only to facilitate United's interstate operations," you are inserting the word interstate from the quotation of the Illinois Court, are you not?

MR. BERENS: Yes, and that was inadvertent.

Q On what authority are you doing that?

MR. BERENS: That was inadvertent.

Q You've done it more than once, I think, in your brief.

I thought you built an argument on this inadvertent insertion. But it is inadvertent?

MR. BERENS: The quote of the Court was "on its operations from the Chicago airport." The word interstate was not in there.

I think in the brief we have frequently said "built on its interstate operations," but I don't believe we have quoted it, if that was the import of your comment, Your Honor.

Q Well, you also store this fuel and pay tax in relation to your intrastate flights, do you not?

MR. BERENS: I am sorry, I didn't hear your question.

Q I say, you also store this fuel and pay tax in relation to your intrastate flights?

MR. BERENS: Yes, we always have. That is not part of this assessment or part of this case.

Q I realize that, but your insertion of the word "interstate" in the quotation, I think, is confusing, in view of that fact.

I can leave it to counsel to comment on it and see what they have to say by way of illumination.

Q Mr. Berens, you say you want to get away from formalism and then cite very authoritative precedents to that effect, and, yet, if you concede that Illinois could have reached this same result had it just picked the right incident

to tax, i.e., the storage itself.

Your own position has a certain formalism to it, doesn't it?

MR. BERENS: Well, I think, the formalism supported by considerable line of authority in this Court, such as the Spector case, Dilworth v. McLeod and many others, which said the means by which the State, in Freeman v. Hewit, imposes its tax, is decisive.

Q You really can't reconcile all the cases in this Court on the subject, can you?

MR. BERENS: I don't think we can reconcile all of them. We can certainly reconcile most.

Q What have we got on this deal, 80 or more decisions?

MR. BERENS: I understood it was 300.

Q All right then, 300. If you can reconcile even 80, I think you've done quite a job.

MR. BERENS: Fortunately, I don't think I have to reconcile that many.

Q Getting back to Mr.Blackmun's question to you, I notice you've bracketed at least page 31, where you quote from the Supreme Court, you've bracketed the word "interstate," but isn't this something like the Evansville approach to the Supreme Court, of Illinois taking -- dropping out your interstate, speaking about these as operations to facilitate?

MR. BERENS: We would distinguish Evansville on the

basis that --

Q My question was: don't you think that's the approach the Illinois Supreme Court was taking?

MR. BERENS: I don't think so.

Q Well, I gather the storage -- I take it, whether it's used on intra or interstate flights, it's all stored in the same tanks, isn't it?

MR. BERENS: Yes.

Q And you say for 12 days. And I'd expect in that period, there is considerable quantity withdrawn and loaded aboard intra-state planes.

MR. BERENS: I have to make one clarification, Mr. Justice Brennan. None of the flights departing Chicago are intra-state flights of United. While they do stop at Moline, they are continuing flights to points outside the State.

Q That may be so, but, nevertheless, I think you've already agreed that -- have you not? -- that what's burned between Chicago and Moline is taxable?

MR. BERENS: We pay the tax on it, but we have done it as a volunteer for many years. We do not think those are intra-state flights.

Q But you don't think the Illinois Supreme Court -- of course, Evansville was decided after this case was decided --

MR. BERENS: And I believe the Lower Court cases in Evansville were also after that.

We distinguish Evansville, very briefly, on the fact that the landing fees and other fees that United pays and the other air lines pay at the Chicago airports are fully compensatory, not only for maintenance of the airports and operation of them, but also it repays the bond issue --

Q That was true in Evansville, too. They also paid landing fees.

MR. BERENS: But the airport was operating apparently at a deficit, as I read the opinion, and this --

Q We had the companion New Hampshire case -- I have forgotten the name of it, where they had all kinds of additional fees besides the departure tax.

MR. BERENS: As I read those cases, or at least your opinion of those cases, not the Lower Court's, they were still not fully compensatory, that additional funds were needed and this contributed to them.

And, in fact, as I recall your opinion, you pointed out that as long as the amounts for the head taxes did not exceed by a gross margin the deficit, that would be treated as a service that the State was providing, was being paid by these head taxes.

I would like to also mention very briefly the cases and line of cases cited by the amicus brief, the so-called stream of commerce cases, which points out that the fuel here is committed from the time not just when it is stored

in Illinois, but at the time it is brought up as jet fuel to Northern Indiana to interstate commerce.

And that it is brought from Indiana through Illinois, stored there temporarily, only for the exigencies of United's interstate operation, and then is taken -- almost all of it is taken from the State and is consumed elsewhere.

If the stream of commerce cases preclude property taxes on goods moving in commerce, which are assessed only once a year, it seems even more essential that they be construed liberally, as this Court has indicated on several occasions, including Richfield Oil, to preclude a tax on the flow every day of the year, which would be the situation here.

One possible approach, of course, is burn-off, and we have -- while we believe the situation is controlled by Michigan-Wisconsin, and that the loading is an event that cannot be taxed, examples in recent years, such as Northwestern Portland Cement and General Motors v. Washington, have approved apportion taxes on net and gross income from interstate transactions.

Q Are you suggesting that we construe the statute that way, that is, save it by saying it can't exceed the burn-off rate?

MR. BERENS: I don't think, Mr. Chief Justice, you have to construe the statute that way. As a constitutional matter, you can say that this is permissible.

And, we have the situation where the Lower Court seemed to have construed the statute the way it did, or at least two of the four-judge majority did, because they thought burn-off was constitutionally impermissible, and so they had to go for the decision which yielded the full tax or none at all.

MR. CHIEF JUSTICE BURGER: Mr. O'Rourke.

ORAL ARGUMENT OF ROBERT J. O'ROURKE, ESQ.,

ON BEHALF OF THE APPELLEES

MR. O'ROURKE: Mr. Chief Justice, and may it please the Court:

The question presented before this Court is whether United Air Lines exercised such a right or power over tangible property, and in this case it is aviation fuel, incident to the ownership of that property in Illinois, so as to subject United to the provisions of the Illinois Use Tax, and whether or not the imposition of this tax is violative of the Commerce Clause set forth in Article 1, Sec. 8, Clause 3 of the Constitution, and the Due Process Clause of the Fourteenth Amendment.

The Illinois Use Tax, which went into effect in August of 1955, imposes a tax on the privilege of using in the State of Illinois, tangible personal property that was purchased elsewhere, and was designed to complement the retailers' occupational tax, under which a tax is imposed upon

persons engaged in the business of selling tangible personal property to purchasers for use and consumption.

Now, both of these statutes, the Illinois Use Tax and the Illinois Retailers Occupation Tax, have both been found to be constitutional.

The Use Tax Act of Illinois was enacted for the valid purposes of preventing evasion of the Retailers Occupational Tax by persons making out-of-State purchases of tangible personal property for use in Illinois, and also the additional purpose of protecting Illinois merchants against the diversion of businesses.

Shell Oil Company, in this case, refines its turbine fuel at its refineries in Wood River, Illinois, then transfers it via pipe lines, 250 miles, to storage facilities in Hammond and East Chicago, Indiana, for storage.

Both Hammond and East Chicago, Indiana, are south suburbs of the City of Chicago, and no further processing occurs at Shell's facilities, merely the filtering necessitated by the pipe line transfer.

United Air Lines purchased this aviation fuel from Shell. United sends its orders into Shell's office in East Chicago, Indiana, takes delivery in Indiana, and transfers the aviation fuel via a common carrier pipe line, to storage tanks in Des Plaines, Illinois, which is a northwest suburb of the City of Chicago, just adjacent to O'Hare Airport.

The storage tanks in Des Plaines are owned by Shell Oil Company, but are leased to United and to American where gas owned by both companies is co-mingled.

The aviation fuel is allowed to settle in storage tanks in Des Plaines, Illinois, before it is transferred again by pipe line owned by Shell but leased to United to United's O'Hare Airport underground facilities.

These underground tanks service the jet aircraft before they embark from O'Hare.

Now, the delivery of the gasoline to Chicago's Midway Airport is via common carrier tank trucks from Shell's Indiana facility to the Midway Airport.

Now, all aviation fuel that is ultimately pumped into United's aircraft at either O'Hare or at Midway, and that is subject to the present litigation, is either refined and/or stored by Shell at Wood River, Illinois, facilities prior to its transfer to Hammond and East Chicago.

Now, Shell claims that it pays an income tax based on one-half of 1% of its gross sales in Indiana, but Shell pays no sales tax or retail occupation tax to the State of Indiana or to the State of Illinois.

United does not pay any sales tax or use tax in any State, other than Illinois, on the purchase of the fuel involved in this controversy.

From August, 1955, until June 3, 1963, United paid

to the State of Illinois, without protest, a use tax on this fuel purchase, delivery and storage, on that portion of the fuel deemed to have been used or consumed within the borders of Illinois on flights departing from Midway and O'Hare to points outside of Illinois.

The advantage of this burn-off theory is that in many instances it would make United subject only to a use tax on the 10 to 15 mile trip from O'Hare to Lake Michigan.

Then as now, Illinois Use Tax was imposed upon the privilege of using in Illinois tangible personal property which was purchased at retail.

Now, use, as defined in the Illinois statute, is defined, and I quote, "exercised by any person of any right or power over tangible personal property incident to the ownership of that property."

Now, Section 3 of the Illinois Use Tax, from its inception in 1955, has provided for exemptions from the payment of that tax. We recite these in our brief. There are quite a number, but I would like to call the Court's attention just to two provisions.

Section 3(c), which states -- Section 3 states the Illinois Use Tax has provided an exemption from the tax, quote, "to prevent actual or likely multi-State taxation. The tax here imposed shall not apply to the use of tangible personal property in this State under the following circumstances.

And circumstances (c) is the use in the State of tangible personal property which is acquired outside of the State and caused to be brought into the State by a person who has already paid a tax in another State in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in the other State.

Now, the exemption (d) which counsel alluded to, the temporary storage one. Temporary storage in this State of tangible personal property which is acquired outside of this State and which subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into tangible personal property that is used solely outside of the State.

Now, on June 3, 1963, the Department of Revenue of the State of Illinois issued a bulletin which provided in pertinent part, and I quote again, "Temporary storage ends and a taxable use occurs when the fuel is taken out of storage and placed into tanks of airplanes, railroad engines or trucks." At this point, the fuel is converted into its ultimate use and therefore a taxable use occurs in Illinois. If a common carrier does not have separate facilities for the transferring of the fuel out of the State of Illinois, but always puts it into the tank of the airplane, railroad engine or truck for final consumption, then they no longer will be able to give a

certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the Use Tax to their supplier.

Q Mr. O'Rourke, suppose the United plane has two tanks.

MR. O'ROURKE: Yes, sir.

Q One is the fuel that's left over when they land and the other is the fuel they pick up. And when they land they turn on the tank of the fuel that's left over. And they turn on the other tank when they cross Lake Michigan. What happens?

MR. O'ROURKE: Mr. Justice Marshall, I would like to make it clear that none of the gas that is brought into the State of Illinois, in this respect, is ever taxed.

The placing, however, of the fuel into the instrumentality of consumption, the airplane, then would cause the tax on the fuel placed into the tank.

The very fact that it would be connected to the lines and would be capable of being consumed within that vehicle would subject it to the tax.

Q Well, suppose they put on the second tank a sign which says, "Storage Tank."?

MR. O'ROURKE: Well, I don't think that the Court or anyone else, the State, particularly, would be subjected to the provisions --

Q It wouldn't be taxed if it was put on the plane in the cargo department, would it?

MR. O'ROURKE: No, sir, it would not.

If it were loaded onto a storage tank for the purpose of taking it out of the State to be used solely out of the State, and that qualified as a storage tank, as a tank truck or tank car on the railroad, or --

Q In the good old days when they first put liquor on planes, they used to have things on there that locked it up until after they got through takeoff.

MR. O'ROURKE: Right. I recall that.

Q Well, suppose they put like that on this tank? Then what would you do?

MR. O'ROURKE: If it were still connected to the instrumentality for consumption, it would be an evasion of the Retailers Occupational Tax of the State of Illinois. It would not qualify for an exemption.

Q And that means, Mr. O'Rourke, as I understand it -- your answers to Mr. Justice Marshall mean that your argument does not depend at all on the premise that any of this fuel is actually burned within the boundaries of Illinois.

MR. O'ROURKE: No, sir, we do not.

The fact that they exercise dominance or ownership over that particular fuel in the State of Illinois subjects them to that tax.

Q It is when they put it in --

MR. O'ROURKE: That's one of the events that we claim shows ownership of that particular fuel.

From the date of June 3, 1963, to the date of the bulletin, all fuel loaded aboard United's planes at the two airports, was deemed to measure the tax.

And the exemption contained in the temporary storage provision in question was construed as having application only if the temporarily stored fuel is transferred out of the State for use elsewhere by means other than placing it in the equipment which would consume it.

The first inquiry that we should make becomes whether upon the facts stated there is an event upon which Illinois may impose the Use Tax without violating the Commerce Clause.

And we submit that the first of these events is the storage and withdrawal from storage at Des Plaines, Illinois, tank.

We quote in our briefs and also counsel for the opposition, the National Chattanooga and Tennessee Railroad v. Wallace case,which is cited at 288 U.S. 249. In this case, Tennessee levied a privilege tax upon the storage of gasoline within the State and its withdrawal from storage for use or sale.

The taxpayer is the interstate rail carrier purchasing

large quantities of gasoline outside of Tennessee and transporting it into the State in tank cars, from which it had loaded and placed this gasoline in storage tanks.

All of the fuel that was withdrawn and used by it as a source of motor power in interstate railway operations was taxed.

The taxpayer challenged the imposition of the tax on the basis that it was imposed on the gasoline which was still a subject of interstate commerce, and also on the basis that, in effect, the tax was upon the use of gasoline in appellant's interstate business.

In this particular case, the Court held that the power to tax property, the sum of all the rights and powers incident to ownership, is that the State can tax the successive exercise of two of the powers incident to ownership, storage and withdrawal of storage, both completed before interstate commerce began.

Now, in the case of Edelman v. Boeing Air Transport which was discussed, Wyoming imposed a license tax upon the use of gasoline within the State.

The taxpayer maintained an air service for transportation of passengers, mail and express, in interstate commerce.

It purchased gasoline from both within and without the State, which it intermingled and stored in tanks at two

airports.

The taxpayer contended that the State could not validly apply the use tax to gasoline imported from outside the State, stored in tanks at the airport and used for filling the interstate planes in which it was eventually consumed.

The tax was applied to stored gasoline as it was withdrawn from storage tanks at the airport and placed in planes.

In this particular case, the Edelman case, the Court upheld the tax upon the theory that a State may validly tax the use to which gasoline is put in withdrawing it from storage within the State and placing it in tanks or planes, notwithstanding that the ultimate function was to generate motor power for carrying on interstate commerce.

Now, United stores and withdraws at least twice, once at Des Plaines, Illinois, where it allows the fuel to become comingled with that of other air lines, and then at O'Hare where United again withdraws the fuel from storage, preparatory to loading it aboard its aircraft.

And it has thus committed taxable events or uses not violative of the Commerce Clause.

Q Tell me if I am wrong. If the taxable incident in the Edelman case was the storage of the gasoline, is that right?

MR. O'ROURKE: The withdrawal from storage.

As Mr. Justice Blackmun has pointed out, they also had a temporary storage provision there. It was the withdrawal from storage that was the incident of ownership.

Q Is it your position that Edelman controls this case, your case?

MR. O'ROURKE: I would say so, both Edelman and the Nashville-Chattanooga and St. Louis Railroad case.

It appears equally certain that United's acts constitute events within the meaning of the Illinois Use Tax as well.

If we recall the language of the acts, and I quote: "Use means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property."

Now, any right or power includes United's loading fuel aboard its plane, and the storing and withdrawl from storage of the fuel.

When the fuel is loaded on the aircraft, it is irrevocably committed to its ultimate use.

Now, both in the Nashville case and the Edelman case, the Courts have held that storage and withdrawal from storage of gasoline was complete before interstate commerce began.

It was further held that the burden of tax was too indirect and remote from the function of interstate commerce to

transgress constitutional limitations.

Now, both the per curiam and the dissenting opinions of the Illinois Supreme Court agree that the events of storing fuel in Illinois, or the taking of fuel from storage in Illinois, are constitutionally taxable under the Illinois Use Tax, because these events are complete before interstate commerce begins.

Indeed, United, this morning, or this afternoon, conceded that if temporary storage provisions of the Illinois Use Tax did not apply to the incidents in question, then it is subject to the Illinois Use Tax.

United, however, asserts that all fuel placed in tanks of its planes continues to be exempt under the temporary storage provision of the Illinois Use Tax Act, and that the exemption is lost and the fuel subject to the tax only to the extent of the fuel released from the tanks for consumption over Illinois.

Now, the statute in question refers to, quote, "Temporary storage in this State," unquote, of tangible personal property and to such property, quote, "stored here temporarily," unquote.

The meaning of the term "stored" or "storage" has been defined as a deposit in a store or warehouse for safe-keeping.

Here, the fuel is not placed in the tanks of the

airplane for safekeeping but for consumption, and it cannot be said the fuel will be solely used outside of the State of Illinois.

To accept United's argument that the placing of fuel in departing planes is but a continuation of temporary storage, and that the burning of fuel in and over Illinois is a determination of the temporary storage, and the fuel's release as the plane operates is a local event or use, is properly taxable, would completely run us afoul of Helson v. Kentucky.

And, if United's theory is correct, then each State could pay the burn-off as the plane -- or charge the burn-off, rather, as the plane crossed over State borders, and this would then be an unconscionable burden to interstate commerce.

Q Are you suggesting it could charge a burn-off tax for just a fly-over?

MR. O'ROURKE: That's how far the theory, I believe, could be carried, Mr. Justice, Chief Justice.

Q Any case gone that far that you know?

MR. O'ROURKE: No, it has not.

As a matter of fact, Helson v. Kentucky, which I just cited and we've cited in our case, was a case where a ferry-boat was operated between the State of Illinois and the State of Kentucky. It went up the Ohio River and gas was brought aboard the ferryboat in Illinois and as it traversed up the

Ohio River, 75% of the fuel was burned off on the Kentucky border side of the Ohio River.

Kentucky attempted to tax the consumption of that gas and the Court found that the gasoline, in this instance, was an instrumentality of interstate commerce and that the tax was actually a price on the privilege of using interstate commerce.

And, therefore, according to Helson the burn-off theory as you cross the border would not be carried forth.

Our contention, further, is that the burn-off theory would equally be an imposition on interstate commerce.

Q But you say that putting it in the tank does commit it to the use in that airplane, but that is not a commitment to carry interstate commerce.

MR. O'ROURKE: That's before interstate commerce has begun.

We also say that the taxing event could occur when they comingle their fuel both at Des Plaines in the storage tanks and also at O'Hare Airport where they place it in storage.

These are exercises of ownership according to the use definition of the statute.

Q You said that some event was before interstate commerce was begun. You mean the loading event?

MR. O'ROURKE: Yes, sir.

Q But the aircraft is in interstate commerce --

MR. O'ROURKE: That is true, but according to the Edelman case the loading of the airplane or the withdrawal of it from the tanks,and the loading of it in the airplane was done before interstate commerce began.

Q Mr. O'Rourke, why don't you tax the storage tanks?

MR. O'ROURKE: We could do that very well, Mr. Justice Marshall, but we do not do that because of the temporary storage provision or the possibility that this gas may be taken out of the State and into another State and it would, therefore, impose a multi-tax burden upon the user of the gas.

Once it has been committed to its final use or the exercise of ownership, then we maintain --

Q Then there is no question that this gas is always used in United planes?

MR. O'ROURKE: No, it could possibly be taken -- and I know of no evidence that was presented -- but the argument was used both in the Lower Court and the Trial Court and the Supreme Court,that the gas could be taken out of the storage tanks at O'Hare and transported to Milwaukee, Wisconsin, for example. Therefore, there would not be a tax imposed upon it.

They consider that temporary storage.

Q It is just a (inaudible) question. You knew you

could do it but you want to be sure.

MR. O'ROURKE: Yes, sir.

Q Did your reference to the impropriety of the burn-off theory concede the unconstitutionality of the tax collected in earlier years, under the old system?

MR. O'ROURKE: Yes, sir.

Again, we wish to emphasize that the Illinois Supreme Court so held in Turner v. Wright, which is an Illinois case, 11 Illinois 2d 161, that the Illinois Use Tax is a tax imposed on the privilege of use, not on the extent of the use of that privilege.

The definition of use extends beyond the actual consumption of tangible personal property, and once you get into the question of consumption in the use tax, it is then that you arrive at the ridiculous situations and the undue burdens.

We feel that many parts of the transaction between Shell and United are of sufficient local nature that we would invite the imposition of retail occupational tax on the transaction.

Q Mr. O'Rourke, opposing counsel cites Justice Rutledge's opinion in the Nippert case in their brief, where, as I understand it, he said it isn't enough to just say I am picking out -- for the State to say, I am picking out a local incident that occurs there. It still could be a burden on

interstate commerce.

You've got to go further than just say an event, however small in stature, took place.

MR. O'ROURKE: Well, our statute does point out that in the exercise of ownership would permit us to impose the tax upon that property, provided it does not qualify for an examption, provided that there has not been a tax paid on the property, to avoid the multiple tax situation.

Q You think that would be constitutional, however applied?

MR. O'ROURKE: I believe that there could be situations where it could be unconstitutional.

Now, we recognize the right of Shell and United to enter into any contractual arrangement that they may want to, but such contractual arrangements cannot serve to defeat the right of the State to tax parties or events taking place within the State.

Otherwise, an unfair advantage would inure to those having out-of-State storage tanks and that it would relieve the parties of the obligation of the retail occupation tax and the use taxes by the terms of their contract.

This would be discriminatory to those who do business in Illinois and would destroy the accepted purpose of the Use Tax Act which was designed in part to negate an unfair advantage over local business who are obligated to pay the retail

occupation tax on fuel.

And we have examples of this occuring at O'Hare Airport, where other air lines come into the airport and they buy or purchase the gasoline directly at the airport and they are charged or responsible for paying a retail occupation tax.

Now, the Illinois Use Tax was designed to complement the Retail Occupation Tax Act, and in the decision of Turner v. Wright, it was held not to be discriminatory in that the use tax is imposed at the same rate as the tax under the Retail Occupation Tax Act.

It does not apply to out-of-State transactions that would not measure a tax under the retail occupation tax if the event had occurred in Illinois.

Nor is it applicable to the use of property purchased outside of Illinois on which a sale or use tax has been paid in another State to the extent of the tax so paid.

Q If Shell's facilities were in Chicago Heights instead of Hammond, you wouldn't have this problem because you would simply directly tax the sale.

MR. O'ROURKE: You would directly tax under the Retail Occupation Tax Act.

Q The Retail Occupation Tax, as you call it, is what is generally known as a sales tax, is it not?

MR. O'ROURKE: In other States. We don't like to

refer to it as a sales tax.

Q No. For various reasons --

But it is what is in other States known as a sales tax. 4% of the --

MR. O'ROURKE: 4%. And if it occurs in a municipality -- by example, other air lines coming into Chicago, actually pay a 5% tax because they are responsible for the municipal retailers occupational tax, as well.

Q That's a long circumlocution --

MR. O'ROURKE: Yes, sir.

Mr. Berens pointed out that the Use Tax Act came into effect in 1955, two years after this type of operation had started with Shell Oil.

I would like to respectfully point out, though, that the Retail Occupation Tax Act was passed in the State of Illinois in 1933, many, many more years prior to the contractual arrangements between Shell and United.

We maintain, if the Court please, that the imposition of the Illinois Use Tax on United's exercise of its right or power over tangible personal property -- and this is the fuel -- incident to its ownership of that property in Illinois, does not discriminate against interstate commerce since it neither imposes a tax solely on interstate commerce, nor imposes a higher rate of tax on interstate commerce, nor subjects interstate commerce to the multiple tax burden.

And it is upon this argument, and the arguments which we have submitted in our brief, that we respectfully urge this Court to affirm the judgment of the Illinois Supreme Court.

Thank you.

MR. CHIEF JUSTICE BURGER: I think you have used all your time, Mr.Berens.

The case is submitted.

(Whereupon, at 1:59 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)